

# The Heat Subsides: The Future Of MDPs In New York

BY STEVEN C. KRANE

In the July 2000 issue, we reported on what were then imminent debates in the Houses of Delegates of the New York State Bar Association (“NYSBA”) and the American Bar Association (“ABA”) concerning the future of multidisciplinary practice in the United States. The NYSBA House addressed the issue first at its June 24 meeting in Cooperstown. Then, on July 11, convening in New York City, the ABA House debated and voted. The clear message sent by both of these bodies was that American lawyers should not form partnerships or share fees with nonlawyers or otherwise relinquish control over the way in which law is practiced today.

Originally, in its 1999 report (rejected by the ABA House), the ABA Commission on Multidisciplinary Practice had proposed that lawyers be permitted to form partnerships and share fees with nonlawyers, with only the demand of the marketplace as a guidepost. But in 2000, the Commission returned with a scaled-back proposal, that only “lawyer-controlled” MDPs be permitted. (How lawyer control would be defined, measured or policed were matters the Commission presumably decided to leave for another day.) In the meantime, a comprehensive report of the NYSBA’s Special Committee on the Law Governing Firm Structure and Operation, chaired by former ABA and NYSBA President Robert MacCrate, concluded that if, as proponents of MDP suggest, the reason for permitting it 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.

The report recommended that lawyers be permitted to provide ancillary nonlegal services to their clients, either directly or through subsidiaries or divisions of their firms, and that lawyers and nonlawyers be permitted to enter into interprofessional contractual relationships with one another — “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.

## By The Shores Of Otsego Lake

The “MacCrate Report” came before the NYSBA House of Delegates and was resoundingly approved by a voice vote. It stated as general principles that, among other things:

1. Lawyers and law firms should be permitted to provide nonlegal services to clients or other persons, directly or through affiliated entities, provided that no nonlawyer or nonlegal entity involved in the provision of such services owns or controls the practice of law by a lawyer or law firm or otherwise is permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person.

2. Lawyers and law firms should be permitted to enter into interprofessional contractual arrangements with nonlegal professionals and nonlegal professional service firms for the purpose of offering legal and other professional services to the public, on a systematic and continuing basis, provided no nonlawyer or nonlegal entity has any ownership or investment interest in, or managerial or supervisory right, power or position in connection with, the practice of law by any lawyer or law firm. \* \* \*

6. No change should be made to the law that now prohibits lawyers and law firms directly or indirectly from transferring ownership or control to nonlawyers over entities practicing law, since any demand that exists for greater integration of legal services with those of other professions may be satisfied by permitting lawyers to enter into strategic alliances and other contractual relationships with nonlegal professional service providers, as well as by permitting lawyers to own and operate nonlegal businesses.

The NYSBA House urged the ABA to adopt these principles and, at the same time, directed the prompt consideration of implementing amendments to the New York Code of Professional Responsibility. In early August, proposed amendments to the Code were distributed statewide for comment. (Copies of the materials circulated can be obtained from NYSBA Associate Executive Director John A. Williamson, Jr., 518-463-3200, [jwilliamson@nysba.org](mailto:jwilliamson@nysba.org).) The Code amendments, in the form in which they have been circulated, appear on p. 8 of this newsletter. Comments on the proposals are due by October 13, 2000, in anticipation of debate at the November 4, 2000 NYSBA House of Delegates meeting in Albany.

### **Strange Bedfellows In The ABA**

The political maneuvering leading up to the ABA House of Delegates vote centered around two efforts: the effort of the ABA Commission to defuse the growing support for the New York approach by deferring the question to the next meeting of the House of Delegates, in February 2001, and the effort of New York, Illinois and New Jersey to build a consensus around the MacCrate Report. Ultimately, after a series of meetings in hotel rooms and coffee shops, Florida and Ohio, each of which had submitted proposed resolutions against MDPs and seemed determined to go their own way, joined the other three states and a unified position was presented to the House. The "debate," meticulously choreographed by floor managers on both sides of the question, was little more than a set piece. Prepared speeches by a carefully chosen list of speakers — led by Robert MacCrate himself — were delivered for about an hour. Even incoming ABA President Martha Barnett's impassioned plea for deferral was to no avail. The House rejected the deferral motion by a vote of 292-152, and thereupon approved the five-state resolution as presented by a vote of 314-106.

The resolution of the ABA House of Delegates, like its NYSBA counterpart, directs that amendments to the ethics rules be prepared. Specifically, the House resolved:

that the Standing Committee on Ethics and Professional Responsibility of the American Bar Association shall, in consultation with state, local and territorial bar associations and interested ABA sections, divisions and committees undertake a review of the Model Rules of Professional Conduct ("MRPC") and shall recommend to the House of Delegates such amendments to the MRPC as are necessary to assure that there are safeguards in the MRPC relating to strategic alliances and other contractual relationships with non-legal professional service providers consistent with the statement of principles in this Recommendation.

The ABA Commission on Multidisciplinary Practice was discharged, with thanks.

## **Implications Of The Proposals**

One of the ironies of the MDP debate is that MDPs are neither new nor currently prohibited. To the contrary, lawyers have been providing their clients with nonlegal services for many years. In some cases, law firms have formed divisions or subsidiaries to provide ancillary business services to clients. As discussed at pages 326 to 332 of the MacCrate report, however, the extent to which lawyers may engage in these activities has been the subject of considerable controversy. Concerns were expressed that the risks of conflicts of interest, loss of confidentiality and confusion on the part of clients and nonclient customers were simply too great to justify permitting lawyers to provide ancillary services. Others viewed these concerns as too speculative to justify regulation and questioned the propriety of permitting the ABA to regulate the non-legal business activities of lawyers. After flip-flopping on the issue in the early 1990s, the ABA adopted Model Rule 5.7 in 1994. In order to allay concerns that professionalism and ethical conduct would suffer in the context of the non-legal ancillary business, the rule establishes a rebuttable presumption that the framework of attorney ethics rules apply to a lawyer who performs law-related services or controls an entity that does so. Few states have adopted the rule, however, choosing instead to rely upon case law and ethics opinions to interpret and apply existing principles in the ancillary business context.

The current ethical landscape in New York can be summarized as follows: under the existing rules, ancillary businesses are permitted so long as (a) there is a strict division between the services provided by the lawyers and those provided by the nonlawyers, so that the nonlawyers cannot hold themselves out to clients as being able to provide legal services; (b) the lawyers do not use the nonlegal business as a feeder of clients for their law practice; (c) the lawyers do not recommend that their clients purchase the specific products being sold by the ancillary business (*e.g.*, title insurance, financial planning services); and (d) all other ethical rules (regarding confidentiality, conflicts of interest, nonlawyer partners, sharing of fees with nonlawyers, etc.) are followed. [*See*, NYS Ethics Ops. 709 (1998), 687 (1997), 636 (1992), 619 (1991), 595 (1988), 557 (1984), 536 (1981); *also*, NY County Ethics Op. 693 (1992).] The emphasis of the existing New York framework is on the relationship between the ancillary business entity and the client, *as seen from the perspective of the client*. The current law assumes that the lawyer is subject to the Code at all times, even when engaged in a nonlegal ancillary business venture.

The MacCrate Report recommends that New York adopt as a new DR 1-106 a rule patterned on the Pennsylvania version of Model Rule 1.7. Whereas the focus of the ABA rule is on the provider of the service, *i.e.*, the lawyer, the Pennsylvania rule looks to whether the client is receiving services that are distinct from legal services to determine whether attorney ethics rules apply. The Pennsylvania rule imposes on the lawyer a duty to educate the recipient of nonlegal services if there is a chance that the recipient will fail to understand the implications of the lawyer's role in the ancillary business and erroneously conclude that the ancillary services are the subject of an attorney-client relationship.

In addition, the MacCrate Committee proposed changes intended to minimize the risk that a nonlawyer generating a substantial amount of revenue for a law firm through ancillary business activities may attempt to manage or control the overall venture and to dictate, to some extent, the way in which the legal practice is conducted. It also recommended that the advertising rules be amended to negate any remaining suggestion that a lawyer or law firm may not advertise the fact that it also provides nonlegal

services to the public, a rejection of existing ethics committee opinions premised on the concern that lawyers should not use nonlegal business operations as a “feeder” to supply them with legal business leads. The MacCrate Committee viewed such precautions to be unnecessary and contrary to the public interest in receiving accurate and relevant information relating to the abilities, qualifications and services offered by lawyers.

Strategic alliances and other similar cooperative contractual arrangements have likewise become commonplace in the legal profession, where they have generally involved nonexclusive cross-referral arrangements between law firms and other businesses, as well as the allies’ rendering of professional and other services to each other. Depending upon the relative economic strength of the law firm and the professional service firm, the ethical implications of these interprofessional arrangements may be of a relatively low order. One issue is the propriety of a lawyer’s referring clients to an unrelated nonlegal service provider with the expectation or understanding that the provider will reciprocate and recommend the lawyer’s services to others, and conversely, the propriety of the “compensation” paid by the lawyer who receives those referrals to the nonlawyer service provider by steering legal clients to it in violation of DR 2-103. The MacCrate Committee has proposed liberalizing and clarifying these rules.

A question arises as to the extent to which the relationship between lawyer and nonlawyer service provider gives rise to a potential conflict of interest, particularly as interprofessional contractual relationships evolve into more complex sets of commercial and structural agreements. Even under current ethical principles, depending upon the economic importance of the relationship to the lawyer, the lawyer must disclose the existence and nature of the interprofessional contractual relationship to clients so that they can make an informed judgment regarding the services of both the nonlegal ally and the lawyer. This is because, as the Restatement notes, the desire of the lawyer to perpetuate the stream of referrals from the ally, if sufficiently significant to the lawyer, may constitute a business or personal interest that could conflict impermissibly with the lawyer’s duty to exercise independent professional judgment on the client’s behalf.

The MacCrate Committee was also concerned that lawyers and law firms not be permitted to join alliances with nonlawyers whose standards of ethics and professionalism could dilute the lawyers’ duties to clients. Thus, rules are proposed so that a lawyer entering into an interprofessional alliance must be satisfied that the nonlawyer professionals belong to a profession requiring a reasonable degree of higher education and having a set of enforceable standards of professional conduct sufficiently comparable with those of lawyers. Other changes proposed by the MacCrate Committee include permitting lawyers to advertise their contractual relationships with nonlegal professionals or nonlegal professional service firms.

And so, the debate continues, but with the singular purpose of providing lawyers with ways to work cooperatively with nonlawyers in providing professional services to clients that do not compromise the core values of the legal profession.

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