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From the Editor

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Multidisciplinary Practice in Context

Last summer, the House of Delegates of the American Bar Association (ABA) at its annual meeting expressed its intention to stick to a very restrictive view of multidisciplinary practice (MDP), a form of business enterprise in which lawyers join with nonlawyer professionals to provide a variety of services that include, but are not limited to, legal services.[1] Lawyer regulations have been hostile to MDPs in a number of ways and for a number of reasons. The most direct regulation involves restrictions on sharing legal fees with nonlawyers or permitting ownership or control by nonlawyers of an entity that engages in law practice.[2] These restrictions are premised on the protection of "the lawyer's professional independence of judgment."[3] The theory is that nonlawyers are not steeped in the lawyer's professional culture of duties to clients and the legal system; nor do nonlawyers necessarily have a license at stake when those duties are breached. Thus, nonlawyers necessarily should not be placed in a position to influence lawyers to breach their professional duties to clients and the legal system.

The House of Delegates expressed particular concern for those business arrangements seen as posing a threat to the "core values of the profession" including loyalty, confidentiality, and the avoidance of conflicts of interests. Not all MDPs are equally disfavored. For example, businesses that are ancillary to law firms (i.e., separate entities providing services that are associated with but not intrinsic to law practice) are allowed in a minority of states. Thus, a law firm operating a particular kind of business consulting firm as an ancillary business may not pose the same risks as a business consulting firm operating a law firm as an ancillary business. According to this view, having lawyers in charge, and holding them to the standards of the legal profession, makes all the difference. The ABA would open the question of this specific form of MDP to review to determine the nature of safeguards needed to protect the independence of lawyers.

The ABA decision is not binding on any licensing body, leaving the choices in lawyer regulation where they have always been, with the states. Actions within the states suggest ambivalence on MDP. Ten states are on record in favor of some alliances,[4] though only the District of Columbia actually allows MDP, with the proviso that the sole purpose is to provide legal services to clients. Thirteen states have rejected most or all MDP.[5] A plurality of states are considering

plans that might allow some MDP for their lawyers, including Alabama, California, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Michigan, Mississippi, Montana, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Virginia, Wisconsin, and Washington.[6] Many have appointed commissions for study and the drafting of a position statement. In Wisconsin, for instance, the bar approved a white paper recommending further study of MDP; and a conference of bar leadership and members advanced that study in December 2000.[7]

The question of MDP—what kinds of associations between lawyers and others, under what circumstances, and for what purposes—is prominent among current issues for elder law attorneys.[8] The elder law office has long been a crossroads for the skills of social workers, health care providers, real estate salespeople, financial planners, and accountants. The typical arrangement includes hiring geriatric case managers, which poses few MDP problems because the lawyer remains in control and can provide for payment arrangements other than splitting legal fees. Some elder lawyers engage in dual practices of law and financial planning, which may be harder to sort out to the satisfaction of the state ethics committees. Combining professionals by joint venturing to create an integrated entity of legal, financial, health care, and social services professionals seems to be at least an attractive prospect for some elder law firms.

Interestingly, a voice that is usually influential in the ABA—the big firms—is raised again in favor of MDPs. This is not surprising in that the largest firms are already engaging in MDP abroad, where the practice is more widely accepted, and engage in the closest arrangements to MDP acceptable within the US. They are the direct competition for the largest accounting firms, which have expanded their scope of client services to consulting on computer systems, employee benefits, and human resources. Many would agree that accounting firms have long engaged in tax law practice. They can expand so readily because they employ lawyers. Thus, because of less restrictive regulation, large accounting firms practice law in ways that satisfy client needs, and law firms cannot compete.

Recently I noticed the indications of a kind of grassroots movement in favor of MDP reported in our local newspaper. On the front of the business section on a slow-news Sunday last month appeared an article: "Lately, Law Firms Won't Just See You in Court."[9] Clearly, it was not primarily a piece of investigative reporting. Rather, the components of the "story" had been provided to the reporter by Foley & Lardner, the nation's fifteenth largest law firm, to make its views and intentions more widely known.

Foley chairman and CEO Michael Grebe, the article reports, observes a sea of change in operations sweeping over clients' businesses due to globalization, consolidation, and technological advances. That change, Grebe asserts, alters what clients need from their lawyers. Litigation, the lawyer's stronghold, will not be enough—or even be central to meeting the client's needs. As a result, Foley has been offering new services, many of which are provided by nonlawyers. Further, nonlawyers will be increasingly involved in managing the firm.

The Foley law firm has recently established new entities that go beyond traditional law practice. The earliest established, begun in 1996, is the Compliance, Counseling, and Government Enforcement Practice Group, an entity that works to develop foreign business relationships, going beyond the scope of counseling, negotiation, and representation typical of traditional business lawyers. The 1999 spinoff, Public Affairs Practice Group, similarly expands on a traditional legal niche, lobbying, to offer assistance in crisis management and policy development. In 2000, INTX was established by Foley to provide management of intellectual assets. The work includes addressing the interrelationships in business, technology, and law. Also new last year, Health eTrust Alliance helps health care providers to handle patient information and comply with privacy regulations.[10]

In fact, Foley has hired a new nonlawyer supervisor for strategic planning and business development, Richard Upton, who also worked on major strategic changes for telecommunications, financial services, and health care industries.

The nature of the "sea change" may be characterized as the expansion of business principles to professional practices. This change, an evolution in the forms of business entities and their competition, has been in progress for some time, but older ways of doing business and setting professional fees hold strongly enough to continue to shape the perceptions of many professional services providers. To get a

sense of the nature of the change, perhaps we could compare it to the evolution that took place in the commerce in the city at the end of the middle ages. (Please, bear with me here—it's not as remote as it sounds.) Medieval businesses of the same kind occupied adjacent space; that is, the medieval city and its guilds designated streets where similar craftsmen clustered together. The consumer knew what types of goods were wanted and went to their sources. In the early modern city, in contrast, shopkeepers located where people were more likely to find buying convenient. With increasing frequency, the seller of the goods was not the craftsman, but rather the buyer of goods from many craftsmen. The shopkeeper offered stocks of items that were likely to meet the needs and wishes of particular consumers.

The social evolution that brought about the marketing change was, at least in part, an increase in the numbers of buyers and sellers. Simultaneously, there was a vast increase in the types and varying qualities of goods and in the ability to display the varied stock of goods. As you might imagine, technology also played a part, since shopkeepers could for the first time use large windows to put their goods before the public without constant threat of light-fingered theft. Shopping was invented.

These three changes are occurring again simultaneously and are particularly important in the professional services markets where competition has been limited. First, the number of legal consumers has risen as many find recurring circumstances for wanting legal counsel. Circumstances might vary from a dispute with the children's school to divorce to business structuring to tort liability to tax and estate planning. In the past, other professionals or informal advisors to the community might have filled the role of legal advisor in some of these circumstances, but the controls of detailed laws and the threat of financial problems has shifted the public's desire toward legal authority.

The number of lawyers seems to match the growth in consumer interest. There are enough legal services available to meet the needs of those able to pay. Therefore, consumer wishes regarding the legal services themselves also are becoming more particular, probably in two quite different directions. Some consumers are most concerned with limiting quantity. Such cost-conscious buyers are more likely to want to understand their position and choices, and to purchase only the services they either cannot do without or simply cannot attend to themselves.[11] Other legal consumers want the best quality of services, which might be described as exactly the right amount at the right time with just enough personalization to make the experience at least acceptable, and to achieve client goals. That is, more affluent, quality-conscious consumers are more likely to want to fill their market baskets with the types of services (including counseling and reassurance) that seem to meet their needs best—provided the cost is not too high. Thus, modern market dynamics come to apply to legal services as they once did to crafting goods.

The factor that lags farthest behind is the legal display window. Just like the display of the shopkeeper's goods, the information that completes the necessary elements of a legal market place is prices, with an explanation of the services bearing the price tags. Few attorneys want to compete on price. Those who do more than offer a "loss leader" like inexpensive wills or a package of simple services at a set rate are often considered to demean the profession.

Yet, the means of "displaying" prices has lately come into existence. It seems likely that consumer wishes for price information might be fulfilled readily in a short time by means of the Internet. One may imagine the initiative of a consumer group with an interest in the fees charged in the regional legal market, soliciting information from those who have received particular types of work from area lawyers. A database begins to be compiled. However, such information is not useful to most consumers without some indication of client satisfaction, roughly correlated with the traditional measure of the lawyer's reputation. Beyond the traditional measure, the consumer is likely now to want a tabulation of outcomes—wins, losses, contested wills or contracts, successful business ventures.

Many lawyers might respond that legal practice has too many nuances in the individual case, protected by privilege, to be assessed by any such reductive scheme. Yet, it is no more difficult surely than categorizing health care procedures in order to compare costs and outcomes, a process that is in full and contentious implementation in the health care industry of the past decade or so.

Once again, the changes can be seen as a shift from professional values to business principles. The shift represents the development of a market-based economy, and a reliance on objective measures of quality for professional services in the health care market.

Law is not the only profession affected, nor the first. Consider that health care services were formerly sold on a cost basis.[12] That is, the provider tallied up actual costs and the desired income level to be earned from the community in which he or she practiced, and then asked for a particular fee. That fee, of course, might be adjusted to account for the means available to the client, so some cost shifting to the more affluent (*quantum meruit*) was seen as an appropriate professional task in allocating a social good.

The cost of health care ended traditional health care pricing, as costs rose at a rate far greater than inflation in the general economy. Insurers responded. Fee-for-service prices set by providers were viewed as too expensive, favoring the providers unnecessarily, and cutting some consumers off from necessary services. First government and then the private sector have adopted new payment bases: capitated prospective payments and discounted fee-for-service payments, with many variations comprising "managed care."[13] Employers in search of relief from rising health care costs adopted managed care for their employees. The market was transformed, seldom making reference to the health care provider's asserted costs any longer, and expressing instead what the payers are willing to pay.

The second element of transition, which is in progress in health care services, is the use of objective measures of success. Outcome measures are used regularly by hospitals and insurers (including government program analysts) to determine the optimum treatments for specific conditions. "Optimum," according to the industry, is an amalgam of price and outcome, but good outcome is essential. Managed care asks, "Did the physician choose appropriately?" This objective information influences decisions about practice privileges in the hospital or about coverage in a treatment decision disputed by a managed care payer. It is fundamental to a managed care plan's willingness to contract with a health care provider, since that provider's decisions can expose the plan, as well as the provider, to the risk of excess health care costs in a world governed by fixed, prospective payments. The general term for measuring the health care provider's fitness for the market is "credentialing."

The legal market is less likely to be captured in such a system, because of the lack of large third-party payers with incentives to "manage" the costs of large numbers of cases. Yet, in other ways, legal costs are more vulnerable to such management because they do not take in significant aspects of expensive infrastructure, as health care bills often do. Rather, the lawyers' costs are in large part determined by the income that the practitioner wishes to receive in order to be in keeping with his or her professional community, to have a particular lifestyle, and to be as busy as desired in the types of cases of interest.

Also, the lawyer's win/lose record may be even more harshly judged than a physician's. In the most frequent malpractice setting of surgery, the physician is usually surrounded by other professionals who empathize with momentary lapses of attention, overloaded schedules, or comparatively difficult cases. In addition, the factors compromising a good outcome in the case often are apparent to all including the patient, because the patient is aged or has more than one debilitating condition. In the law office or in the court, in contrast, the lawyer delivers services that the client expects to set things right; but the professionals, however friendly, are adversaries or judges. The result of the contract, the trial, or the negotiation is considered largely in terms of what the client wanted, and disgruntled losers may have much to say.

In sum, some professional services markets are changing in predictable ways. The changes require an ample supply of service providers and consumers, as well as information to allow consumers to compare providers for the value of their services. These circumstances arose first in accounting, where a greater number of consumers are knowledgeable and there are few barriers to the development of competition. They arose next in health care for different reasons: Health care providers raised prices and developed new, expensive services too fast for the total cost of care to be a reasonable and acceptable part of the overall economy; and organized and powerful consumers (government, insurers and employers) were able to force change in the system at a rapid rate.

With the legal services market, the most powerful forces are different yet again. One component of change is the fact that legal services are often a type of goods sought out reluctantly by prospective clients who already have disturbingly high costs of business or family disintegration, or who must defend against what they view as an unwarranted claim

of liability or guilt. Thus, there is a very strong demand from many consumers that legal services cost less—just less. Another element, the educated consumer, is created not only by Internet information, but also by the packaging of legal services as entertainment so many can feel more familiar with the people who provide legal counsel. As in health care, where there is the need for health care consumers to be knowledgeable about care options or bear the consequences of recommendations that are not right for them individually, Court TV is showing the way.

To return to the issues of elder law, change is not just about accountants and lawyers, or even about clients; it is about lawyers who want to practice in a different atmosphere and context, providing services different from those of the traditional firm. Specifically, some elder law attorneys are intent on meeting the client's various needs without referring out the work. This is both a desire to serve and a desire to make a profit on a larger basket of services. This may be the future of the small, nimble firm. Supporting that idea, the ABA Section of General Practice, Solo and Small Firm has endorsed MDP.

The Milwaukee article cited above asked the head of a nine-member firm, Gary Bakke, to comment on his views of MDP for the smaller firm. He observed that the economic pressure to diversify services clearly is coming.[14] He anticipates that, without changes in legal practice, clients will seek services from professionals other than lawyers because of the narrowness of traditional practice, expense, and mistrust.[15] "We have to be problem solvers, not litigators. Litigation is a tool you have to use when other tools fail. We need to be more holistic in what we do."[16]

I have been known to say that elder law itself is a consumer product, that is, constructed (from torts, contracts, property, and con law education) to meet the needs of a specific clientele. As a result, elder law attorneys are already more "holistic" than many practitioners. It makes sense that elder law practitioners will want to add related services for clients in the least costly, least complicated, and, yes, most financially rewarding ways.

Endnotes

1. Information is available at www.abanet.org/cpr/multicom.html.

2. A.B.A. Model Rules of Prof'l Conduct (Model Rules) R. 5.4 professional independence of a lawyer

   (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
      1. an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
      2. a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation which fairly represents the services rendered by the deceased lawyer; and
      3. a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

   (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

   (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

   (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
      4. a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
      5. a nonlawyer is a corporate director or officer thereof; or
      6. a nonlawyer has the right to direct or control the professional judgment of a lawyer.

3. *Id.* cmt.

4. According to the A.B.A., states in favor are Arizona, Colorado, District of Columbia, Maine, Minnesota, North Carolina, South Carolina, South Dakota, Utah, and Wyoming.

5. Arkansas, Illinois, Kansas, Kentucky, Maryland, Nebraska, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Texas, and West Virginia.

6. Available at www.abanet.org/cpr/mdp_state_summ.html.

7. Information on the Wisconsin Bar's position and the conference are available at www.wisbar.org/mdp.

8. The materials for the 2000 NAELA Symposium include articles by two speakers: Laurence J. Fox, of Drinker, Biddle and Reith, Philadelphia, PA (who spoke against expansion of MDP) and James W. Jones, of ABCO Associates, Washington, DC (who spoke in favor of expansion). Their taped presentation is also available from NAELA.

9. Joel Dresang, *Lately, Law Firms Won't Just See You in Court*, MILWAUKEE J. SENTINEL, Nov. 5, 2000, at 1D.

10. *Id.*

11. The concept of "unbundling" services—that is, "I want the petition but I want to talk to the judge myself if it costs that much to have you do it"—was broached around 1990 in the context of elder law services by the American Association of Retired Persons (AARP).

12. The difference between cost-basis and market-basis might be envisioned in the sale of a house, a traditionally market-based transaction. If the sale were cost-based, the owner/seller would tally up her purchase price and improvements and any expected profits for inflation and set a price the buyer must meet. In practice, however, the buyer is unlikely to pay any more than the price for similar houses regardless of the seller's costs. The market, not the seller's financial interests, sets the price at which the sale takes place. The prudent seller must take care to offer what buyers want at a competitive price.

13. First, government adopted a capitated payment system for hospitals that treated Medicare beneficiaries, grouping the illnesses and their appropriate treatments and assigning a total fee. The hospital had to undertake the risk that any particular patient would need more care than average for the condition. Twenty years later, government adopted a discounted fee for service system to guide payments to physicians treating Medicare patients.

14. Dresang, *supra* note 9, at 1D.

15. *Id.* at 7D.

16. *Id.*