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A, Frank Johns

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Multidisciplinary Practice Fails as Lawyers Declare the Legal Profession Is Not for Sale!

What Is the Impact on the Practice of Elder Law, and the Continued Pursuit of Ancillary and Related Services?

During the past decade, there has been a call by lawyers and nonlawyers for multi-disciplinary practice. The ABA has issued its ruling and the ramifications are discussed here.

By A. Frank Johns

Introduction

The voting is finally in; it was not even close. Actually, it was more like a crushing defeat. This, of course, does not refer to the presidential election which, as of this writing during the Thanksgiving holidays, is still not final. This vote refers to the American Bar Association (ABA) House of Delegates' vote that denied any chance for multidisciplinary practice (MDP) by lawyers—at least for now. This article reports on how the ABA arrived at that decision, focusing on the official positions of the ABA and a coalition of state bar organizations across the country. These legal organizations confronted the important question of how the profession would adapt to "radical" proposals forcing the extension of the ABA Model Rules of Professional Conduct to embrace changing forms in the practice of law. The article also focuses on ancillary and related services as an area in which renewed interest will be generated in the coming years in elder law as in many other areas of legal practice.

Our society has mandated that, to protect consumers, those practicing law must be licensed and regulated. We insist on a higher threshold of education and training and mandate core values, including loyalty and confidentiality. Nonlawyers are barred from providing legal services and from sharing fees with lawyers. These prohibitions sustain their legitimacy only when they continue to provide client protection and are promoted by public interest. The conclusion reached by the ABA House of Delegates is clear: the prohibitions continue to be legitimate by protecting clients and promoting the public interest.

A. Frank Johns, JD, CELA, is the immediate past president of the National Academy of Elder Law Attorneys and a partner in the firm of Booth Harrington Johns and Toman, LLP, Charlotte and Greensboro, North Carolina. This article expands and updates work developed in his article Ethics in Elder Law: Part Three of a Three-part Article, 99 ELDER L. ADVISORY 1 (June 1999).
The Quandary and the Struggle

During the past decade, that was the quandary in which the legal profession found itself. A rising groundswell of lawyers and nonlawyers have insisted that there is some demand by clients and lawyers alike for multidisciplinary practice. In its simplest form, an MDP is when a lawyer works and shares fees with a nonlawyer. From that simple form, legal relationships become more complex when nonlawyer entities have lawyers working in them, offering and delivering what seem to be legal services. Just as complex are law entities that have nonlawyers working in them, offering services that, if offered in a traditional law firm, would be called legal services. These entities are considered outside interventionists, struggling to be recognized as part of the legal profession.

The Opponents

On one side of the struggle, the intervention of nonlegal entities was seen negatively by some as a virtual shotgun wedding by an involuntary suitor. Those more polite, yet still negative, have insisted that protection of core values in the practice of law must be realized by retention of its current form—the idea that "old wine should remain in old bottles."

The Proponents

On the other side of the struggle, the legal profession's embrace of MDPs and its marriage to nonlawyer entities was seen positively by others as essential in the 21st century. If MDPs are unavailable in today's world, then, the proponents contend, clients would solve their problems without lawyers. Others asserted that since the profession was in a time of change, the ABA should have allowed the evolution to continue, rather than trying to change the tide, get the train back in the station, or ride a dead horse, to use various metaphors found in testimony and written remarks presented to the ABA MDP Commission.

The ABA Process to the 1999 Vote

The ABA tackled the problem by organizing the American Bar Association Commission on Multidisciplinary Practice (ABA MDP Commission) in August 1998. The ABA MDP Commission faced what it described as unprecedented challenges of revolutionary advances in technology and information sharing, of the globalization of the capital and financial services markets, and of more expansive government regulation of commercial and private activities. The ABA MDP Commission's members included a cross section of the legal profession, including distinguished practitioners, judges, and academicians. They worked at a feverish pitch for two years before the final vote was cast in August 2000. The ABA MDP Commission worked with urgency, addressing the emergence of competition against the legal profession that is aggressively soliciting clients, offering services remarkably similar to those traditionally offered by law firms, such as advice on mergers and acquisitions, estate planning, elder care services, human resources, and litigation support systems.

The Background Paper

The work of the ABA MDP Commission was initially formulated in its Background Paper on Multidisciplinary Practice: Issues and Developments; its development of hypotheticals and models, based on some of the testimony and comments received by the commission through the summer of 1999, and the testimony and written remarks of the more than two hundred witnesses filing papers and appearing at public hearings conducted over the two years of the commission's tenure.

The Background Paper on Multidisciplinary Practice: Issues and Developments explained its purpose: "[to] inform the members of the House of the Commission's charge, to introduce generally the topic of multidisciplinary practice, and to solicit responses to the questions set forth below." The commission invited response to these questions:

1. How would clients be harmed or benefited by amending the ABA Model Rules of Professional Conduct (Model Rules) to permit a lawyer to enter into a partnership with a non-lawyer or enter into other arrangements that permit fee sharing with a non-lawyer? Can any specific instances of harm to a client by such a change be identified in either the United States or a foreign jurisdiction? If the benefit to clients would outweigh the harm, what restrictions, if any, should the Commission recommend? Should the restrictions follow or
differ from those adopted in Rule 5.4 of the Washington, D.C. Rules of Professional Conduct?

2. How, if at all, would a lawyer’s independent professional judgment be impaired by changing the Model Rules to permit a lawyer to enter into a partnership with a non-lawyer or enter into other arrangements that permit fee sharing with a non-lawyer?

3. How, if at all, are the professional standards that govern the conduct of accountants and accounting firms different from those that govern the conduct of lawyers and law firms? How do any differences in professional standards impact on the protections offered to clients and the public?

4. If the Model Rules were amended to permit a lawyer to deliver legal services to the clients of a non-law firm entity at which the lawyer is employed or of which the lawyer is a partner (i.e., accounting firm, gerontological consulting firm, engineering firm, etc.)
   (a) What changes, if any, should be made to protect client confidentiality, i.e., information relating to the representation (Rule 1.6); and (2) to assure the lawyer’s avoidance of conflicts of interest (Rules 1.7–1.9)?
   (b) What changes, if any, should be made to the general rule on imputed disqualification (Rule 1.10)? Should all the clients of the non-law firm entity be treated as if they were the clients of the lawyer?
   (c) What changes, if any, should be made to the rules on the responsibilities of a partner or supervisory lawyer (Rule 5.1), the responsibilities of a subordinate lawyer (Rule 5.2), the supervision of nonlawyer assistants (Rule 5.3), the unauthorized practice of law (Rule 5.5(b)), the responsibilities regarding law-related services (Rule 5.7); and on advertising and solicitation (Rules 7.1–7.5)?
   (d) Should the Model Rules be amended to permit the discipline of law firms and/or MDPs?
   (e) What changes, if any, should be made to other Rules?

5. Is an entirely new regulatory framework needed? If so, how should it be structured?

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Proponents and Opponents Debate Before the Commission

The commission recognized those on both sides of the debate.

On one side are the proponents of ‘one-stop shopping’ who argue that restrictions on lawyer and non-lawyer partnerships and the sharing of legal fees are outdated. In their view, these restrictions are the unfortunate relics of a regulatory system constructed in the early twentieth century that now impede the delivery of efficient and reasonably priced professional services. On the other side are the defenders of the restrictions who contend that they are necessary to preserve a lawyer’s independent professional judgment and to protect client rights of confidentiality and loyalty.

The opponents warned of “wolves at the door,” setting off piercing alarms and further promoting anxious urgency and aggressive, heated debate. The continued impassioned pleas preached of dire consequences in which the wolf pack would actively and aggressively solicit clients, offering services that the commission recognized as traditional legal services. The services included advice on mergers and acquisitions, estate planning, human resources, and litigation support systems.

An example of the ABA MDP Commission’s grueling pace was seen when it heard the testimony of twenty-one witnesses during two days of public hearings in the fall of 1998 and its listening to another twenty-one witnesses and meeting for four days during the 1999 Midyear Meeting. The ABA MDP Commission also received formal endorsement of the concept of MDP from the ABA Taxation Section and the ABA General Practice, Solo and Small Firm Section. Among the many writers submitting remarks to the commission, and conveying a direct sense of urgency and high risk, were Lawrence Fox, a vocal and visible opponent, and Charles Robinson, an ardent proponent and former member of the National Academy of Elder Law Attorneys (NAELA) Board of Directors and a highly respected elder law attorney.

Options and Models

With the impetus of rising debate, the ABA MDP Commission crafted three primary options from which it developed five models. The three options were:

1. Leave the rules alone. A lawyer can be a partner in some kind of other professional service (e.g., accounting or financial services), other professionals can be employed by a law firm, but other
professionals cannot be principals (partners in a partnership or shareholders in a professional corporation) in a firm holding itself out as rendering legal services. Under this regime, “MDP services” will be rendered as coordinated services of separate organizations.

2. Amend Rule 5.4 to allow nonlawyer principals in a law firm, but require that the lawyer rules of conflict of interest (including imputation) apply.

3. Amend Rules 5.4 and 1.10(a). An amended Rule 1.10(a) could provide either (1) that there is no imputation, only disqualification by personal participation, or (2) that imputation exists among the professionals in any service firm holding itself out as providing legal services. Under the second arrangement, the MDP firm would, as a practical matter, be required to departmentalize with departments separated by “insulation walls.” The MDP “law” department would be subject to lawyer conflicts, confidentiality, and imputation rules, but those rules would not apply in or extend to the nonlawyer departments.²⁸

The five models were

Model 1: The Cooperative Model
This model retains the status quo. There would be no changes to Model Rule 5.4. The prohibitions against fee sharing and partnerships with nonlawyers would continue. Lawyers would be free to employ nonlawyer professionals on their staffs to assist them in advising clients. Lawyers could work with nonlawyer professionals whom they directly retain or who are retained by the client. To the extent that the nonlawyer professionals are employed, retained, or associated with a lawyer, the partners in a law firm and any lawyer having direct supervisory authority over a nonlawyer professional would have to take steps “to ensure that the person’s conduct is compatible with the professional obligations of the lawyer,” especially with respect to the obligation not to disclose information relating to the representation and the protection of work product. See Rule 5.3 & Cmt.

Model 2: The Command and Control Model
This model is based on the amended version of Rule 5.4 adopted in the District of Columbia, permitting a lawyer to form a partnership with a nonlawyer and to share legal fees subject to certain clearly defined restrictions. For example, the law firm or organization must have “as its sole purpose” the provision of legal services to others; the nonlawyer must agree “to abide by these rules of professional conduct;” the lawyers with a financial interest or managerial authority must “undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1; and these conditions must be set forth in writing.

Model 3: Ancillary Services Model
In this model, a law firm operates an ancillary business that provides professional services to clients. The ancillary business conforms its conduct to Rule 5.7 and takes great care to assure that its clients understand that the ancillary business is distinct from the law firm and does not offer legal services. Lawyers and nonlawyer professionals are partners in the ancillary business, sharing fees and jointly making management decisions. The lawyer-partners provide consulting services not legal services to the clients of the ancillary business. Some but not all of the clients of the ancillary business are also clients of the law firm, and correspondingly, some but not all clients of the law firm are also clients of the ancillary business.

Model 4: The Contract Model
In this model, a professional services firm would contract with an independent law firm. A typical contract might include terms such as: (1) the law firm agreeing to identify its affiliation with the professional services firm on its letterhead and business cards, and in its advertising (e.g., A & B, P.C., a member of XYZ Professional Services, LLP); (2) the law firm and the professional services firm agreeing to refer clients to each other on a non-exclusive basis; and (3) the law firm agreeing to purchase goods and services from the professional services firm such as staff management, communications technology, and rent for the leasing of office space and equipment. The law firm remains an independent entity controlled and managed by lawyers and accepts clients who have no connection with the professional services firm. The contract model might take different forms. In one model, the professional services firm might contract with a single law firm with only one office. In another, it might contract with a single law firm with several branch offices. And in still another, it might contract with separate, independent law firms, some of which might have only a single office; others of which might have several branch offices.

Model 5: The Fully Integrated Model
In this model, there is no free-standing law firm.
is a single professional services firm, XYZ Integrated, with organizational units, such as accounting, business consulting, and legal services. It advertises that it provides "a seamless web" of services, including legal services. The legal services unit may represent clients who either (1) retain its services but not those of any other unit of the firm or (2) retain its services as well as the services of other units in the firm. In the case of (2), the legal and non-legal services may be provided in connection with the same matter or different matters.

**The 1999 ABA MDP Commission Recommendation**

In a Herculean effort, the commission finished months of labor, recommending removal of the prohibition against fee sharing between lawyers and nonlawyers in June of 1999. At that time, it was anticipated that the recommendation would pass the ABA House of Delegates touching off an explosion of MDPs in all areas of the practice of law, including elder law.

**State Bar Uprising**

By the time the ABA House of Delegates convened in Atlanta in August of 1999, several state bar associations voiced sufficient opposition to the ABA MDP Commission recommendation to have it tabled. The ABA House of Delegates adopted the following resolution:

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.

**The ABA Process to the 2000 Vote**

As the century turned, the ABA MDP Commission reported that as many as forty-one state and local bar associations were studying the question of whether and to what extent the current ethical prohibitions on fee sharing and entering into a partnership with a nonlawyer should be relaxed. Acknowledging the critical importance of the participation of the state and local bar associations in the debate over multidisciplinary practice, the commission released its Midyear Meeting postscript, providing interim guidance and inviting responses and comments.

**The Postscript**

While the ABA MDP Commission still reflected on the five organizational structures, it reorganized alternative recommendations offering (1) a single MDP structure for adoption by the House of Delegates or different structures, to be adopted alternatively, or (2) a simple resolution that the House of Delegates approve the relaxation of the ethical prohibitions in general, allowing the states, if they so choose, to adopt the structure(s) best designed to protect the public interest and the interests of the bar in each individual jurisdiction.

**The ABA MDP Commission Recommendation In 2000**

By late spring the commission offered its recommendations. It first declared that lawyers should be permitted to share fees and join with nonlawyer professionals 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. It defined "nonlawyer professionals" to mean "members of recognized professions or other disciplines that are governed by ethical standards." Secondly, the ABA MDP Commission required that the recommendation be implemented in a manner that "protects the public and preserves the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and pro bono obligations." The recommendation invited regulatory authorities to enforce existing rules and adopt such additional enforcement procedures as would be needed to implement the principles and protect the public interest. The recommendation did not alter the prohibition on nonlawyers delivering legal services and the obligations of all lawyers to observe the rules of professional conduct, or the prohibition against passive investment in MDPs.

**The Coalition of State Bars Gained Strength**

The more the opposing state and local bar groups found out about how the Big Five operated and how lawyers functioned within them, the more they...
sought to oppose MDP.42 In May 2000, the state bars of Illinois, New Jersey, New York, Florida, and Ohio and the county bars of Erie and Cuyahoga joined in recommending a strident declaration of prohibition against fee sharing and a reaffirmation of the core values of the law of lawyering.43

In the multistate recommendation, the legal jurisdictions across the country were urged to revise their laws governing lawyers to implement principles that preserved the core values of the legal profession.44 Those principles included the standard duties of delivering undivided loyalty, exercising independent legal judgment competently, holding client confidences, promoting access to justice, and avoiding conflicts of interest. However, to make it perfectly clear, they added one more duty:

[T]he lawyer's duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.45

The coalition of bar associations went further by declaring that lawyers are of one profession, that the law governing lawyers was developed to protect the public interest and to preserve the core values of the legal profession, that state bar associations and other entities charged with attorney discipline should reaffirm their commitment to enforcing vigorously their respective law governing lawyers, that each jurisdiction should redefine the "practice of law," and enforce laws that bar the practice of law by entities other than law firms.46

The recommendations of the states also sought to direct the ABA Standing Committee on Ethics and Professional Responsibility, in consultation with various other bar entities, to recommend to the House of Delegates such amendments to the Model Rules of Professional Conduct as would be necessary to assure safeguards relating to strategic alliances and relationships with nonlegal professional service providers.47

Substitute Recommendation for Stay Awaiting Further Study Among State and Local Organizations

A substitute recommendation by the Colorado State Association and the Denver Bar Association would have again tabled the motion of the states, allowing the rest of the law organizations to finish their studies of MDP in their jurisdictions.48 The substitute motion failed and the final position of the House of Delegates was taken from a comprehensive recommendation of the Illinois State Bar Association, the New Jersey State Bar Association, and the New York State Bar Association.

\textbf{Final Resolution with Emphasis on the MacCrate Report}

In the New York Session of the ABA, its House of Delegates overwhelmingly passed Revised Recommendation Motion 10F. The \textit{ABA Journal} reported that on July 11, 2000, the delegates "crushed mixed practices in which lawyers and other professionals would work under the same roof, sharing fees and firm ownership."49 The vote was 314 to 106 in the head-to-head battle between the coalition of state and local bars and the ABA Commission on Multidisciplinary Practice. What may have helped sway the delegates was the MacCrate Report,50 considered by many as "the most comprehensive examination in the United States of multidisciplinary practice."51

MDP House Report 10F, filed by the sponsoring states, focused on the MacCrate Report, which exhaustively surveyed developments in other jurisdictions and considered multidisciplinary practice within the context of trends within the U.S. legal profession and the economy.52 The MacCrate Report permits ancillary businesses by lawyers and law firms, so long as safeguards are in place to prevent the ownership or control of the practice of law by nonlawyers.53 The final decision only commended the safeguards proposed by the MacCrate Report to the jurisdictions that permit ancillary business, taking no position on the question of whether to permit ancillary business. Ancillary and related services and products or businesses are the focus of countless elder law attorneys around the country.54

While the ABA House of Delegates has barred MDps from the legal profession, that conclusion does not completely answer questions posed by what is actually occurring. To answer those questions, members of the legal profession must take one of two positions. The first position is that changes in the marketplace are a force that demands client access to one-stop shopping, where specialization in particular areas is available through contractual relationships through other nonlawyer service providers, or simply offered with no formal relationship with non-law-related entities.55 The second,
opposing position is that the merger of lawyers and nonlawyers in fee-sharing arrangements eviscerates client protections and the core values of the legal profession. Either the legal profession's ethical rules will traverse into other nonlawyer associations and organizations, stretching to protect the confidences and to address possible conflicts that protect clients, or the ethical rules will not stretch to protect clients when lawyers are providing them with services considered consulting rather than lawyering. For some, consulting in elder care services, tax, accounting, or mergers and acquisitions promotes the notion that such consulting skirts the ethical boundaries of the practice of law. Regardless of the conclusion reached by the House of Delegates, many practicing lawyers contend that they are not practicing law at all and will continue to provide services and consulting that are not in their opinion lawyering.

Ancillary and Related Services and Products

Elder law embraces a holistic approach to legal practice, expanding the scope of the general practice of law and defining how it is properly delivered to clients. To cover the scope of elder law, many elder law attorneys have hired nonlawyer professionals in their practices, while others have offered nonlegal services and products to their clients in a one-stop-shop modality.

NAELA’s Task Force

As elder law attorneys approach what will in the future be an expanded scope of practice, they must be mindful of the generalized description of what ancillary services are and how the rules impact on such services and products. The National Academy of Elder Law Attorneys (NAELA), under the leadership of past president Rebecca C. Morgan, professor of law at the Stetson University College of Law, has examined ancillary and related services in its Task Force on Ancillary and Related Services and Multidisciplinary Practice, chaired by Alex L. Moschella of Massachusetts. The foundation of information on which the recommendations are based are a cross section of many state cases, statutes or codes, and the rules of state bar organizations across the country.

Identified Ancillary and Related Services and Products

The services, relationships, and products that may fit in the practice of elder law are broad. They include those services and products that are and are not law related.

There are many examples of law-related services, including but certainly not limited to the following:

1. providing Internet technology and access to law firms for legal research;
2. offering processes and forms for lawyers to integrate into their practices that help clients through federal and state fair hearings;
3. promoting a lawyer’s trustee and guardianship expertise to be used by other firms for appointment to such positions; and
4. offering financial and tax analysis to lawyers for their clients.

There are just as many examples of non-law-related services and products. They include

1. selling all forms of insurance products, especially long-term care insurance;
2. offering many forms of psychological assessments, geriatric nursing services, and care management services;
3. delivering a wide array of finance, investment, and money management products and services;
4. publishing advisory bulletins and reporter services that keep lawyers and consumers informed about the trends and hot topics in the area of elder law; and
5. mechanical and technical support and consultation to elder law attorneys developing, designing, and marketing to consumers, especially on the Internet with links, lists, home pages, and Web visibility.

All of the above references may actually fit in the broader scope of services and products considered law-related under the ABA’s Model Rule 5.7. The Comment to Rule 5.7 includes title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical, or environmental counseling.

1994 ABA Findings

When is it appropriate to provide law-related ancillary services and products? The answer to this question is found in the 1994 findings of the ABA
Committee on Ancillary Business Services, appointed to review ancillary business activities by lawyers, in preparation for the ABA House of Delegates' consideration of the proposed then new Model Rule 5.7.64

The answer may also be found in each state's legal ethics rules, decisions, statutes, and case law. NAELA's task force found that many of the ABA Committee on Ancillary Business Services' findings and recommendations are pertinent to any analysis by elder law attorneys:

1. Whenever a lawyer provides law-related services, "there exists the potential for ethical problems," and that "[p]rincipal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship."

2. When law-related services are provided by a lawyer "under circumstances that are not distinct from the lawyer's provision of legal services to clients," the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Rule 5.7 (a) (1).

3. When law-related services are provided by a lawyer through an entity that is distinct from that through which the lawyer provides legal services, the lawyer must take "reasonable measures" to assure that people who receive such services know that the services are not legal services, and that the "Rules of Professional Conduct that relate to the client-lawyer relationship do not apply."65

**ABA Model Rule 5.7**

At the time of the findings, the ABA Committee on Ancillary Business Services found no reported disciplinary infractions or malpractice claims resulting from the delivery of law-related services by lawyers through separate entities.66 These and other findings were the basis on which the ABA House of Delegates, considering elements that raise such services or practices to that which is ethically appropriate, approved the 1994 ABA Model Rule amendment comprised in Rule 5.7:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

1. by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
2. by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.67

**Applying Model Rule 5.7 to Case Study**

Since 1994, Indiana, Maine, Massachusetts, North Dakota, Pennsylvania, and the Virgin Islands (with slight modification) have adopted Model Rule 5.7.68 Even without the rule, many practitioners across the country are either gearing up to offer ancillary services and products or are already delivering them to their clients. With this being the reality in which elder law attorneys find themselves, then consider a case study.

**Case Study of Jane Dole**

Jane Dole was a licensed long-term care (LTC) insurance agent while working her way through law school somewhere in California. While in law school, she took the elder law clinical program and decided that was the kind of law she wanted to practice. Once she passed the bar, Jane decided to open her own practice as an elder law attorney. At the same time, she maintained her insurance license, selling insurance when she didn't have enough clients to sustain her law practice. When Jane sold LTC insurance to clients, she went to great lengths to disclose orally, and in writing that she was properly licensed and that the license was active and current. She also explained orally and in writing that she would receive a commission or fee on the sale of LTC policies. She also provided client-policyholders with information regarding her license and an 800 number clients could call at their convenience to inquire of the Department of Insurance's consumer protection ombudsman regarding the propriety of the arrangement. Jane went further, offering each client information from the state's legal ethics commission...
to confirm that such was within the ethical boundaries of the legal profession.

Assuming that Jane is within the ethical rules of the state bar, she has met the primary requirements to sell the product to clients by being licensed, providing disclosure, and carefully explaining to the clients who buy the product where they may seek more information about the propriety of her selling ancillary products from which she derives a commission.

It is important to note that the law firm in the case study above conforms its delivery of ancillary services to meet the requirements of Model Rule 5.7, and those identified in Model 3 of the first ABA MDP Commission, by assuring that all clients of the ancillary business are given clear notice that the services are not law services and that the business does not offer legal services. The lawyers involved make clear that they are consulting and not lawyering, at the same time they are sharing fees and management decisions.

From Model 3, and Rule 5.7 above, consider the following case.

Case Study of Gordon Harllee

Gordon Harllee owns a law corporation in the Allegheny foothills of western Pennsylvania, in a bedroom community outside Pittsburgh, specializing in elder law. Harllee also owns a majority interest in G&H, an ancillary business engaged in sophisticated insurance marketing, planning, and promoting sales growth. G&H provides consulting services to insurance industry companies with respect to long-term care insurance products and how they are integrated into elder law and estate planning strategies for older Americans. The nonlawyer partners in G&H are insurance analysts and strategists. Two of them have been providing such services to LTStrategies, a long-term care insurance conglomerate. The analysts have had access to the confidential financial information of LTStrategies, along with the confidential files of thousands of long-term care insurance policyholders of LTStrategies. However, neither Harllee, nor any lawyer-partners in the law corporation or in G&H have been involved in any aspect of the analysts' work. Governmental Benefits Services Processing Company asks Harllee, its longstanding outside counsel, to represent it in connection with possible marketing, soliciting, and selling benefit processing contracts to the policyholders of LTStrategies.

The commission position paper asked the following questions (revised for the paraphrased model above):

1. Should the ancillary business's provision of services to LTStrategies be imputed to Gordon Harllee?
2. If it is imputed, should the imputation operate preclusively to prevent Harllee from accepting the proposed representation of Governmental Benefits Services Processing Company under all circumstances? What disclosures are necessary?
3. Is the consent of LTStrategies necessary?
4. Are screens appropriate?
5. How should they be constructed?
6. Would the analysis differ if Harllee were representing Governmental Benefits Services Processing Company and then G&H were asked to help LTStrategies, with only the analysts working on the strategies that gained confidential information about the policyholders?

Assume that there should be no rules of legal ethics imputed to Harllee because of the relationship of nonlawyers providing ancillary services in a firm in which he is associated. Based on the assumption, the answers to the questions raised above are (1) no; (2) no; (3) none; (4) no; (5) they shouldn't be constructed; and (6) no.

Assume that there should be rules of legal ethics imputed to Harllee because of the relationship of nonlawyers providing ancillary services in a firm in which he is associated. Based on that assumption, the answers to the questions raised above are (1) yes; (2) no, not always—apply a balancing test on case-by-case basis; (3) yes; (4) yes; (5) set policy that denies any contact, orally or in writing, between Harllee and those who deal directly with clients or information regarding clients where there is needed confidentiality or there is conflict of interest under the ethical rules of the legal profession; and (6) no.

Conclusion

The vote of the House of Delegates was clear. MDPs have failed to gain recognition in the legal profession. MDPs as simply defined in this article are not now recognized or authorized in the Model Rules or in an overwhelming majority of state bar organizations.

While many elder law attorneys and other practitioners are anxious to compete and to provide what
they consider to be the “one-stop shop” that clients are looking for, the legal profession has for now declared MDPs off-limits in the practice of law.

As for elder law attorneys providing ancillary and related services, each state’s rules of professional conduct or responsibility must be understood and followed. Many elder law attorneys have positioned themselves to deliver services and products based on their state’s rules. Others have simply seen the potential for additional clients and revenues by offering expanded services and products without any consideration of the ethical boundaries or for the impact on their clients. Regardless of the jurisdiction, lawyers are performing these services in a variety of settings. Some are delivering ancillary services or products as dual-practitioners, lawyers both competent and licensed to perform, deliver, or sell ancillary services or products. Others are hiring nonlawyers as employees of their firms to provide the ancillary services or products, or even going so far as to organize partnerships and companies in which nonlawyers deliver the services or products within a multidisciplinary practice. As for any of this, beware! Consultation with professional malpractice insurance professionals should be of assistance in determining just where the boundaries are located for practicing law in the future.

Endnotes


2. See the American Bar Association Commission on Multidisciplinary Practice (hereinafter ABA MDP Comm’n) website, http://www.abanet.org/cpr/multicom.html, for a complete listing of all hearings, speakers, and written statements. The Center has also posted all reports, minutes of hearings, motions, and recommendations before the House of Delegates.

3. James W. Jones & Bayless Manning, Getting at the Root of Core Values: A “Radical” Proposal to Extend the Model Rules to Changing Forms of Legal Practice, 11 NAELA SYMPOSIUM, Plenary Session Addressing the Question of Multi-Disciplinary Practice: Point-Counterpoint, Tab. 6 (May 2000).

4. Lawrence J. Fox, Old Wine in Old Bottles, 11 NAELA SYMPOSIUM, Plenary Session Addressing the Question of Multi-Disciplinary Practice: Point-Counterpoint, Tab. 6 (May 2000).

5. Jones & Manning, supra note 3, at 36.


7. Id. at 4.

8. Id.


10. Id.

11. Fox, supra note 4.

12. Id.

13. Id.

14. Terry, supra note 6, at 7.


16. The commission met in executive session during September, November, and December 1999 and held two-day public hearings in November 1999 and February, March, June, and July 2000. In August, at the 1999 Annual Meeting of the ABA House of Delegates, and again in July, at the 2000 Annual Meeting (New York) of the ABA House of Delegates, the commission submitted progress reports addressing what is being considered to be the most important issue to face the legal profession this century.


18. ABA MDP Comm’n, Hypotheticals and Models (posted Mar. 3, 1999), http://www.abanet.org/cpr/multicomhypos.html. (The commission noted that in some designated instances, the hypotheticals are based on the Restatement of the Law Governing Lawyers (Proposed Final Draft No. 1, 1996)).

19. The papers of the commission, and the written comments of the witnesses are published on the


21. Id. In the paper, the ABA MDP Comm'n reminded readers that its work was ongoing, that the paper contained no recommendations and sought no action by the ABA House of Delegates.

22. Id.

23. Id.

24. Fox, supra note 9.

25. Id.

26. Background Paper, supra note 17. The commission recognized that the biggest consulting firms were closely affiliated with the Big Five accounting firms and derived substantial benefit from the cross-selling initiatives of accounting/auditing partners. The commission concluded that the rules that regulate lawyer conduct in some foreign countries, permitting various forms of lawyer/nonlawyer affiliations prohibited in the United States, are what have driven the Big Five accounting firms to vigorously enter those foreign markets offering legal services. The commission also believes that they have significantly expanded their consulting services in the United States in search of new sources of revenue. Id.

27. ABA MDP Comm'n, supra note 15.


29. Id.

30. Id.

31. On May 28, 1999, the Internet Law News Network reported that Geoffrey Hazard Jr., a preeminent member of the commission announced that the commission would issue its report on June 8, 1999, proposing the elimination of the long-standing prohibition against fee sharing because it has no current relevance to the practice of law. The Law News Network quoted Hazard stating that the issue is so controversial that "There's really going to be ferment." Siobhan Roth, Facing the Big Five, American Lawyer Media's Law News Network (May 28, 1999), http://www.lawnewsnetwork.com/stories/A1897-1999May28.html.

32. Id.


35. Id.

36. Id.


38. Id.

39. Id.

40. Id.

41. Id.

42. Gibeaut, note 33, at 85.


44. Id.

45. Id.

46. Id.

47. Id.


49. Gibeaut, supra note 1, at 92.


51. Id.

52. Id.

53. Id.

54. Id.
55. See Daniel R. Fischel, Multidisciplinary Practice, 55 Bus. LAW. 952 (May 2000); Charles F. Robinson, Written Remarks of Charles F. Robinson Submitted to the Commission on Multidisciplinary Practice (Feb. 5, 1999), http://www.abanet.org/ct/p robinson1.html; see also Terry, supra note 6, at 7.


57. See Fox, supra note 9.

58. See Gibeaut, supra note 33, at 85.

59. Alex L. Moschella, Chair, Interim Report on Multidisciplinary Practice and Ancillary Services, 11 NAELA SYMPOSIUM, Plenary Session Addressing the Question of Multi-Disciplinary Practice: Point-Counterpoint, Tab. 6, Exh. 3 (May 2000).

60. Id. The task force made its final recommendation to the NAELA Board of Directors at the NAELA Advanced Institute on Elder Law in November 1999. The NAELA Board adopted the following:

RESOLVED, that NAELA take immediate steps through the joint task forces of ethics and multi-disciplinary practice (MDP) to adopt a set of ethical guidelines and principles that membership may review to insure that those members who wish to provide MDPs to clients may do so in compliance with current ethical rules and state specific rules of professional responsibility.

61. Moschella, supra note 59 at 7.

62. Id.

63. A.B.A. Model Rules of Prof'l Conduct R. 5.7(b) cmt. ¶ 9.

64. Id.

65. Moschella, supra note 55, at 32–33.

66. Id. at 31–34.


69. Id. n. 30 and accompanying text.

70. The persons and firms identified in this case study are fictitious. Any similarity with persons or firms in western Pennsylvania is coincidence.

71. A.B.A. Model Rules of Prof'l Conduct R. 1.9(b) and comments about imputed disclosure.