



PROFESSIONAL RESPONSIBILITY

MULTIDISCIPLINARY PRACTICE: ONE YEAR LATER

BY EDWARD J. CLEARY

One year ago, *Bench & Bar* devoted an issue to the topic of multidisciplinary practice and what it might mean for the legal profession.¹ In May of this year, the Multidisciplinary Practice Task Force of the MSBA submitted its report and recommendations.² These were adopted by the House of Delegates in June. In early July, the American Bar Association voted in New York City to reject the concept of multidisciplinary practice and to continue the prohibition on lawyers sharing fees with nonlawyers. The delegates also "called for vigorous enforcement of state rules prohibiting the unauthorized practice of law."³ Some believe the debate has ended; others believe that the debate over multidisciplinary practice — or at least the debate over what constitutes the unauthorized practice of law and what to do about it — has just begun.

A LOOK BACK

The ABA created a Commission on Multidisciplinary Practice in 1998, in part due to the acquisition of law firms by a number of major accounting firms in Europe and the expressed intention by many of these same firms to acquire law firms within the United States.

A year later, in June 1999, the ABA Commission recommended that the rules be amended to allow for multidisciplinary practice within the legal profession. This recommendation came as a shock to many in both the legal profession and the accounting world.

For many attorneys, the idea of sharing fees and possibly losing professional independence due to the lack of ownership and control of a practice, was unacceptable. For accounting firms, the recommendation that conflicts of interest be imputed within an MDP was problematic, since it would mean that an accounting firm could not provide legal services to a client if that client had interests adverse to those of an accounting client. In any case, the ABA House of Delegates rejected the Commission's proposal by a wide margin "unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence

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and the legal profession's tradition of loyalty to clients."⁴

Then, in mid-May, the ABA Commission returned with a scaled back proposal that provided for multidisciplinary practice when "the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services." The ABA Commission also requested that the entire issue be deferred until the ABA midyear meeting in February of 2001.

In the meantime, many states, including Minnesota, appointed groups to study the ABA proposal. The Minnesota MDP Task Force issued its report in May and, as noted above, it was then approved by a wide margin of the MSBA House of Delegates in June. While both the MSBA and ABA plans would provide for multidisciplinary practice if and only if the lawyers have the control and authority necessary to ensure lawyer independence in the rendering of legal services, the two reports differed in the method of reaching this goal. The ABA report suggested that "neither the percentage of ownership interest nor any particular wording in the partnership or shareholder agreement will conclusively determine either control or authority. The control and authority principle looks to substance not form."

In contrast, the MSBA recommended that "a majority percentage of ownership in the entity must be held by lawyers licensed to practice law and practicing law in that entity. In addition, the lawyers practicing law in the entity must ensure that they retain the control and authority necessary to assure lawyer independence in the rendering of legal services." Minnesota thus chose to look to both sub-

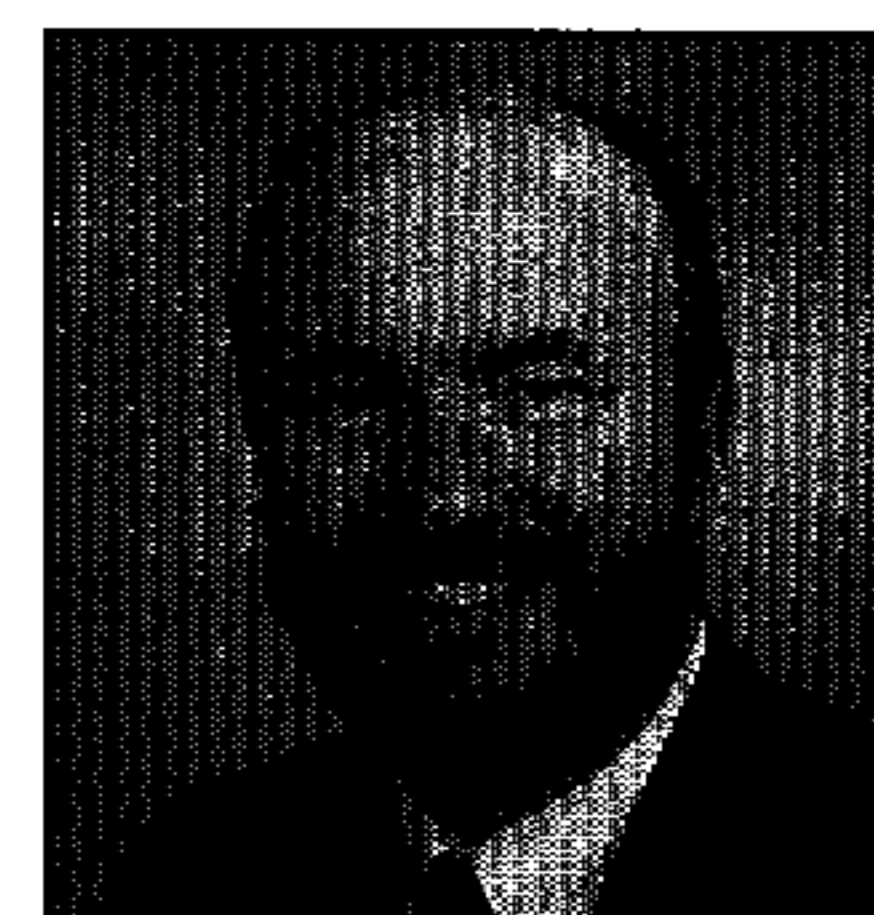
stance and form. The MSBA recommendation required both the objective element of a majority percentage of ownership by lawyers and the subjective element of retention of the control and authority necessary to assure lawyer independence.

EUROPE AND THE BIG FIVE

Underlying the debate over multidisciplinary practice is the unauthorized practice of law, particularly as it pertains to nonlawyers in major accounting firms. As one observer has noted, "the boundary is indistinct between (a) tax advice and (b) legal advice . . . legal advice provided by an accounting firm to its clients is unauthorized practice of law."⁵ Rule 5.5 of the Minnesota Rules of Professional Conduct provides in part that a lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. Minn. Stat. § 481.02, subd. 8, makes it a misdemeanor for any person or corporation, or officer or employee thereof, to engage in the unauthorized practice of law and further provides that it "shall be the duty of the respective county attorneys in this state to prosecute violations of this section." The rule provision applies to licensed attorneys; the statute applies primarily to those who are unlicensed. To no one's great surprise, this office seldom receives complaints under 5.5 and local prosecutors seldom, if ever, prosecute violations of this statute.

Across the nation, there are some states that have been active in "UPL" prosecution. Usually, this takes the form of seeking injunctions against those alleged to be engaging in the unauthorized

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practice of law.⁶ However, few states have either the funding, the resources, or the professional staff to prosecute alleged 5.5 violations against lawyers in the Big Five. At the same time, local county attorneys have little or no interest in prosecuting violations of the UPL statute against members of these organizations. Finally, those states that have attempted to commence regulatory initiatives against large accounting firms have not done so successfully. The Texas UPL Committee, after an 11-month investigation, decided in 1998 that it would not file a complaint against Arthur Anderson. The Virginia bar counsel made the same decision in 1999 with respect to services offered by an unnamed professional services firm. As of now, "No fact finder has yet determined that such consulting services constitute the practice of law."⁷

In Europe the Big Five are stepping it up a notch. "In dozens of cities in Europe, the U.S.'s Big Five accounting firms are doing what they can't do at home: practicing law."⁸ Rather than using their in-house attorneys to offer advice on taxes and on other issues while arguing that they are not practicing law, the MDPs in Europe are openly providing a broad array of legal services, including counseling on finance as well as on mergers and acquisitions. Recently, Ernst & Young, one of the Big Five, recruited several British solicitors to form a British-based law affiliate. Working from Ernst & Young's client base, the new 40-person law firm is "in direct competition with leading law firms in the U.K. and . . . in the United States."⁹

The issues that existed before the recent debate on multidisciplinary practice continue to haunt the legal profession. There is no going back to a simpler time when the profession was not as threatened by the unauthorized practice of law. While many attorneys have not considered the issues enough to arrive at a position, it is time for the organized bar in Minnesota to make a decision, rather than allowing outside forces to make a decision for it.

SOME REGULATORY ISSUES

With the ABA shelving the proposal for multidisciplinary practice nationwide, the issue returns to the states. The MSBA Task Force on Multidisciplinary Practice must decide whether to: a) continue to recommend multidisciplinary practice and the rule changes that would be required to make such a change effective; b) shelve the matter in Minnesota in recognition of

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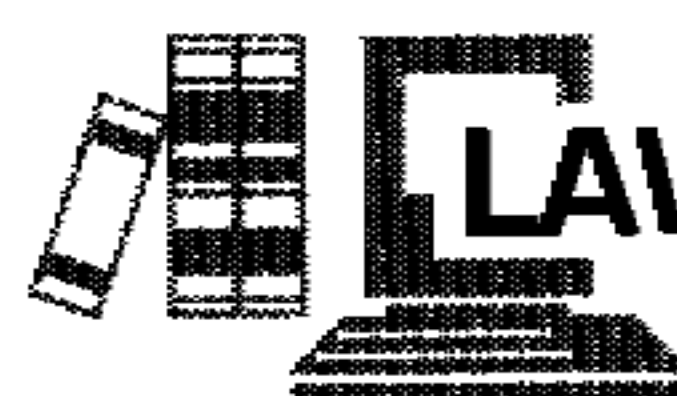


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the ABA's actions; or c) shift the focus to more active enforcement efforts against the unauthorized practice of law and those who assist it (or a combination of increased enforcement with one of the other options).

If the legal profession in Minnesota chooses the last of these courses of action, those within the profession must be aware of the costs that will be incurred and the risks that will be entailed.

Since this office does not have jurisdiction over the unauthorized practice of law, it will continue to be up to local prosecutors to enforce Minn. Stat. § 481.02 against those who violate its provisions. (The Minnesota Supreme Court could consider the creation of a committee or a commission to monitor UPL, as found in other states. In order to do that, the Court would be required to effectively take back the regulation of the unauthorized practice of law from the Legislature.) While this office does have jurisdiction over attorneys who aid others in the unauthorized practice of law, we have not received any complaints in this area.

There are costs associated with the stepped up enforcement by this office of the prohibition against aiding the unauthorized practice of law, particularly when a complaint has not been filed. First, the nature of our office and the way it operates will need to change. Since 1985, this office has been primarily "reactive" as it pertains to regulating the legal profession and protecting the public. In other words, we are "complaint driven"; we do not proactively open files, conduct random audits, or knock on doors to investigate lawyers. If we are to become more proactive, it is unlikely such efforts would be limited to the enforcement of unauthorized practice of law provisions. Once the change was made, the office would likely engage in proactive investigations against other lawyers and law firms as well as those in large accounting firms. Second, these enforcement efforts are very expensive and this office would require additional funding and expansion of staff in order to effectively prosecute well-financed business organizations.

There are other risks associated with this course of action as well. First, any stepped up enforcement effort against a large international business organization may well be doomed to failure unless there is a unified enforcement effort among the states, which currently seems unlikely. Second, there is a danger that the exclusive jurisdiction over the prac-

tice of law currently held by the Judicial Branch based on the doctrine of inherent authority could be challenged by either the federal government or state legislatures as a result of a backlash against such enforcement efforts. Lastly, if we attempt to be proactive and engage in stepped up enforcement without an aggrieved client, we risk being perceived as primarily protectionist in nature. If that happens, the public could become even more cynical of our profession than it already appears to be.

CONCLUSION

With the ABA's rejection of the MDP proposal, the matter is now before each individual state. Minnesota has been among the most active states in examining the MDP issue. The reason this topic has engendered so much debate and discussion is that there are no easy answers. Now, the legal profession in our state must decide what course of action available to us would best serve our clients, the public, and our profession. We can maintain the status quo, follow through on our own MDP proposal, or redirect our resources and regulatory system. Which course we follow could have an impact on our profession for years to come. □

NOTES

1. See Bench & Bar 56:8 (September 1999).
2. See Bench & Bar 57:5 (May/June 2000), at 34 ff..
3. Jane Pribek, "ABA nixes MDP plan at annual meeting," *Minnesota Lawyer*, 7/17/00, p.1.
4. Steven C. Krane, "Hot Town, Summer in the City: The MDP Debate Heads for Showdown in New York," *The NY Prof. Resp. Report*, July 2000, p. 2.
5. Hazard, Konik and Cranton, *The Law and Ethics of Lawyering*, 3rd Ed. (NY: Foundation Press, 1999) p. 1045.
6. Several recent injunctions have been aimed at Internet activity. See Richard B. Schmitt, "Lawyers vs. The Internet," *The Wall Street Journal*, 7/17/00, R36.
7. "Commission on Multidisciplinary Practice Updated Background and Informational Report and Request for Comments," *The Professional Lawyer*, Fall 1999, p. 8.
8. Margaret A. Jacobs, "Accounting Firms Covet Forbidden Fruit: Piece of U.S. Legal Market," *The Wall Street Journal*, 5/31/00, p. B1.
9. Geanne Rosenberg, "Is Ernst & Young-linked U.K. firm a blueprint for a U.S. launch?" *The National Law Journal*, 7/17/00, B8.