



PROFESSIONAL RESPONSIBILITY

MULTIDISCIPLINARY PRACTICE & PROFESSIONAL INDEPENDENCE

BY EDWARD J. CLEARY

RESOLVED, that the American Bar Association amend the ABA Model Rules of Professional Conduct consistent with the following principles:

...
No. 2. A lawyer should be permitted to share legal fees with a nonlawyer, subject to certain safeguards that prevent erosion of the core values of the legal profession.¹

With this momentous recommendation released this past June, an ABA commission formed to study the issue of multidisciplinary practice has suggested a new course and direction for the legal community. The ramifications are enormous and the debate surrounding the recommendation is just beginning.

BACKGROUND

Perhaps the current confrontation within the profession was inevitable. For years there have been lawyers working within organizations alongside nonlawyers while offering services that appear similar, if not identical, to traditional legal services. This has been the case particularly within the large accounting firms where the provision of these types of services has exploded in the past decade. Those who practice in the area of tax law have felt this transition perhaps more than any other segment of the bar, even to the point of seeing Congress recognize a privilege of confidentiality between accountants and their clients. The lawyers participating in such business organizations continue to take the position that they are not practicing law, for to do so would be to admit violations of Rule 5.4 of the Minnesota Rules of Professional Conduct.² Indeed as Phil Cole argues elsewhere in this issue, "a major thrust of the commission's report is to bring the lawyers practicing law in these MDPs back into the fold as practicing lawyers."

Rule 5.4 addresses the professional independence of a lawyer and essentially prohibits fee-sharing with nonlawyers, law partnerships with nonlawyers, and the relinquishing of decision making or control to nonlawyers. Given the increasing hiring of attorneys by the "Big Five" accounting firms and the increasing

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involvement of lawyers and nonlawyers in business arrangements in other settings, conflict within the profession was bound to emerge.

THE ABA POSITION

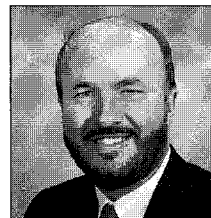
The Commission on Multidisciplinary Practice, formed in August of 1998, heard over 60 hours of testimony from 56 witnesses in addition to receiving and reviewing the written testimony of additional parties. Much of the debate centered on the "threats posed to large law firms by 'Big Five' accounting giants." However, one observer said that the testimony seemed to indicate that "multidisciplinary practices may actually have the most impact on sole and small firm practice . . . in areas such as tax, family law and elder care" where some lawyers "want to form closer ties with accountants, counselors, and financial advisors." Such a change likely would affect many segments of the profession; nevertheless, large law and accounting firms, particularly those firms with an international practice, would likely feel the greatest impact . . . and perhaps reap the largest benefit. It should be remembered that much of the impetus for the creation of the commission was the presence of MDPs in other countries, particularly in Western Europe.

The commission concluded, "with appropriate safeguards a lawyer can deliver legal services to the clients of an MDP without endangering the core values of the legal profession or the interests they are designed to protect."⁴ While acknowledging the "principal arguments raised in the past . . . specifically professional independence of judgment, the protection of confidential client information, and loyalty to the client through the avoidance of conflicts of inter-

est," the commission nevertheless concluded that there were "appropriate safeguards" available to address such concerns.⁵ As it pertains to fee-sharing, the apparent safeguard for the lawyer is to "take special care that payment for legal services and funds received on behalf of a legal services client are clearly designated as such and segregated from other funds of the MDP" subject to an "administrative audit process." With respect to professional independence, the commission recommends, among other changes, that "a lawyer who is supervised by a nonlawyer may not use as a defense to a violation of the Rules of Professional Conduct the fact that the lawyer acted in accordance with the nonlawyer's resolution of a question of professional duty."⁶ In other words, the safe harbor provided for a subordinate lawyer in Rule 5.2 (subordinate lawyer held not to have violated the Rules of Professional Conduct if that lawyer acted in accordance with supervisory lawyer's reasonable resolution of arguable question of professional duty) is not available to the lawyer who is supervised by a nonlawyer. But should a nonlawyer be supervising a lawyer engaged in legal services?

Whether or not these "appropriate safeguards" (and others suggested) are sufficient is arguable. What is perhaps more telling about these procedures, along with others recommended by the commission, is the direction they take us. Rather than focusing on professional independence, we seem to be conceding the impossibility of meeting that "core value." Instead, we appear to be reaching for the semblance of regulations, accepting form over substance, perhaps ignoring the likelihood that such additional regulations will prove ineffective once, in Phil Cole's formulation, the "eco-

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conomic and cultural control of the delivery of legal services is ceded to large, well-capitalized business organizations.”

THE RESPONSE

While many observers believe that the recommended changes will inevitably result in a loss of professional independence, others argue that the impact is far greater: that the legal profession is throwing in the towel on law as a “profession” and will henceforth be known as the legal “business.” Some suggest these changes have already occurred and that all the ABA commission has done is to recognize this and open the barn door, since closing it when the animals have left long ago seems pointless. Still others point out that such changes put “lawyers outside the mega-accounting firms at a competitive disadvantage” and that the result will be that accounting firms such as “PricewaterhouseCoopers could have a full-service law firm here in America” resulting in “a dramatic effect on the delivery of legal services . . . in a relatively short amount of time.”⁸

The individual states have begun to respond. The New York State Bar Association passed a resolution on June 26 expressing concern that such changes will “adversely and irreparably affect the independence and other fundamental principles of the legal profession.” For that reason, among others, the association announced opposition to “any changes in existing regulations prohibiting attorneys from practicing law in MDPs, in the absence of a sufficient demonstration that such changes are in the best interests of clients and society and do not undermine or dilute the integrity of the delivery of legal services by the legal profession.” Before the ABA House of Delegates decided on August 10 to defer action on the issue pending further study, both the Florida and Ohio bars, as well as the MSBA, had urged that the matter should be studied and debated further.¹⁰

MSBA President Wood Foster has formed a task force to study the issue and report back to the members. The task force, whose members are listed on page 13 of this issue, includes both proponents and opponents of the ABA recommendation and includes pri-

vate practitioners, public lawyers, and a representative from this office.

CONCLUSION

It appears likely that at some point in the future observers will look back upon the resolution of this issue as a pivotal moment in the history of the legal profession. Here in Minnesota we should listen to advocates and critics of the ABA proposal and take our time before considering what course of action benefits our clients, protects the public, and best serves our profession. □

NOTES

1. ABA Commission on Multidisciplinary Practice, *Report and Recommendation*, released June 8, 1999, p. 8.
2. MRPC 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,



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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 the proportion 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.

(4) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

(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:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of a lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

3. Ritchenya A. Shepard, "Lawyers, accountants and beyond" (quoting Minnesota attorney Steven C. Nelson), *The National Law Journal*, June 21, 1999, p. A1.

4. ABA Commission, *supra*, p. 5.

5. *Ibid.*, p. 2.

6. *Ibid.*, p. 8.

7. Phillip A. Cole, "The Legal Profession at the Crossroads," *Bench & Bar of Minnesota* 56:8 September 1999 at 26.

8. Siobhan Roth, "Facing the Big Five," *Legal Times*, June 1, 1999.

9. Shepard, *supra* p. A9.

10. ABA/BNA Lawyers' Manual On Professional Conduct, July 7, 1999, p. 323.

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