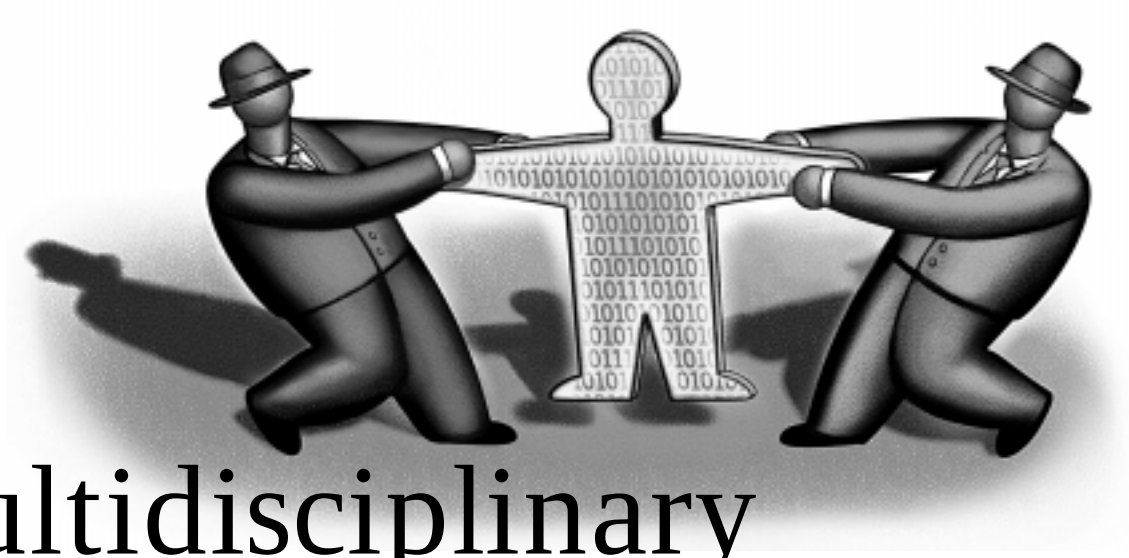


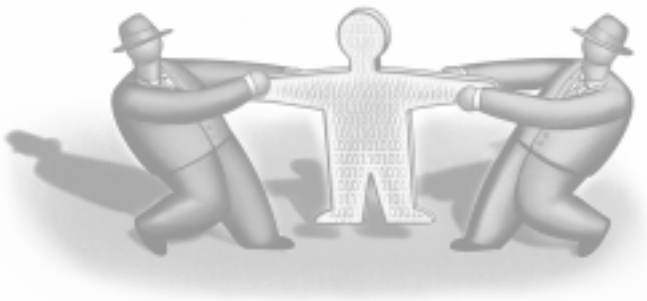
Multidisciplinary Practice: *Armageddon or Salvation?*

Law Office Management

by J. Emery Barker

This July the American Bar Association House of Delegates is scheduled to vote on an amendment to ABA Model Rules of Professional Conduct No. 5.4. This historic vote was scheduled for August 1999 but postponed one year because of the enormity of the debate last year. The debate centers on whether a lawyer and a non-lawyer can form a business arrangement and share fees.[1] The current iteration of Rule 5.4 has been adopted in Arizona and in essence prohibits such fee-sharing arrangements if *any* of the activities of the arrangement will constitute *the practice of law*.[2]

The question is: Will the adoption of a modified rule permitting fee-sharing with non-lawyers be the death knell of the legal profession, or will it allow lawyers to expand their services and better serve their clients? The ABA is at least a decade late in entering the debate. A substantial number of countries have already decided the issue in favor of allowing the fee-sharing arrangements.



Some History

Multidisciplinary practices (MDPs) originated in Germany shortly after World War II when lawyers and tax accountants were permitted to practice together and today MDPs are liberally allowed.[3] In Europe, the Big Five accounting firms have spent the last decade acquiring law firms and hiring lawyers. Regulations vary from country to country. In France, lawyers practicing in firms owned by non-lawyers are required to sign an affidavit that they are professionally independent from control by non-lawyers. In New South Wales, Australia, the Big Five offer legal services under their own names.[4]

The January 1999 report of the ABA's Commission on MDPs noted that if compared with law firms on a worldwide basis, PriceWaterhouseCoopers and Arthur Andersen would be ranked third and fourth, respectively in numbers of lawyers employed.[5]

The International Bar Association has taken the position, and forwarded it to the World Trade Organization, that a jurisdiction permitting such MDPs should require certain minimum standards in allowing MDPs. The IBA is concerned with the same issues facing the ABA and Arizona lawyers, i.e., conflicts of interest, confidential client information and, most importantly, regulation of MDPs by the legal profession, rather than by any other body.[6]

Several law offices in Phoenix and Tucson have been operating in recent years with letterheads and pleading paper proclaiming the lawyers to be the employees of prominent insurance carriers. Accountants and enrolled agents practice "tax" before the Internal Revenue Service. The proliferation of document preparation and paralegal service firms throughout Arizona and other states creates a serious concern about the quality of services being purchased by the public. Several states permit lawyers to own legal service businesses such as trust companies or estate agents and offer their services conjointly with those firms. Throughout Arizona, banks and trust companies, insurance companies and financial planners all provide "estate and trust planning," including forms with "fill in the blank" capability. This is not a problem that is going to go away.

The issue confronting lawyers in the United States will have to be resolved on a state-by-state basis. Each state decides for itself what constitutes "the practice of law." That exercise in Arizona has a very "checkered" past. What constitutes the practice of law in all its varieties, and the decisions about who will be authorized to provide those services, is sometimes decided by the public, not by the courts.

This writer was admitted to practice in 1960 in Arizona. In 1961, a decision by the Arizona Supreme Court over what constituted the practice of law caused a public outcry and campaign resulting in an initiative petition that forever changed the course of real estate law in Arizona.

In *State Bar of Arizona v. Arizona Land Title and Trust Co.*, 90 Ariz. 76, 366 P.2d 1 (1961), the Arizona Supreme Court decided that it was illegal for title insurance companies to prepare deeds, mortgages and contracts in connection with the sale of real estate as it was the unauthorized practice of law, it also constituted the unauthorized practice of law by corporations, and it violated Arizona law.

Upon rehearing in 1962, the Supreme Court expanded its opinion, holding that real estate brokers were ***not*** authorized to prepare preliminary purchase agreements for the sale of real estate, but could only prepare their own employment agreements.[7]

The second decision involving real estate agents was handed down by the Arizona Supreme Court on May 31, 1962, and in November 1962 the voters of Arizona approved an initiative measure, which is now a part of the Arizona Constitution, authorizing real estate brokers to prepare all instruments incident to the sale of real estate in Arizona.[8] The public decided that real estate brokers had the right to practice real estate law in Arizona, overruling the Arizona Supreme Court.

The MDP Argument: The Opponents

The opponents of MDPs argue that in order to protect the public, there must be strict regulation of professional conduct and unauthorized practice of law, that the client's needs are only met by a vigorous bar operating under strict

ethical rules, and that to permit otherwise would create chaos, leaving the public unrepresented properly because of the lack of concern about conflicts of interest, loss of confidentiality, and lack of professional independence. The opponents also argue that the needs of the public are fully met by the status quo.[9]

The Proponents

The proponents of MDPs suggest that opposition to MDPs comes from the guild of lawyers who wish only to preserve the integrity of the guild, who have no concerns for the needs of clients, and who believe that the needs of clients are better protected by a more efficient provision for legal services, better access to a wide range of professional resources and "one-stop shopping."[10]

Historical Note

In 1976, the Arizona Court of Appeals held that the court had sole discretion over determining what constituted the "practice of law" in Arizona, and that the entire regulation of the practice of the law (including the State Bar Act, A.R.S. § 32-201, et seq.) was within the preview of the court and not something subject to regulation by the Legislature of Arizona.[11]

As a result, do not expect the Arizona Legislature to come to the aid of the lawyers in establishing any legislation which regulates or imposes penalties, whether civil or criminal, for the "unauthorized practice of law." That will not happen in Arizona, most likely. Our legislature may well have decided that this is a mess that the courts have created and the courts will have to fix.

The Real Issues

The real issues to be determined in connection with MDPs were best defined by Michael Simmons, a partner in Finers law firm in London, England. Simmons, a fellow of the College of Law Practice Management, defined the real areas of concern for MDPs as the "Four Cs." He says they are:

1. Client privilege
2. Custodianship of client funds
3. Confidentiality
4. Conflict of interest[12]

Simmons believes we must provide the following protections:

Privilege

This concern deals with the client's materials in the hands of counsel. It is generally recognized that the attorney-client privilege will protect documents in the hands of counsel and protect them from the prying eyes of the Internal Revenue Service or any other governmental agency seeking access. This safeguard could be at risk in an MDP.

Custodianship of Client Funds

Clients' trust fund accounts held by lawyers have the strictest standards and are the most generally recognized of all such types of accounts. Trust accounts maintained by other types of professionals are neither regulated nor respected in the same fashion as attorneys' client trust accounts.

Confidentiality

Although the Arizona Legislature has granted accountants a confidentiality privilege,[13] it is not recognized by the Internal Revenue Service and the courts have held there is no confidentiality privilege for accountants in connection with a criminal prosecution.[14] Only the attorney-client privilege is recognized.

Conflict of Interest

Simmons also notes that conflict is the most difficult of the areas to define because of the different types. He identifies the types as commercial conflict, legal conflict of interest, and the special conflict problems for auditors. Simmons believes the biggest problem occurs in the third area, i.e., the special duties of the auditor. The courts have held that auditors have special duties, and under certain circumstances auditors are required to report the misdeeds of the audited

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subject. Except in very rare circumstances, the lawyer has the obligation to remain silent and preserve the client's secret.[15]

The Debate Continues

Ward Bower, a noted authority on legal management and principal of the management firm Altman Weil, noted in an article in the firm's publication in January 1999 that even in the U.K., where MDPs are banned outright legislatively, "independent" law firms can practice in close cooperation with Big Five firms under a contractual arrangement for management services. He also reports that in the Netherlands, a trial court decision banning MDPs has been appealed to the European Court as violating the competitive rules adopted by the European Union.[16]

It should be remembered that in this country the adoption of the Modified Rule 5.4 by the ABA will not create a wholesale change in the Ethical Rules involving lawyers. This matter will be dealt with on a state-by-state basis. However, a serious practical difficulty will arise if adjoining states adopted different rules although they share a major city on their common boundary where lawyers compete in the legal-service market. If the lawyers in State A were prevented from entering into an MDP, while the lawyers in State B were permitted to do so, the resulting donnybrook would spill over into the courts, the legislature, and especially into the marketplace.

In all of the discussion, both pro and con, each side purports to be concerned only about the client's or public's interests. Those in favor of MDPs, wrapping themselves in the cloak of consumerism, argue that the customer will have a wider range of services available, that the services will be coordinated, and that the price will ultimately come down because

there will be a single bill issued to the client and that the shared overhead will lower the final tally.

On the other hand, those waving the flag of the status quo argue that they, and they alone, are worried about the conflicts, confidential communications, and other protections afforded by a strong legal profession-backed rule. They also argue that the claim of the large demand for such services is vastly overstated by those promoting such a rule change.

The State Bar has appointed Nicholas Wallwork as Chair of a task force on the Future of the Legal Profession to review this problem and formulate a recommendation. The task force formally began debate in Arizona at a town hall meeting at ASU Law School's Great Hall on March 31. At the meeting, members had the chance to learn about MDP, ask questions and voice their opinions on what type of recommendation the State Bar's Board of Governors should send to the American Bar Association. The ABA's House of Delegates will be voting in July on whether to endorse MDP.

Prediction. This writer believes that the market will drive the rule change in favor of MDPs. One cannot have been alive in the past ten years and failed to notice the merger, acquisitions, combinations and associations of heretofore apparently incompatible businesses and continue to believe that the legal profession can insulate itself from the market. As was demonstrated in 1962 when the Arizona courts decided that real estate brokers could not draw real estate contracts, the public responded vigorously. In the ensuing 38 years, attorneys have lost market share for dissolutions, incorporations, business associations, tax preparation, property tax appeals, and a multitude of other services that previously were considered solely the domain of lawyers. The availability of legal services on the Internet will cut across state lines and national boundaries.

Until the legal profession recognizes that it must not only provide the service that the client demands, but also add additional value for the client, then it is doomed to the market share of the buggy whip. It is the personal opinion of this writer that attorneys need to become aggressively involved in the process and affirmatively preserve the client's interests while pursuing new and innovative arrangements with other professionals. Get involved or Armageddon looms![17]

J. Emery Barker *is the former managing shareholder of Mesch, Clark & Rothschild, P.C. and the current attorney co-chair of the State Bar Law Practice Management Section.*

ENDNOTES:

1. American Bar Association Commission on Multidisciplinary Practice, "Background Paper on Multidisciplinary Practice: Issues and Developments," January 1999 (hereinafter the "ABA Report").
2. ER 5.4, Rule 42, Rules of Arizona Supreme Court.
3. Ward Bower, "The Big Five's Case for MDPs," *Report to Legal Management*, January 1999, p. 1.
4. *Id.*, pp. 4-5.
5. ABA Report, p. 8.
6. *Id.*
7. 91 Ariz. 293, 371 P.2d 1020 (1962).
8. Art. 26 §1, Arizona Const., Vol. 1A, A.R.S.
9. ABA Law Practice Management, Spring Meeting Report, p. 3, 5/18/99.
10. *Id.*
11. *Bridegroom v. State Bar*, 27 Ariz. App. 47, 550 P.2d 1089 (App. 1976).
12. Michael Simmons, "Multidisciplinary Partnerships: Who's Afraid of the Big Bad Wolf?," *News*, College of Law Practice Management, Summer 1999, p.1.
13. A.R.S. § 32-749.
14. *State v. O'Brien*, 123 Ariz. 578, 601 P.2d 341 (App. 1980).
15. Simmons, pp. 2-3.
16. Bower, p. 4.
17. To obtain access to the ABA discussion and all its materials, get on the Internet at www.abanet.org/discussions/M-rlists.html, scroll down to MDP Roundtable and click on subscribe. The resource materials are at www.mdpcentral.org.

If you were unable to attend the town hall meeting about MDP at ASU March 31, it was videotaped. Please check the State Bar Web site, www.azbar.org, for details.