



Serving clients in a
**multidisciplinary
practice**

By Victoria V. Kremski

As MDPs become a reality, attorneys must strictly uphold the core values of their profession

FAST FACTS:
New York has led the nation in adopting rules permitting lawyers and nonlawyers to do business together.
The attorneys in an MDP must be relied on to ensure client confidentiality.
Nailing down issues of malpractice insurance, indemnity, liability, and other such matters will be key to making MDPs work.

Recently, I opened up my *Black's Law Dictionary* and was surprised to see a definition for the word *change*: “v. Alter; cause to pass from one place to another; exchange; make different in some particular; put one thing in place of another; vacate.”

Why should I be surprised at finding such a common word in a legal dictionary? The old adage is that the only constant in life is change. The word “change” may be the most applicable word a legal dictionary could contain. After all, the law is not a static institution, and our society would be poorly served if the law could not change and grow with the times.

We are currently in a time of great change in the legal profession. The ability to conduct business easily and quickly across state lines, and across the globe, has caused some people to question whether our state-by-state system for admitting and regulating attorneys makes sense. The steadily increasing number of lawyers and technological advances often forces us to practice law in ways we did not contemplate when we were in law school.

One of the biggest changes facing our profession is the move towards multidisciplinary practice, often referred to as “MDP.” The ABA Commission on Multidisciplinary Practices defines an MDP as

a partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, and there is a direct or indirect sharing of profits as part of the arrangement.

It comes as a surprise to many attorneys to learn that it may already be too late to vote on whether MDPs should exist. As Larry Ramirez, past chair of the ABA General Practice Solo and Small Firm Section states: “I don’t think we can just ignore the issue . . . We can’t simply bury our heads in the sand and say ‘We won’t permit this to happen.’ The fact is, it’s already occurring, it’s already occurred.”

This change arrived in New York State in July 2001, when the four New York Appellate Division departments jointly adopted rules that specifically govern lawyer participation in multidisciplinary practice groups, making New York the first state to adopt an MDP rule. The rules govern both ancillary services and strategic alliances with nonlegal professional service providers, including engineering, financial planning, accounting, brokerage, social work, and real estate, for example.

As attorneys facing this change, our critical mission remains to ensure that our clients and the public at large are well-served by the legal profession and to avoid the erosion of the ethical values and professional independence. Make no mistake: This is a critical mission—nothing less than the independence of the profession is in question. Currently, the legal profession is self-regulating, enjoying a high degree of autonomy. However, the more the legal profession and law firms begin to look like other businesses, the less reason exists for the legislature and executive branch not to regulate them like any other business. Thus, it is critical to the survival of an independent legal profession that if MDPs are allowed, we do them ethically, and do them well.

So how can attorneys in an MDP best serve their clients and the public as a whole? By remembering, on a daily basis, the core values of our profession and applying them to the everyday tasks involved in practicing law, we can, as a profession, grow with the times and still preserve our independence.

Confidentiality

Michigan Rule of Professional Conduct 1.6 contains what many consider the heart of our profession—the canons of confidentiality and the attorney-client privilege. How are these core values threatened by allowing nonlawyers as co-owners of a law firm? One concern arises when a client conveys information to a nonlawyer partner, such as an accountant, erroneously believing that the nonlawyer partner is bound by the privilege. The nonlawyer partner may be under no independent ethical duty to keep any client communications confidential. Thus, it is up to the attorneys to ensure that client confidences are maintained.

Michigan Rule of Professional Conduct 5.3 gives attorneys a good start towards that task. MRPC 5.3 requires a lawyer to take reasonable steps to ensure that the firm has in place procedures giving assurance that the conduct of nonlawyers is compatible with the professional obligations of the lawyer. It also imposes responsibility in certain circumstances on the lawyer for the conduct of a nonlawyer who violates the Michigan Rules of Professional Conduct.

One sensible step would be to use strict confidentiality agreements between any firm with nonlawyer partners and its clients. Further, recognizing the realities of the marketplace, any firm that could

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not maintain confidentiality would fare poorly in the marketplace and would not remain competitive for long.

A more difficult question is the evidentiary question of attorney-client privilege. If a client confesses something to a nonlawyer partner, even one covered by a confidentiality agreement, may a third party compel the nonlawyer partner to divulge the statement on the grounds that no attorney-client privilege exists? Clearly, current case-law governing privilege issues may be inadequate to protect a client in an MDP world and the answer to this question remains unclear. As such, attorneys must be very careful in instructing their clients about the privilege and with whom it exists.

Loyalty

The duty of loyalty to clients is another core value of the legal profession. Michigan Rules of Professional Conduct 1.7, 1.8, and 1.9 form the foundation of the duty of loyalty to client. Conflicts of interest questions are some of the most important, but often, most complicated questions a lawyer faces. In an MDP setting, determining conflict of interest questions, up front, will be critical. The conflict question will apply not just to lawyers but to the nonattorney partners as well. These questions may even be governed by other regulatory frameworks, such as Securities and Exchange Commission regulations, which prohibit accounting firms from providing professional services to clients for whom they perform independent audits.

The complicated relationships that MDPs pose make an automated conflicts check system a good idea, even for smaller firms.

Independence

Critics of MDPs often argue that allowing nonlawyer partners in law firms would increase the pressure to earn profits and inevitably result in interference with a lawyer's professional independent judgment. The fear is that the pressure of the bottom line will dictate the nature and quality of legal services to the client. However, this is not a new tension to the legal profession. Indeed, many lawyers, especially those in small and solo firms, argue that the pressure of the bottom line is an always present concern, whether that pressure comes externally, in the form of the bank that extends a line of credit, or internally, when there is not enough money at the end of the month to pay all the bills, much less advance costs on behalf of a client.

This long-standing tension is recognized in Michigan Rule of Professional Conduct 5.4[c] which states that "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." MRPC 5.4[c] recognizes that, for many years, lawyers have owed duties to many constituencies, but the ultimate duty is to the client. Any violation of MRPC 5.4[c] would not only cripple an MDP in the marketplace, it would threaten the complete independence of the profession. No less than strict adherence to MRPC 5.4[c] is sufficient in an MDP environment.

Practical Measures

It will be imperative for attorneys contemplating forming an MDP to carefully structure the alliance. Obtaining the counsel of an attorney specializing in legal ethics and malpractice issues before entering into the arrangement helps minimize the risk to the clients and indeed, the partners.

Anthony Davis, a partner with the Denver firm of Moye, Giles, O'Keefe, Vermeire & Gorrell, speaking at the ABA 26th National Conference on Professional Responsibility in June of 2000, posited the following scenario: An MDP is comprised of a lawyer, a surgeon, and an investment banker. A client of the firm is physically incapacitated by the surgeon's negligence and the investment banker negligently invested the client's funds, leaving her destitute. However, the attorney, who did not malpractice the client, is the only member of the firm with malpractice coverage and is the only member subsequently sued by the client. Will the policy exclusions prevent the client from recovering damages? What will this do to the cost of malpractice insurance? Will coverage be by project rather than for individuals?

Nailing down the issues of malpractice insurance, indemnity, liability, and other such matters will be key to making MDPs work and protecting the clients. Ideally, these issues are addressed before the creation of the MDP.

Conclusion

The legal profession is not the only profession facing great change. The medical profession is under increasing pressure from insurers to "manage care" and cut costs, often conflicting with a doctor's ethical duties to patients. The banking and financial services industries are also facing great change.

The legal profession can survive a transition to an MDP environment, and remain an independent profession dedicated to serving the public, only if each of us is vigilant in protecting and upholding the core values of our profession. According to Mary C. Daly,

For the lawyer in an MDP, the challenge will be to create institutional structures that preserve the core values of independence of professional judgment, confidentiality, of client information, and loyalty. . . In small MDPs it will mean a heightened consciousness of the day-to-day routine events that may pose a threat to the core values. Lawyers in both settings will face the organizational challenge of having to learn to work in teams, something that lawyers in general do quite poorly today. They will also have to develop a sense of their "professional" self.

It is critical to the survival of an independent legal profession that if MDPs come, we do them ethically, and do them well. ◆



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