During strategic planning sessions with alumni and faculty concerning the future of legal practice, the ongoing debate within the profession regarding multidisciplinary practice (MDP) came up often. Because he believes that such practice is in the interests of the profession in general and of Chicago students and alumni in particular, Dean Daniel Fischel has taken strong public positions favoring MDP. This article provides some background about MDP and explores some of the issues it presents.
Joseph Schumpeter famously described the engine of capitalism as "creative destruction"—"a process of mutation . . . that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating the new one." As the legal profession looks at multidisciplinary partnerships—that is, at lawyers combining with other professionals in arrangements that include the sharing of fees—some see the desirable creative energies of the free market at work, while others see nothing but destruction.

"Most lawyers seem to have developed a siege mentality about MDP," says Barry S. Alberts, ’71, who teaches legal ethics at the Law School. "On one side you have the folks who say, 'Let's face reality and move forward,' and on the other you have those who are saying, 'Over my dead body.' Both sides have merit, and no one has found a workable compromise."

Resolutely on the over-my-dead-body side is Lawrence J. Fox, a highly respected attorney who has served in many top ABA posts, including membership on the Ethics 2000 Committee. Saying the soul of the legal profession is up for grabs, Fox warns that permitting multidisciplinary practice will lead to "the destruction of everything lawyers should and must stand for."

Firmly on the other side stands Law School Dean Daniel Fischel, who asserts, "The legal profession should welcome multidisciplinary practice as creating new career and economic opportunities for its members. Instead, the
ABA and other organized bar groups have thus far taken the opposite approach, capitulating to interest group pressure from those segments of the profession covering at the prospect of increased competition from other service providers." Fischel makes the case for MDP in an article in the May 2000 issue of The Business Lawyer.

The expansionist activities of the Big Five accounting firms have been the principal impetus for attention to the promise—or the threat—of MDP. Since the early 1990s, those organizations have dramatically increased their utilization of lawyers, branching out from auditing and tax advice to include services in estate planning, employee benefits, litigation support, regulatory compliance, financial planning, and such front-end services as investigation and discovery.

Among them, the Big Five now have upwards of 5,000 lawyers on staff; and PricewaterhouseCoopers and Arthur Andersen rank third and fourth, respectively, in number of lawyers employed worldwide, behind only the law firms of Baker & McKenzie and Clifford, Chance, Rogers & Wells.

One commentator has observed, "While the majority of U.S. lawyers did not react to the MDP phenomenon until recently, lawyers elsewhere in the world have been looking at it for some time." Two Law School alumni with exceptional records of accomplishment and service in the international field have identified MDP as a major force affecting the future of their practices. Gene E. Dye, '67, has practiced law in France for 30 years (see page 19). When he participated on the planning panel addressing the law firm of the future, and in subsequent contributions, Dye stressed "increasing integration of legal services with other sorts of services—i.e., the end of historic professional-service monopolies" as an irresistible force affecting his practice.

Similarly, Guillermo Morales Errazuriz, L.L.M. '87, who heads the Santiago-based firm Morales, Noguera, Valdivieso & Besa, says, "Big multinational providers of legal services, such as the consultancies and global law firms, are already putting a lot of pressure on the legal market." He asks, "Is there a future for local firms?"

The Big Five say that their multidisciplinary approach is better, faster, and cheaper, meeting the modern world's demand for integrated solutions to complex problems through convenient "one-stop shopping" for professional services. Moreover, they say that the globalization of business has created demand for seamless service delivery around the world, a demand they are uniquely qualified to meet.

Statistics show that these are more than hollow claims: one legal services consultant staked at half a billion dollars the amount of legal fees included in the bills of American MDPs—an estimate he called "conservative." And Andersen Legal, the global lawyering arm of Arthur Andersen, recently reported 30 percent annual growth in revenues, a rate more than twice the average for the firms in the American Lawyer 100.

Multidisciplinary practice is not just for the big sluggers. Many lawyers in many kinds of practice see potential benefits for their clients and for themselves from providing integrated services. Esther F. Lardent, '71, a member of the ABA Board of Governors and an MDP proponent, says, "This is not simply a corporate Big Five issue. In the world that I work in, the world of legal services, one of the most exciting developments is holistic service. We are now working as lawyers with doctors, social workers, and other professionals because we recognize that addressing only the legal element of those clients' problems is not enough. We must work with our colleagues in other disciplines to address their problems." James Robinson, whose

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two-person firm specializes in elder law, told the ABA Journal, "I would like to form a consortium with a CPA and a money manager, and provide comprehensive services on a fee basis that's split among the members of the consortium. I can't do that right now."

The reason Robinson can't do that, and the reason why many contend that the Big Five are engaging in unauthorized practice of law, is Rule 5.4 of the Model Rules of Professional Conduct, titled "Professional Independence of a Lawyer." That rule, which has been enacted in all 50 states, prohibits lawyers from combining or sharing fees with non-lawyers if any part of the business consists of the practice of law.

Lawyers at the big accounting firms say they don't violate 5.4 because they are providing advice, not practicing law, but even the strongest advocates of multidisciplinary practice are unconvinced. Fischel, for instance, writes, "Few are persuaded by the claim that Rule 5.4 is not being violated. No functional difference exists between what practicing lawyers do (other than possibly litigating in court) and what the supposedly non-practicing lawyers do as 'tax compliance experts,' 'estate planners,' and the like."

Fischel adds that the profession has little stomach for confronting unauthorized practice, and so competitors "are becoming increasingly brazen in flouting the prohibition on fee sharing." A 1998 investigation of Arthur Andersen by the Texas Committee on Unauthorized Practice of Law was terminated with no charges brought. Many state bar associations, however, are still vowing to get tough on the miscreants. At the ABA's 1999 national meeting, for example, Cheryl Niro of the Illinois State Bar Association announced to robust applause, "It is the strong preference of the members of the Illinois State Bar Association to act more aggressively on this issue... [W]e are definitely on the road to taking action."

Rule 5.4, however, is just the starting point for what many view as a domino effect of collapsing values. Fox charges that the accounting firms "are a one-profession wrecking crew, destroying any ethical rules that stand in their path." He also says attorneys who work there have to answer to a long bill of particulars:

They are violating Rule 1.7 on conflicts of interest, because no accounting firm imputes conflicts from one professional to another.

They are violating Rule 1.6 on confidentiality by writing their clients in advance and saying that those clients waive their entitlement to confidentiality, to the extent that the accounting firm has an attest function obligation to the public to disclose. They are violating our rules against non-competes by signing non-competes when they go to work. They are violating our rule on limiting liability.

He could have gone on—some commentators see as many as 10 conduct rules under direct threat from MDP, and many more as potentially endangered.

The specter of all those toppling dominoes has led some to describe multidisciplinary practice as the most important issue facing the legal profession in the past 100 years. It prompted the ABA commission examining multidisciplinary practice to declare that its report and the subsequent action by the ABA would constitute "memorable events in the annals of the American Bar Association and the legal profession." Immediate ABA past president Jerome J. Shestack dramatized the significance of the issue as follows in an address to the ABA House of Delegates last year: "I don't want to enter the next century known as those who have driven nails in the coffin of legal professionalism... It's a clever name, this multidisciplinary practice. A more appropriate name would be multi-
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A more appropriate name would be multi-laxity of disciplined legal practice.

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laxity of disciplined legal practice. This is not the legacy that I hope to take with my profession into the 21st century.

Dean Fischel looks on such complaints with great skepticism. In general, he says, the legal profession can’t be—and shouldn’t be—insulated from free-market realities: “If the law firms can’t compete because MDPs offer a superior product, then the law firms’ position is exactly analogous to horse and buggy manufacturers faced with the invention of the automobile. They should either adapt or go out of business.”

The dean views the threatened professional conduct rules as indefensible vestiges of cartelism in a profession that is increasingly moving, as it should, toward becoming a competitive enterprise. “These rules serve lawyers’ interests ahead of society’s,” he says, adding, “Lawyers should define their role in society by the value of what they do, not by the purity of their hearts.” He says that, because most of the clients for the accounting firms’ multidisciplinary services are highly sophisticated purchasers—general counsels of major corporate or commercial entities, for example—“the need for customer protection in this market is non-existent.” Conclusions based on undifferentiated assertions regarding lawyers’ independence or the special social responsibilities of lawyers are, in this context, only rhetorical diversions from the important analytical questions at hand: “non sequitur” in the dean’s words.

As for the specific rules, the dean avers that the imputed conflicts rule, which disqualifies an entire firm from representing a client if any lawyer in the firm would be disqualified from representing that client, “should be discarded altogether,” as “an artificial, anachronistic constraint on the ability of law firms to grow to their efficient size.” Regarding Rule 1.6, Dean Fischel acknowledges that lawyers and accountants have different ethical responsibilities—the lawyer’s for confidentiality, the accountant’s for disclosure—but trusts the free market to police inappropriate behavior and to guide companies in deciding wisely about whether MDPs are the best way to meet their professional-services requirements.

Looking forward, the dean views the continued expansion of multidisciplinary practice as inevitable, since it serves customer needs, creates strong financial and professional incentives for its practitioners, and will not be deterred by regulators. Moreover, he considers it inconceivable that American firms will stand by and allow European and other overseas firms—many of which are not subject to restrictions on multidisciplinary practice—to make inroads into this lucrative market.

After more than two years of study and debate, during which a modification of Rule 5.4 was proposed and then quickly tabled because of the strong opposition it generated, the ABA’s Commission on Multidisciplinary Practice ultimately recommended in July 2000 report that the prohibition against fee-sharing should be undone, providing (in the commission’s words) “that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services.”

The commission also urged the ABA to consider postponing any action on MDP-related issues for another year, until its 2001 Midyear Meeting. However, at the ABA Annual Meeting this past July, the House of Delegates adopted a resolution strongly slanted against MDPs. Among other things, the resolution urged jurisdictions to “retain and enforce laws that generally bar the practice of law by entities other than law firms,” and to revise their laws to reflect the view that “[e]xternal sharing of legal fees with
non-lawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession."

"The law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised," the resolution asserted.

Dean Fischel, who participated in a panel discussion at the ABA meeting where the resolution was passed—but which was scheduled for a time after the vote had already been taken—does not see the current action as putting any kind of end to the momentum for MDPs. He says, "The ABA, whatever the strength of the words it has endorsed, has done nothing to change reality. Regulation can override market forces for only so long."

Over the past two decades, American businesses have undertaken the wrenching, often painful transformations necessary to compete in the 21st century's dynamic global marketplace. According to the incisive organizational theorist Peter Drucker, today's successful free-market competitor "must be organized for constant change. . . . It must be organized for systematic abandonment of the established, the customary, the familiar, the comfortable—whether products, services, and processes, human and social relationships, skills, or organizations themselves." Some lawyers and law firms are embracing that vast challenge (see next page), while some others maintain that the legal profession cannot abandon its traditions without forfeiting its very justification for existence.

It was General Electric CEO Jack Welch, heralded as one of the 20th century's greatest corporate leaders, who formulated the imperative that in one way or another animates all sides in the continuing battle over multidisciplinary practice.

"Control your destiny," Welch said, "or someone else will."

References


The ABA's publications on MDP can be found at www.abanet.org/cpr/multicom.html.