Cash Boughs
Since the ABA’s rejection of multidisciplinary practices, more law firms are branching out into law-related businesses

BY JOHN GIBEAUT

The eulogies were largely unflattering back in July when the ABA House of Delegates whacked multidisciplinary practice, then buried it in a shallow grave. Many on the winning end of the 3-to-1 vote ratio probably believed that the association’s policy-making body once and for all had done away with the perceived evils of lawyers going into business and sharing fees with accountants and other professionals.

They needed to dig a deeper hole.

"Guess what? They didn’t kill MDPs," says Joel F. Henning of Chicago, vice president of Hildebrandt International, which provides management consulting to law firms. "Anybody who thinks the ABA killed MDPs really is in serious denial."

To be certain, the name has changed since the House purportedly drove a stake through MDP’s heart, but the tune remains the same.

Law firms impatient with what they view as bar leaders’ sluggish reaction to emerging business needs are pumping fresh blood into spin-off enterprises. On the surface, at least, these ancillary businesses—which the ABA calls “law-related services”—don’t appear weighted down by the ethical ballast that sank MDP in the House. Observers say these enterprises are rapidly filling the gap left by the rejection of truly integrated MDPs, where lawyers and others practice under the same roof.

In both scenarios, sophisticated business clients—including other law firms—comprise the bulk of the target market for services ranging from litigation support to computer technology.

Many see little more than a semantic difference between MDPs and outside businesses created by law firms, both of which can include members of other professions in the ownership mix. Like searching for the right hearsay exception, the ancillary business movement illustrates the quintessential case of lawyers going in the back door after the front door is bolted.

On paper, however, true MDPs ultimately may turn out more appealing, because they can function with greater efficiency as a single entity. Ancillary businesses, on the other hand, require separate organization, financing, facilities and support staff to avoid ethical problems that can result by combining them with law firms.

Meanwhile, the profession is showing the first signs of balkanization forecast by doomsayers in the wake of MDP’s defeat in the House. Barely six months in the ground, MDP already is scratching and clawing at the coffin lid as some state bars begin resurrecting it with their own versions.

MDP proponents insist that lawyers need the flexibility of mixed practices to effectively compete with professionals such as accountants, whose regulatory structures allow them more freedom to expand into new lines of business. They say the organized bar’s intransigence endangers its relevance as an effective self-governing group.

"They’d better get the message real fast, because they’re getting slapped around in the court of public opinion," says Richard E. Rassel, MDP committee chair for the State Bar of Michigan.
Bar officials in that state were hoping to present a proposed rule to the state supreme court in late January. The measure permits fee-sharing among lawyers and other, outside professionals but stops short of fully integrated firm ownership. If the court adopts the proposal, Michigan would become the first state with a conduct rule governing MDPs.

However, bar leaders in other states remain convinced that the ABA did the right thing. They focus on potential damage that close relationships with other professionals could cause to the legal profession’s core values of independent judgment, client loyalty and confidentiality.

As Arizona moved closer to a formal conduct rule, dissidents, including 17 former bar presidents, were trying to reverse a stance approving the concept of MDPs taken last year by the state bar’s board of governors. Former state bar president John J. Bouma of Phoenix says Arizona bar officials should respect the ABA House position, or at least allow a fuller hearing for MDP opponents.

"It has been thoroughly studied and debated at the state bar and ABA House levels," says Bouma, a member of the ABA Board of Governors. "I don’t think you can dismiss that as idiocy or as sticking your head in the sand."

Still, interest in new business structures appears to be accelerating, regardless of whether they are called MDPs or something else.

"There’s nothing the ABA House of Delegates can do to stem the tide," says John C. Tredennick Jr., vice chair of the Law Practice Management Section, whose members perhaps support MDP more strongly than those of any other ABA entity. "The market forces are so powerful, it’s mind-boggling."

ABA Model Rule of Professional Conduct 5.7 defines ancillary or law-related ventures as "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services and are not prohibited as unauthorized practice of law when provided by a nonlawyer." In the classic example, real estate lawyers long have offered title insurance services, a sideline that logically flows from their practices. Over the last decade, law firms have entered into a wide range of related businesses, from analyses of medical records and financial documents to environmental consulting and investigative services.

But since the House shelved MDP on the national level, law firms are plunging into an array of ancillary businesses at a pace that has begun to pick up noticeably, say Henning and other management consultants. "The ABA’s current posture just renders it irrelevant on these issues," Henning says. "We are seeing law firms affiliating with financial institutions [and] getting involved in real estate matters that go well beyond the practice of law, like site planning. I don’t know any enlightened law firm that isn’t looking forward strategically."

Tredennick, formerly of Denver’s Holland & Hart, heads CaseShare Systems, which supplies computer technology to help lawyers communicate with clients across the country. Because such systems can serve clients and firms with adverse interests, conflicts inevitably would stunt their growth if they remained within the law firm. So Holland & Hart last year spun off CaseShare as a separate business.

The move also enables CaseShare to offer ownership interest to nonlawyers and to outside investors, which law firms are forbidden from doing under the professional conduct rules that govern them. Even the most liberal MDP proposals eschew selling ownership stakes to outsiders who don’t work for the firm.

Although CaseShare technically is an ancillary business, "Ultimately, it’s an MDP by another name," Tredennick says.
Regardless of firm structure, observers say clients increasingly are demanding more streamlined services. "We actually talk to thousands of living and breathing clients every year," Henning says. "Clients have very simple objectives. They want their deals done and their problems solved."

Lawyers also have begun to shed their image as notoriously sloppy managers, says management consultant James Wilber of suburban Philadelphia-based Altman Weil Inc. Heightened interest in new types of practices "is just a continuation of the trend of lawyers and law firms becoming more savvy in business," he says. "If law firms wait around for this MDP thing, they’re going to miss the boat on ancillary business."

**Bigger Piece of the Pie**

Client demand fueled growth in the ancillary services provided by 400-lawyer general practice firm Womble Carlyle Sandridge & Rice, based in Winston-Salem, N.C. Fifteen years ago the firm began providing litigation support services such as document coding and review, then expanded into other areas such as hiring nurses to review medical records. By last year, the ancillary services arm was bursting at the seams, bringing in $23 million of the firm’s $129 million in revenues.

In November, Womble Carlyle spun off the side businesses along with two other legal consulting companies the firm had acquired into a new limited partnership called FirmLogic. Already with 300 employees and more than 2,000 clients on four continents, FirmLogic expects to increase revenues to $30 million this year.

Many of those clients are other law firms, making conflict prevention crucial to success. For example, Womble Carlyle does tobacco defense work, so directly providing even unrelated services to a tobacco plaintiff firm could be big trouble. While FirmLogic still wouldn’t aid plaintiffs in tobacco cases, it expects no problems in selling litigation support to the same firms for other areas of practice. For added insurance, Womble Carlyle’s lawyers will be screened from materials compiled by FirmLogic.

"We hope that the conflicts issue will be relieved," says Womble Carlyle managing partner John L.W. Garrou. "We also think this will make us more attractive to other law firms. It's hard to sell your services to a law firm when you are a law firm."

The spin-off also takes FirmLogic out of the law firm culture, where decision-making bogs down in the age-old ritual of consensus building among partners. "In a competitive environment, you can't do that," Garrou says.

Unlike most law firms, the last word in decision-making at FirmLogic rests with one person, president and CEO Hassel L. Parker, a retired army colonel who spent 20 years as Womble Carlyle’s executive director.

"That has been a very big factor in taking the morale at FirmLogic to the highest level I've ever seen," Parker says. "In most law firms, if you're a nonlawyer you're sort of a second-class citizen."

Not surprisingly, ancillary business navigated a rocky road in the ABA House of Delegates that in hindsight foreshadowed MDP's later travails.

In 1986, the Commission on Professionalism reported that it was disturbed by a trend of lawyers getting involved in other businesses. Further study produced two diametrically opposed versions of Rule 5.7 presented to the House in 1991.

Defeated was a proposal by the Standing Committee on Ethics and Professional Responsibility that would have allowed law firm subsidiaries to provide ancillary services to clients and nonclients. Narrowly winning approval was a proposal by the Litigation Section to confine
ancillary services to clients and keep delivery within the law firm, which effectively would have killed any significant expansion of nonlegal business.

"The threat to professionalism brought about by law firm diversification is one of the most important ever to face the American legal profession," the Litigation Section's report declared, eerily evoking the same criticisms later leveled at MDP. But after just one year, the controversial first incarnation of 5.7 in 1992 became the first model rule repealed by the House, without a single state adopting it.

Another committee set out to work on a more liberal rule. In 1994, the House passed a second, simpler version of 5.7 that places the burden on the lawyer to explain to the client which services are legal in nature, and which are not and thus don't carry the client-lawyer protections. The House also dumped the term "ancillary business" in favor of "law-related services."

"The committee ... didn't want to call it ancillary business because that was such a hot button," says Seth Rosner of Greenfield Center, N.Y., who as chair of the Standing Committee on Professionalism served as liaison to the panel that drafted the new 5.7.

Rosner later served on an association commission that recommended adoption of MDP, provided that lawyers retained the control over provision of legal services. The House dissolved that commission in July at the same time it spit out MDP.

**Few Feel Threatened**

In the strictest sense, freestanding ancillary businesses are no closer to actual law practice than a lawyer running a car wash after hours. And because side ventures in most cases are financially and administratively separate from the law firms that own them, regulators typically view them as beyond the bar's authority.

So only a handful of jurisdictions have seen the need to adopt Rule 5.7. In rejecting MDP this summer, the ABA House also didn't consider more detailed rules proposed to govern ancillary businesses and "strategic alliances"—ongoing client referral arrangements between lawyers and other independent professionals.

That leaves undisturbed the policies of most states, which deal with questions on alternative practice structures through ethics opinions issued on a case-by-case basis.

Of course, because ancillary businesses are not law practices, fee-sharing prohibitions do not apply. But ethical traps do arise, especially if clients don't realize their dealings with the ancillary business may not be privileged. Improper solicitation also can pose a problem if a lawyer uses the ancillary business to steer clients to the firm.

Still, ethics experts agree that ancillary businesses are perfectly proper even without explicit recognition, as long as the lawyers running them obey other applicable conduct rules. But Florida Bar officials last summer decided that they needed to say something more on the subject.

Even as the state bar's board of governors prepared to assume a leading role in the fight against MDP, its members quietly adopted a proposed rule formally recognizing ancillary businesses. Indeed, law firms in the Sunshine State and elsewhere have operated side businesses for at least 40 years with tacit authorization.

"Florida has ethics opinions on ancillary businesses going back to the 1960s," says staff lawyer Elizabeth Tarbert, who served as counsel to a bar committee that studied ancillary business and MDP in tandem.

"In Florida, we say yes, you can engage in ancillary business as long as you don't violate any other rules," Tarbert explains. "But although we have ethics opinions that address the topic, we felt there were so many rules involved that a lawyer couldn't go to just one place for guidance."
So the bar attempted to make it simple, with a rule fashioned after Pennsylvania’s version of 5.7. Basically, a lawyer providing ancillary services is required to follow the rules of professional conduct, including keeping a client’s secrets if there’s a chance the client may not distinguish the nonlegal services from legal ones. A lawyer can avoid that requirement by advising the client that certain services are nonlegal and thus don’t come with privilege.

The Florida rule is awaiting state supreme court approval.

Regardless of whether a jurisdiction implicitly accepts ancillary business or adopts a formal rule, proprietors agree that client knowledge and consent are key to staying out of trouble.

After 10 years of providing its own lawyers with in-house consulting services in business, economics, accounting and more, the Dallas-based national litigation firm of Bickel & Brewer is beginning to offer similar services on the outside. Texas has not adopted Rule 5.7. Lawyer George Roach, director of the consulting group, describes two “capital punishment rules” that are musts for any ancillary business.

First, retainers must include a clear disclaimer that the consultants aren’t lawyers. Moreover, Roach says, “No one in the consulting group can ever hint that they’re a lawyer, including me.”

Sitting on a Gold Mine

The drive for new business models for law firms typically is cast as a race against the Big Five accounting firms. Since the early 1990s, those firms have mushroomed into global consulting giants that include legal services in their resumés and now regard traditional bean counting as a relatively minor aspect of their businesses.

The American Institute of Certified Public Accountants and three other international professional associations kicked it up a notch this fall with a draft proposal for a new global business credential. Dubbed the “XYZ Project,” the credential would recognize the holder’s competency to deliver and manage a variety of professional services, including legal advice, in a single bundle.

"We would be looking at something like a glue that would bring a number of disciplines together on a team," explains project head Robin Hamilton Harding, an accountant and former chief financial officer for Bell Canada.

Indeed, a reality check suggests that even the largest of U.S. law firms cannot reasonably expect to compete on the same field with the Big Five, which reap billions of dollars in revenues and have thousands of employees worldwide.

But the threat of accountant competition has made an impression in states that are weighing in on the MDP issue. By late fall, 24 states had taken positions on MDP, with 14 rejecting mixed practices and 10 supporting them. None, however, had submitted a formal rule for state supreme court approval.

Michigan was expected to break the ice in January, and bars in Minnesota and Colorado also were moving toward formal rule drafting. Michigan MDP chief Rassel didn’t expect any hand-wringing as that bar’s representative assembly prepared to vote Jan. 20 on a detailed rule that would allow lawyers to enter into agreements with outside professionals to deliver legal and nonlegal services to clients.

Fee-sharing would be permitted, but the tab for legal services would have to be stated separately and clients would have to consent to the arrangement. The proposed rule, however, stops short of permitting a fully integrated practice where the various professionals share firm ownership.

"It does not open the door for nonlawyer ownership of firms," Rassel says. "This is a road map for some limited level of cooperation that the public is clamoring for."
Nevertheless, if the proposal passes the assembly and gets through the state supreme court, Michigan would become the first jurisdiction to permit seamless delivery of legal and nonlegal services. The District of Columbia permits partnerships with nonlawyers, but only in settings where legal service is the sole business.

In the absence of the consistency national bar leadership may bring to the table, Rassel envisions some jurisdictions becoming Delaware-type havens for alternative practice structures as states tweak ownership requirements and other rules, perhaps to lure firms from outside their borders.

"That may well play out," Rassel says. "I'm not sure that's how you want to make national policy."

While ABA House rules foreclose reconsideration of MDP until at least 2002, the issue of alternative practices hasn't totally slipped below the association's horizon.

"The fact of the matter is that this stuff is here," says Robert J. Grey Jr. of Richmond, Va., who chairs an ABA committee examining the broad future of the profession. Grey says the panel will include MDP and other practice models in its work. "It's not like we're talking about something that may happen."

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