

LAW PRACTICE, ANCILLARY BUSINESS AND MULTIDISCIPLINARY PRACTICE

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The information set forth in this outline should not be considered legal advice, because every fact pattern is unique. The information set forth herein is solely for purposes of discussion and to guide practitioners in their thinking regarding the issues addressed herein. Nonlawyers are advised to consult an attorney before undertaking mergers and acquisitions.

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TABLE OF CONTENTS

I.	Practice of Law.....	4
A.	Defined in the ABA Model Rules and in Texas.....	4
B.	Kinds of Activities That May Constitute the Practice of Law.....	6
C.	Rendering of Services.....	6
D.	Aiding and Abetting Unauthorized Practice of Law.....	7
E.	Relevance in the Future of the Debate as to What Constitutes Unauthorized Practice of Law.....	7
II.	Multidisciplinary Practice (“MDP”) Debate.....	7
A.	ABA Commission on MDP.....	7
B.	Definition of MDP.....	8
C.	Barriers to the MDP’s.....	9
D.	What is Causing the MDP initiative?.....	9
E.	Arguments For and Against MDPs.....	9
F.	Current Environment.....	10
III.	Business Model Alternatives.....	10
A.	Goal of the Business Model.....	10
D.	What are Ancillary Businesses?.....	11
E.	Business Model Forms.....	11
F.	Under the Various Business Models, how are they Staffed?.....	13
G.	Under the Various Business Models, what Systems are put in Place?.....	13
H.	Under the Various Business Models, how are they Marketed?.....	13
I.	Under the Various Business Models how do they integrate Organizational Cultures?.....	13
J.	How will the Professional be Compensated in the Future for Professional Work?.....	13
K.	Under What Circumstances can Professional Services be Provided Across State Lines.....	13
L.	E-Commerce.....	13
IV.	Conclusion.....	14
A.	All Are Part of the Same Industry - Financial Services.....	14
B.	The Business Models and Alliances used to provide Financial Services to the Consumer will be determined in the next Two to Five Years.....	14

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I. Practice of Law.

A. Defined in the ABA Model Rules and in Texas.

1. ABA Model Rules of Professional Conduct.

Rule 5.5. Unauthorized Practice of Law.

A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Comment:

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

2. Texas.

Texas' Rule 5.05 is identical to Rule 5.5 of the ABA Model Rules.

Comment:

Courts generally have prohibited the unauthorized practice of law because of a perceived need to protect individuals and the public from the mistakes of the untrained and the schemes of the unscrupulous, who are not subject to the judicially imposed disciplinary standards of competence, responsibility and accountability.

Neither statutory nor judicial definitions offer clear guidelines as to what constitutes the practice of law or the unauthorized practice of law. All too frequently, the definitions are so broad as to be meaningless and amount to little more than the statement that “the practice of law” is merely whatever lawyers do or are traditionally understood to do. The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.

Rule 5.05 does not attempt to define what constitutes the “unauthorized practice of law” but leaves the definition to judicial development. Judicial development of the concept of “law practice” should emphasize that the concept is broad enough—but only broad enough—to cover all situations where there is rendition of services for others that call for the professional judgment of a lawyer and where the one receiving the services generally will be unable to judge whether adequate services are being rendered and is, therefore, in need of the protection afforded by the regulation of the legal profession. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment; and the essence of the professional judgment of the lawyer is the lawyer’s educated ability to relate the general body and philosophy of law to a specific legal problem of a client.

Paragraph (b) of Rule 5.05 does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them. So long as the lawyer supervises the delegated work, and retains responsibility for the work, and maintains a direct relationship with the client, the paraprofessional cannot reasonably be said to have engaged in activity that constitutes the unauthorized practice of law. Likewise, paragraph (b) does not prohibit lawyers from providing professional advice and instructions to nonlawyers whose employment requires knowledge of law. For example, claims adjusters, employees of financial institutions, social workers, abstracters, police officers, accountants, and persons employed in government agencies are engaged in occupations requiring knowledge of law; and a lawyer who assists them to carry out their proper functions is not assisting the unauthorized practice of law. In addition, a lawyer may counsel nonlawyers who wish to proceed pro

se, since a nonlawyer who represents himself or herself is not engaged in the unauthorized practice of law.

Authority to engage in the practice of law conferred in any jurisdiction is not necessarily a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where doing so violates the regulation of the practice of law in that jurisdiction. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by individual states. In furtherance of the public interest, lawyers should discourage regulations that unreasonably impose territorial limitations upon the right of a lawyer to handle the legal affairs of a client or upon the opportunity of a client to obtain the services of a lawyer of his or her choice.

B. Kinds of Activities That May Constitute the Practice of Law.

1. Giving general information regarding what the law is and how it applies (i.e., speaking at seminars; marketing of trust services; selling life insurance policies and charitable gift annuities).
2. Giving advice about what the law is and how it applies that is tailored to a particular individual's needs and circumstances.
3. Providing kits or forms (i.e., estate planning document forms and estate planning document form books offered by banks and trust companies; gift annuity and charitable trust forms offered by charities):
 - a. Directly to consumers to enable them to meet their own legal needs.
 - b. To lawyers to enable them to render services to their clients.
4. Drafting documents (i.e., Wills; trust instruments; powers of attorney; prenuptial agreements; shareholder agreements; partnership agreements; LLC operating agreements).
5. Preparation of tax returns and giving tax advice.
 - a. Is a Form 1040 a legal instrument? How about a Form 706 or a Form 1023?
 - b. Is "tax advice" a subdivision of legal advice? If so, should all forms of legal advice be the exclusive province of lawyers?
6. Doing financial and tax projections.
7. Representation of clients in court.

C. Rendering of Services.

1. By non-lawyers.
 - a. Certified public accountants.
 - b. Life insurance agents.
 - c. Financial planners.
 - d. Trust officers.
 - e. Others
2. By organizations that are not law firms (i.e., accounting firms; banks; trust companies; financial planning firms; others).
 - a. By non-lawyers employed by such organizations.
 - b. By lawyers employed by such organizations.
3. By a lawyer not licensed in the state in which the services are rendered.
 - a. What constitutes practice of law “in” a given state?
 - (1) Is physical presence required?
 - (2) Would telephone conferences into the state suffice?
 - (3) What if all consultations and work were performed solely in the lawyer’s home state but the lawyer’s work product was intended to be implemented in a foreign state?

D. Aiding and Abetting Unauthorized Practice of Law.

E. Relevance in the Future of the Debate as to What Constitutes Unauthorized Practice of Law.

1. The definition is elusive.
2. Does the consumer care?

II. Multidisciplinary Practice (“MDP”) Debate.

A. ABA Commission on MDP.

1. Formed in August 1998.
2. Issued initial recommendations allowing lawyers to practice in MDPs in June 1999.

3. The Commission's initial recommendations were "tabled pending further study" by the ABA House of Delegates in August 1999.
4. The Commission held additional hearings in February 2000 and issued revised recommendations in March 2000. The Commission issued a report supporting the revised recommendations in April 2000.
5. ABA House of Delegates rejected the revised recommendations at its meeting in July 2000 and adopted resolutions effectively rejecting the MDP concept. The Commission thereafter was disbanded.
6. Forty states are actively studying MDP.
 - a. In January 2000, the Board of Directors, State Bar of Texas accepted the State Bar UPL Task Force's disapproval of the ABA Commission on Multidisciplinary Practice proposal.

B. Definition of MDP.

1. ABA Commission defined an MDP as "a partnership, professional corporation, or other association or entity that includes lawyers and non-lawyers 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 non-legal, 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."
2. Business Models which the Commission considered MDPs.
 - a. Contract/Nonintegrated Model - A contractual arrangement between a law firm and a non-lawyer professional firm which may include sharing of offices and other expenses, the purchase of services from each other, the referral of clients and joint marketing efforts.
 - b. Fully Intergrated Model - One professional services firm which provides both legal and non-legal services with sharing of fees by lawyers and non-lawyers.
3. Business Models which the Commission did not consider MDPs.
 - a. Cooperative Model - Lawyer works with non-lawyer professional employed by the lawyer or client.
 - b. Command and Control Model - Partnerships between lawyers and non-lawyers for the sole purpose of providing legal services which also allow the sharing of fees; Non-lawyers are required to comply with the lawyers' rules of professional conduct.

- c. Ancillary Business Model - joint ownership of businesses that provide non-legal services to clients.

C. Barriers to the MDP's.

1. Rule 5.4 of the ABA Model Rules of Professional Responsibility and Rule 5.04 of the Texas Disciplinary Rules of Professional Conduct - Prohibition of Fee Sharing with Non-Lawyers.
2. Rule 1.6 of the ABA Model Rules of Professional Responsibility and Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct - Confidentiality of Information.
3. Rule 1.10 of the ABA Model Rules of Professional Responsibility and Rules 1.06 – 1.13 of the Texas Disciplinary Rules of Professional Conduct - Imputed Disqualification.

D. What is Causing the MDP initiative?

1. Globalization - Free Market Capitalization.
2. Consumer.
3. Big Five Accounting Firms.
4. Banks.
5. Other Financial Institutions.

E. Arguments For and Against MDPs.

1. One Stop Shopping.
2. Expand availability of legal services to individuals not currently served.
3. Rule 5.4 of the ABA Model Rules of Professional Responsibility and Rule 5.04 of the Texas Disciplinary Rules of Professional Conduct are unenforceable.
4. Ethical Issues.
 - a. Independence.
 - b. Confidentiality.
 - c. Avoidance of conflicts.

- d. Ensure all providers of legal services are governed by ethical rules.
 - e. Ethics arguments are a mask for lawyer protectionism.
 - 5. Effect on quality and price.
 - 6. Experience of jurisdictions which currently have MDPs.
 - 7. Lack of empirical evidence of need for MDPs
 - 8. The practice of law is more than a business whose success is determined by the amount of its profits –Democracy is dependent upon an independent legal community.
 - 9. MDPs are inevitable.
- F. Current Environment.
- 1. Lack of Consensus regarding MDPs.
 - 2. Lawyers and non-lawyers employed by accounting firms and other professional services firms are providing "consulting" services which many would consider the practice of law if performed by an attorney.
 - 3. Charities, banks, real estate companies and accountants are providing clients with legal forms, as well as "consulting" services.
 - 4. Alliances and defacto MDPs exist and are growing -- there is "no time out" during the MDP debate.
 - 5. MDPs are allowed in Europe, Canada and Australia.
 - 6. Lawyers employed by non-lawyer entities and supervised by non-lawyers currently "practice law".

III. Business Model Alternatives.

- A. Goal of the Business Model.
 - 1. Provide quality professional services.
 - 2. Provide diversified professional services.
 - 3. Provide survival and economic enhancement for participants.
 - 4. Provide global solution for all professional issues.
- B. Professional Reality –All are Part of the Financial Services Sector.

- C. Professional Options
 - 1. Stay as we are, seek to maintain/enhance market position.
 - 2. Form strategic alliances, including the development of ancillary businesses.
- D. What are Ancillary Businesses?
 - 1. How do Ancillary Businesses Differ from Multidisciplinary Practice.
 - 2. Advantages of Ancillary Businesses
 - a. New alternatives for income.
 - b. New consumer opportunities.
 - c. Expands intellectual horizons of professionals.
 - d. Enhances relationships with existing consumers.
 - e. Enhances revenue.
 - 3. Business Axioms of Ancillary Businesses.
 - a. Insure financial stability of primary professional activity.
 - b. Keep control in primary professional organization.
 - c. Keep ancillary businesses separate from each other and primary professional organization.
 - d. Insure clear understanding by professionals of relationship among ancillary businesses and primary professional organization.
 - e. Operate ancillary businesses through qualified specialists skilled in such businesses.
 - f. After reasonable start up time, make each ancillary business self supporting.
 - g. Make full disclosure to consumers of the relationships among primary professional organization and ancillary businesses.
 - h. Have a business plan for each ancillary business.
 - i. Require compatibility between primary professional organization and each ancillary business.
- E. Business Model Forms

1. Boutique firm, law or other professional service organization.
 - a. Focus on personal attention to client.
 - b. Focus on stability of personnel.
 - c. Low overhead - flexibility to adjust to market niche changes.
2. Section of large, general practice firm, law or other professional service organization.
3. Formal or informal working relationship(s) with other law firms – network.
4. Informal relationship(s) with other financial service providers.
 - a. Banks
 - b. Brokerage firms.
 - c. Accounting firms.
 - d. Life insurance companies.
 - e. Financial planning groups.
 - f. Multi-specialty financial service organizations.
 - g. Others
5. Formal relationship(s) with financial service providers described in 4. above through:
 - a. Acquisition (by or of).
 - b. Merger
 - c. Partnership
 - d. Contract
6. “The Virtual Firm.”
 - a. Legal components only.
 - b. Other (non-legal) components only.
 - c. Legal and other financial service components.

- d. Online
- F. Under the Various Business Models, how are they Staffed?
- G. Under the Various Business Models, what Systems are put in Place?
- H. Under the Various Business Models, how are they Marketed?
- I. Under the Various Business Models how do they integrate Organizational Cultures?
 - 1. Is integrating Organizational Cultures important?
- J. How will the Professional be Compensated in the Future for Professional Work?
 - 1. Fee established in advance for the entire project or components of the project?
 - a. Flat dollar amount.
 - b. Percentage (basis points) of the value involved in the project.
 - 1) Components.
 - a) Technical expertise involved.
 - b) Risk to professional.
 - c) Reward to consumer.
 - 2. Hourly based fee.
 - 3. Consumers today have a tolerance for higher fees because of the economics in issue.
- K. Under What Circumstances can Professional Services be Provided Across State Lines.
- L. E-Commerce
 - 1. Is a Web page important?
 - 2. What licensing and qualification is required?
 - 3. What difficulties exist in establishing formal relationship with consumer?
 - 4. What difficulties exist in establishing personal relationship with consumer?
 - 5. What opportunities exist for online billing and file management?

6. What difficulties exist concerning confidentiality in online relationships?

IV. Conclusion

- A. All Are Part of the Same Industry - Financial Services.
- B. The Business Models and Alliances used to provide Financial Services to the Consumer will be determined in the next Two to Five Years.
 - 1. The most significant and profitable alliances will be established within that time.
 - 2. The clock is running
 - a. Move too slow and miss strategic alliances – left out.
 - b. Move too fast and make inappropriate alliances - lose out.
 - c. Move expeditiously and with proper due diligence - win out - successful under new paradigm for providing financial services.

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