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UK MDPs: lessons from New York

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UK MDPs: lessons from New York

SYDNEY M CONE III draws on his experience of the New York rules to provide some insights into the imminent arrival of multidisciplinary practices on the English legal scene

When the Lord Chancellor issued a White Paper on Legal Services in October 2005, multidisciplinary practices (MDPs) were one of the more controversial topics it covered. But while the concept of joint ownership of legal practices is foreign to the UK, in New York it has been around for some time. In an effort to anticipate what might happen when MDPs are introduced, there are some useful comparisons that may be drawn between the proposals in the White Paper and the rules in New York.

First, although the White Paper makes reference to legal ethics, New York provides a far more complete elaboration of the ethical considerations that bear on the inclusion of legal services in MDPs. Second, it seems instructive to note that, in recommending a broader scope for MDPs than is permitted in New York, the White Paper also advocates the creation of a new governing agency that has no New York counterpart. Third, the differences between the White Paper's proposals and the MDP rules in New York may have some portent for trans-Atlantic legal practice.

In the way it addressed MDPs, the White Paper departed from the Clementi report – upon which much of it was based. The Clementi report had recommended

delaying the authorisation of MDPs until some future date, to allow an opportunity for lawyers to gain experience with forms of legal practice that, once authorised, might be owned and managed by members of two or more of the recognised legal professions (such as barristers, solicitors, conveyancers or trademark attorneys). Instead, however, the White Paper advocated that legislation to be adopted in 2006 should immediately authorise MDPs in England and Wales. In addition, it recommends that entities practising law, including MDPs, be authorised to sell ownership interests to investors outside the relevant professions.

On its face, the White Paper is in sharp contrast to the New York rules that relate to MDPs and the practice of law. New York recognises only two forms of MDP that engage in legal practice, the first being the law firm that provides both legal and non-legal services, and that is bound by rules designed to advise the client of services that are not the subject of an attorney-client relationship. The second is an MDP in the form of a contractual or 'side-by-side' arrangement between a law firm and a non-legal professional service firm. This second type of MDP is governed by rules that prohibit the non-legal professional service firm from sharing fees with the law firm, and from holding

or exercising – directly or indirectly – any ownership interest in, or managerial role in respect of, the practice of law by the law firm. In addition, the non-legal professional service firm must engage in a profession found on an official list and the existence of the MDP arrangement must be disclosed to clients.

While the White Paper's generally permissive approach to MDPs seems to reflect a quite different policy from that underlying the restrictions found in New York, it is simply a proposal, the implementation of which will almost certainly require parliament and the government to deal with the ethical considerations that inform the rules in New York. Here, we are dealing not only with a difference in policy but also with a variance in institutional approach. The centrepiece of the White Paper is the proposed creation of a Legal Services Board as the ultimate regulator of the legal profession, with authority over practitioners and, in addition, over lower-tier regulators (such as the Bar Council and the Law Society, the so-called 'frontline regulators'). The proposed Legal Services Board is to be for legal practitioners what the Financial Services Authority is for bankers and other providers of financial services – a potent source of rule-making, regulation and supervision.

The White Paper acknowledges that ethical considerations should find expression when MDP rules are actually developed, but it is also rather laconic when it comes to identifying potential ethical concerns and concrete ways to give them expression in the regulation of MDPs. For example, the White Paper's discussion of conflicts of interest is quite abbreviated, and effectively turns this complex and vital area over to the Legal Services Board and the frontline regulators. A basic point is whether non-lawyers in an MDP will be subject to the rules of the legal profession that govern conflicts of interest, but the White Paper leaves this question to others to resolve. When it comes to professional privilege, the paper contents itself with unhelpful observations, such as "[legal professional privilege] should not be used inappropriately to obstruct investigations". In New York, underlying the MDP rules are 'ethical considerations' that are designated as such and that are set out in considerable detail in the form of commentary on the MDP rules in New York's Code of Professional Responsibility for the legal profession. It seems likely that, whether or not New York's 'ethical considerations' relating to MDPs are consulted in form by the Legal Services Board, their substance will closely resemble the subject matter of professional ethics that, sooner or later, will prove relevant to MDPs in England and Wales.

While there may prove to be some common

ground between the ethical considerations that New York has published in detail and analogous factors that are implicit in the White Paper, the institutional approaches are quite dissimilar. New York does not have a counterpart to the Legal Services Board that could take jurisdiction over multi-professional entities. The New York legal profession is regulated in the last analysis by the courts, which do not have authority to regulate other professions. Moreover, although several years ago a Commission of the American Bar Association (ABA) proposed MDPs of the type advanced by the White Paper, it stopped short of proposing a new authority to regulate them. It is therefore conceivable that the institutional lacuna in the ABA proposal on MDPs can be cured, in the case of the White Paper, by its proposal to create a Legal Services Board and, under it, a new Office of Legal Complaints.

The hard cases may well involve alleged conflicts of interest. If an English MDP comprises lawyers and accountants, and if the latter urge a course of action that, arguably, conflicts with the interests of a client that is seeking legal advice, will the institutions envisaged by the White Paper be able to resolve the alleged conflict under rules applicable to the legal profession? Or, if the MDP has sold an interest in itself to a financial investor which attempts to influence professional decisions by the MDP in a manner designed to increase its profitability, will the new

institutions be equal to weighing any resulting questions of professional ethics that may arise? At a minimum, in England and Wales, unlike New York, institutions will apparently be in place with jurisdiction over all of the constituent members of the MDP.

Another topic suggested by the White Paper is the consequences of authorising MDPs for firms, particularly London practices, having offices in, or seeking to establish offices in, New York. Such a London firm would seem to be effectively precluded from taking advantage of the MDP proposal in the White Paper because of the New York rule that forbids a legal practice to permit a non-legal professional service firm to have a direct or indirect ownership or managerial interest in the legal practice, and because, more generally, New York forbids fee-sharing and partnerships between lawyers and non-lawyers. On the other hand, the White Paper and accompanying commentary have suggested that MDPs in England and Wales may prove more attractive for domestic law firms than for the London outfits with international practices. The incompatibility of White Paper-style MDPs with New York rules may, therefore, be of limited immediate concern to international lawyers. Even so, over the long term, certain practitioners may find it in their interest to seek an accommodation of different rules on MDPs in the international legal centres of London and New York. ■