"Elder-Comp, L.L.C." A Multi-Disciplinary Prototype for Tomorrow's Elder Law Practice

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"ELDER-COMP, L.L.C."

A MULTI-DISCIPLINARY PROTOTYPE FOR TOMORROW'S ELDER LAW PRACTICE

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I. INTRODUCTION

Economists, perhaps better than theologians, have defined the character of contemporary humankind. We are, according to Montesquieu, Hobbes, Smith, Edgeworth, et al, influenced predominately by self-interest.¹ We are "pleasure machines," each busily striving to satisfy our psychic appetites.² We are not to be trusted. We lie to ourselves, and therefore to others. Physicians overtreat, or undertreat, depending upon financial incentives. Lawyers are comprehensive transgressors, tainted by the sins of every person who has ever entered a courtroom. Insurance brokers measure policies by commissions, not protection. The Earth is a

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Author's Note: This article emerges from a business plan I developed for use in my Elderlaw course at the University of South Dakota School of Law. The plan is outlined in a two-part lecture on "The Business of Elderlaw." Its purpose is to provide students, and now readers, with a practice design that may succeed in a market characterized by consolidation, name-recognition marketing, and brokering. The plan borrows heavily from my experience in building healthcare mergers. The "Elder-Comp, L.L.C." concept is offered in support of my belief that the legal profession's equivocation on multi-disciplinary practice arrangements fails to recognize the financial realities of the market and works against the best interests of lawyers. Also, the current fragmentation of professional services works against the best interests of consumers. It is written as a companion article to Monte Schatz' "The Elderlaw Attorney: Is Knowledge Enough?" They should be read together. *Michael J. Myers

1. Donald W. Light, Is Competition Bad?, 309 NEW ENG. J. MED. 1315 (1983). The author suggested that certain 18th century philosophers provided insight into the conduct of modern-day professionals, specifically physicians, stating:

Montesquieu agreed with Hobbes that 'every man who has power tends to abuse that power; he will go up to the point where he meets with barriers ...[and] precisely for that reason, Montesquieu argued vigorously for the competition that commerce brings; for as each man pursues his interests he will be a countervailing force to others.

Id.

2. ROBERT L. HEILBRONER, THE WORLDLY PHILOSOPHERS 173 (7th Ed., 1999). "[Francis Ysidro] Edgeworth's simplification was this assumption: every man is a pleasure machine. Id. Jeremy Bentham had originated the conception in the early nineteenth century under the beguiling title of the Felicific Calculus, a philosophical view of humanity as so many living profit-and-loss calculators, each busily arranging for his life to maximize the pleasure of his psychic adding machine." Id. The term "psychic appetites" is used in lieu of "psychic adding machine" as an analogous reference to the desire for things, power, and position that may be uniquely attractive to each individual. Id.
corpus of stuff; its occupants compete for their pro rata share. Greed, once a deadly sin, is now a virtue, driving the NASDAQ and the Dow-Jones. It is the market at work, almost. It is each person delivering perceived value to another, almost. It is the lure of gain, not norms, and not authority, that moves money through the body politic. 3

Against this backdrop of human frailty, this commentary outlines a business plan for “Elder-Comp, L.L.C.,” the “McDonald’s of Senior Services,” a recognizable, one-stop firm providing comprehensive, integrated legal, financial and support services to seniors and caregivers. Elder-Comp (“Comp” is an abbreviated form of “comprehensive”) offices could be adapted to towns and cities of all sizes, each responding to the demographic imperative of an aging society. 4 They would be the “H & R Blocks” of elder law. The Elder-Comp umbrella would contain professionals with knowledge of pensions, Social Security, Medicare and Medicaid, guardianships, trusts and estates, investments, income, estate and inheritance taxes, health, life and long-term care insurance, probate, nursing homes, assisted living and adult living communities. The multi-site Elder-Comp structure is designed to foster overlapping networks among its professionals. Traditionally such services have been characterized by fragmentation. Social workers assist clients during encounters with Medicare, Medicaid and other government programs. Financial planners offer strategies for income maintenance. Investment specialists place monies in the market and elsewhere. Accountants and CPA’s offer tax advice. Case managers assist patients during encounters with hospitals, clinics and nursing homes. Lawyers draft documents, offer legal opinions, and represent clients as requested. 5 Clients currently move from one disconnected professional to another. The process is often duplicitous and expensive. 6 The result is generally dissatisfied consumers and misused professionals. 7

3. Id. at 49. “[François] Quesnay insisted that wealth sprang from production and that it flowed through the nation, from hand to hand, replenishing the body social like the circulation of blood.” Id.


There are more elderly Americans than ever before. Whether measured by an increase in percentage or in absolute numbers, more Americans are age 65 and over than in any past era. In 1970, 20 million Americans were age 65 or older who represented 12.5 per cent of the total population. By 1990 there were 31 million who represented 12.5 per cent. In the year 2000 there are an estimated 35 million, or 12.8 per cent.

5. HARRY S. MARGOLIS, THE ELDERLAW PORTFOLIO SERIES (1999) Portfolio 1-5 through 1-7, after noting that the ABA Model Code of Professional Conduct “gave unquestioned primacy to the role of an attorney as an advocate in a litigation context,” defines four types of elderlaw practitioner: (1) advocate, (2) counselor, (3) organizer, and (4) service provider. Traditional practice confines lawyers to the first two roles. Id. Elder-Comp encourages the latter two.

6. Healthcare professionals have demonstrated the cost effectiveness of “team” delivery of services. Describing integrated approaches to disease management, author Scott Macstravic acknowledged a South Dakota accomplishment: “Sioux Valley Hospital, Sioux Falls, South Dakota, saved itself $1,260,000 in losses and cut patient days by 66% and ICU days by 96% through its community case management program for cerebral palsy patients.” SCOTT MACSTRAVIC, MANAGING HEALTH CARE DEMAND 484 (1998)

7. Fundamental trends driving consumers in the U.S. are well known. See, PETER
It is axiomatic that consumer dissatisfaction creates new markets. But markets have been slow to respond to the demand for integrated legal, financial and support services for the elderly. Banks and trust companies, with their affiliated insurance outlets, are now capable of moving clients through rapidly-developing networks, stimulated by liberalized federal legislation. But as they develop, bar associations reflect upon their intrinsic evil. The Model Rules for Professional Responsibility prohibit forming partnerships with nonlawyers, if any of their combined activities consist of the practice of law. The rules prohibit sharing fees with nonlawyers. The issue of client confidentiality presents other complications. And, there is the compromise of independent judgment under circumstances, for example, where an attorney who recommends the purchase of life insurance to leverage trust assets stands to gain financially from its sale.

The conflict is similar to that confronted by an orthopedic surgeon who can perform surgery at one or more community hospitals, but routinely schedules procedures at a surgery center in which the surgeon has an ownership interest. Physicians apply three rationale in rebutting the

FRANCESE, MARKETING KNOW-HOW 1 (1998). They are (1) Slowing population growth; (2) An aging population, and (3) Fragmentation of consumer markets. Id.

8. Today's accountant is not the stereotype portrayed in the 1962 NEW YORKER depiction of an aggressive young woman addressing a studious-looking young man at a cocktail party: "You certainly have a wonderful way of expressing yourself for a certified public accountant." MICHAEL CHATFIELD, THE HISTORY OF ACCOUNTING, AN INTERNATIONAL ENCYCLOPEDIA 5 (1996). Like lawyers, the role of accountants is changing. "Far from being yesteryear's technician engaged merely in repetitive or routine tasks, the modern accountant is an articulate, diplomatic, and independent professional." Elder-Comp accommodates both roles.

9. After a 20-year journey, Congress and the White House agreed to repeal the Glass-Steagall Act, insulating commercial banks that receive deposits from investment banking, securities and investments, and insurance. In its place Congress enacted the Financial Services Modernization Act, allowing banks, insurers and securities firms to get into each other's businesses. On the eve of its enactment, House Banking Committee Chairman Jim Leach (R., Iowa) stated, "We are ready to proceed with final action on the most important piece of banking legislation to come before Congress in more than 65 years." Bill to Modernize U.S. Financial System Is Set For Approval, WALL ST. J., Nov. 3, 1999, at A18. See 113 Stat 1338, PL 106-102 (S 900), Nov. 12, 1999, Gramm-Leach-Billey Financial Modernization Act.

10. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1989). The Model Rules provide that:

A lawyer shall not share legal fees with a nonlawyer . . . (a) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law [and] (b) 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 [and] (c) A lawyer shall not practice with or in the form of a professional corporation of association authorized to practice law for a profit, if: (i) A nonlawyer owns any interest therein; (ii) A nonlawyer is a corporate director or officer, or (iii) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

Id.

11. The Sioux Falls Surgical Center, Sioux Falls, South Dakota, is owned by some 40 investor-physicians who have surgical privileges at the Surgical Center and at one and usually both of the Sioux Falls community hospitals. They have self-referral capability, able to perform procedures at either of the hospitals or at the Surgical Center in which the surgeon has an ownership interest. Ownership interest is disclosed to the patient. Patients may reject the Surgical Center in favor of a hospital. Elder-Comp operating procedures emulate disclosure and the opportunity
criticism of self-referral: (1) disclosure, (2) quality, and (3) cost. Thus, while attorneys reflect upon the morality of vertical integration and examine the core values of the legal profession, physicians establish insurance companies and build surgical centers and specialty hospitals.

Elder-Comp would resist being drawn into the debate. Pragmatically, in unreceptive jurisdictions, its business plan would declare that Elder-Comp offices shall not be engaged in the “practice of law,” noting with interest that South Dakota, like most states, does not statutorily define the practice of law. Medicine makes an effort at defining the practice of medicine at South Dakota Codified Law section 36-4-9, by asserting that it occurs when a person publicly professes “to be a physician or surgeon [and] recommend[s], prescribe[s] or direct[s] for the use of any person any drug, medicine, apparatus, or other agency for the cure, relief or palliation of any ailment or disease of the mind or body or the cure of any wound, fracture or bodily injury or deformity.” Minnesota defines “practice healing” or “practice of healing” to protect its professional borders. The definition is sweeping and encompassing:

The term ‘practice healing’ or ‘practice of healing’ shall mean and include any person who shall in any manner for any fee, gift, compensation, or reward, or in expectation thereof, engage in, or hold out to the public as being engaged in, the practice of medicine or surgery, the practice of osteopathy, the practice of chiropractic, the practice of any legalized method of healing, or the diagnosis, analysis, treatment, correction, or cure of any disease, injury, defect, deformity, infirmity, ailment, or affliction of human beings, or any condition or conditions incident to pregnancy or childbirth, or examination into the fact, condition, or cause of human health or disease, or who shall, for any fee, gift, compensation, or reward, or in expectation thereof, suggest, recommend, or prescribe any medicine for rejection.

12. Paralleling healthcare integration in its structural rationale, Elder-Comp also borrowed one of healthcare’s ethical standards: “Access for all to an adequate level of care without the imposition of excessive burdens.” President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Securing Access to Health Care: The Ethical Implications of Differences in the Availability of Health Services 1-6 (1983), CLARK G. HAVIGHURST, HEALTH CARE LAW AND POLICY 100 (1998). For discussion of the commission’s work, see Symposium, 6 CARDOZO L. REV. 223 (1984). Id. at 104. The analogous test for multidisciplinary practice generally, and Elder-Comp specifically, is whether its delivery improves the quality of legal, financial and social support services to seniors; whether access to those services is enhanced, and whether they are more affordable.

13. Physicians and hospitals have discovered the market strength of vertical integration, particularly when it moves the seller toward the wellhead of premium collections. An example is the South Dakota health insurance carrier DakotaCare, established under the auspices of the South Dakota State Medical Association and owned primarily by its physician members. Physician ownership of an insurance company raises conflict-of-interest issues faced by surgeons who self-refer to surgery centers. A South Dakota physician with equity in DakotaCare confronts a conflict when asked to participate in a managed care company that is competing with DakotaCare. Conflicts abound when patients are moved through the U.S. healthcare system.

14. S.D.C.L. § 16-18-1 (1995). That statute states that “no person shall engage in any manner in the practice of law in the State of South Dakota unless such person be duly licensed as an attorney at law, and be an active member of the state bar in good standing.” Id. However, the author observes that South Dakota does not statutorily define “the practice of law.”
or any form of treatment, correction, or cure thereof...\(^{15}\)

If state bars intend to initiate unlawful practice of law claims against accounting firms, they may wish to first follow the medical profession’s lead by defining the practice of law. The ABA Commission on Multidisciplinary Practice has proposed the following definition:

‘Practice of Law’ means the provision of professional legal advice or services where there is a client relationship of trust or reliance. One is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

(a) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect the disposition of property of decedents’ estates, documents relating to business and corporate transactions, other instruments intended to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business;

(b) Preparing or expressing legal opinions;

(c) Appearing or acting as an attorney in any tribunal;

(d) Preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal;

(e) Providing advice or counsel as to how any of the activities described in subparagraph (a) through (d) might be done, or whether they were done, in accordance with applicable law;

(f) Furnishing an attorney or attorneys or other persons, to render the services described in subparagraphs (a) through (e) above.\(^{16}\)

Mindful of Model Rule 5.4, *The Professional Independence of a Lawyer*, Elder-Comp’s service description footnotes the intention to provide “consulting services only,” using practice patterns established by national accounting firms as parameters for protection against unlawful practice of law claims. Legal services would be offered, but secured independent of the prohibition that “a lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.”\(^{17}\) In defining its service lines, Elder-Comp assumes that state bar associations, to the extent they accommodate consulting conduct of the “Big Five” accounting firms and their employed attorneys, will extend comparable latitude to the rank-and-file attorney who associates with Elder-Comp.

The Elder-Comp business plan constructs alternative business models: (1) the equity model, and (2) the franchise model. The equity model


\(^{17}\) S.D.C.L. § 16-18 App., Rule 5.4(b) (1985).
would offer full ownership of assets and broad discretion regarding local organizational design and delivery, subject to minimum safeguards pertaining to trade name use and compliance with quality standards. A non-mandatory fee schedule would accompany each affiliation agreement. Both models would require audits. The franchise model would be a shared risk arrangement, with profit-and-loss participation by both parties. Financial targets and operating ratios would be used to reward franchisees for margins, market share, and efficiency.18

Professionally, Elder-Comp entities would be “fully integrated” or “non-law integrated.” Under the first, a lawyer may have full or substantial ownership in an Elder-Comp firm, in association with one or more professionals such as certified financial planners, CPA’s, nurses, case managers, stockbrokers, and social workers. Insurance brokers may be excluded from the fully integrated model because of potential fee-splitting problems.19 The fully integrated model places a lawyer at the forefront of the multi-disciplinary practice, functioning as an owner, manager, counselor, coordinator of services, and when appropriate, an advocate. This multi-faceted role is comparable to dual management-professional positions frequently held by lawyers in accounting firms and full-service financial institutions. Understandably, certain functions are deemed to be purely legal, such as the drafting of documents specific to individual clients and the issuance of an opinion regarding the legal implications of proposed transactions, and representation before administrative tribunals and courts. Such unadulterated legal services could be purchased outside the Elder-Comp structure. If the services are provided by the same attorney who is associated with Elder-Comp, they would be performed in a manner that avoids fee-splitting with a nonlawyer. Elder-Comp’s cost analysis estimates that less than fifteen per cent of its services, in the fully integrated model, would be considered the “practice of law.” Costs of legal services are projected at twelve per cent of operational expense.

The non-law integrated office would function without direct lawyer involvement. This option is expected to be chosen in jurisdictions whose bar associations harbor hostility toward multi-disciplinary practice arrangements.20 The “non-law” office would operate without lawyer ownership or management so its functions would be directed by nonlawyers.

18. Elder-Comp acquiesces to local determination of fees, but retains the right of review. Alternative billing arrangements, on the other hand, require specific approval. Alternative billing arrangements include fixed fees for defined services and unbundles services thereby providing a cafeteria of services within the Elder-Comp service line.
19. It was reported in The Business Lawyer, that, “The Model Rules’ basic ethical precepts governing a lawyer in entering into or carrying out a billing arrangement are: (1) the lawyer must determine that the fees are reasonable; and (2) the lawyer must communicate with the client so that the client is capable of giving informed consent to the arrangement. The Committee on Lawyer Business Ethics (Ann Y. Walker, Chair), Business and Ethics Implications of Alternative Billing Practices: Report on Alternative Billing Arrangements, 54 BUS. LAW. No. 1, 191 (1998).
This structure would place Elder-Comp in the position of an arms-length purchaser of legal services. Legal services could be purchased competitively, but no Elder-Comp-related lawyer would be available for referrals. The non-law alternative, however, is compromised in two important aspects: (1) fragmentation of legal and financial services may impair service quality, and (2) lawyers are excluded from market opportunities considered to be professionally and financially rewarding.

II. CONTINUUM OF SERVICES

The Elder-Comp vision adopts a concept used to build healthcare systems: "the continuum of care." That concept is the foundation of vertical integration, with the hospital at the center, linking the delivery of such non-hospital services as physician practices, ambulatory care, imaging centers, medical laboratories, pharmacies, skilled nursing facilities, and home health care agencies through ownership or management contracts. Variously described as "organized delivery systems," "integrated health systems," or "health systems," the justification for their existence is derived from the rationale that integration is superior to fragmentation in the delivery of professional services to patients. 21 Similarly, this author believes the integration of professional services to seniors is superior to the fragmented delivery of legal, financial and elder support services that characterizes the current market. Quality control measures are incorporated into its design. At both its trial market stage and at its four-year maturation stage, professionals with demonstrated competence would be responsible for delivery and oversight of services.

In health care, physicians serve as the overseers of services provided by physician assistants, nurse practitioners, physical therapists, pharmacists, and an array of allied health professionals who pool their talent in the care of patients. Fragmentation is avoided because medical services pulling in opposite directions can have negative, even fatal, results. Courts, recognizing the intrinsic value of integrated team approaches to patient care, have rejected antitrust attacks on vertical integration. Ethical prohibitions on fee-splitting, and the unauthorized practice of medicine, have given way to widespread employment of physicians by hospitals as well as other non-professional corporations. The market has changed. The "cowboy" physician, answerable to no unlicensed entity, providing care according to independent clinical judgment and bound only by a professional code of ethics, has largely become a fiction. Admittedly, the predominance of third-party government and insurance payment has accelerated the collapse of medicine into commercialism, a characteristic

21. LEIYS SHI, DELIVERING HEALTH CARE IN AMERICA 300 (1998). "These organizational alliances and networks are referred to as integrated delivery systems (IDS) in [Shi’s] book. These systems are also known by other names such as ‘organized delivery networks,’ ‘health care systems,’ ‘integrated service networks,’ ‘integrated delivery networks,’ ‘integrated provider networks’ or ‘hospital systems.’" Id.
that does not predominate in the arena of law. But the corporatization of
the practice of law flourishes within accounting firms, banks and the legal
departments of thousands of corporations. The “cowboy” lawyer, too, is
fading into the corporate sunset, not far behind the physician.

III. PROFESSIONAL SELF-INTEREST

Promulgators of medical and legal ethics have had good reason to be
suspect of professional self-interest. Evidence abounds that licensed and
unlicenced workers are equally acquisitive. Ethical tenets, anchored in
“fiduciary” relationships, are frequently diluted when subjected to the
promise of cash flow. A conspicuous, but generally unseen example is
“defensive medicine.” Health economists estimate that fifteen per cent of
medical care ordered or provided by physicians is related to concerns
about malpractice exposure; care provided not for the clinical benefit of
the patient, but rather for the legal benefit of the physician. Defensive
medicine is an example of professional self-interest that escapes public
protest. Examined deductively, the practice of forcing patients to pay for
medical services they do not need is at best ethically-strained, and at
worst, fraudulent. It is axiomatic that physicians, because of a gross im-
balance of knowledge and power, occupy a position of trust with patients,
and therefore are ethically required to place a patient’s interest ahead of
their own. The AMA’s admission of defensive medicine is, therefore, an
admission of collective self-interest that yields substantial financial returns
to its members.22 Montesquieu and Hobbes would have expected as
much, from both physicians and lawyers.

Physician self-interest became calculable in the 1980s when studies
showed that physicians with ownership in imaging centers and medical
laboratories ordered greater numbers of tests than in situations where
they had no ownership. The studies concluded that physicians had placed
their interest ahead of their patients’ interest, and ahead of the taxpayers’
interest. Medicare officials became alarmed. The cost of unnecessary
testing arising out of physician conflict-of-interest ownership was calcu-
lated to cost the federal program tens-of-millions-of-dollars.23 Congress

22. Among vendors, physicians appear to be uniquely capable of creating demand for their
services. In economics, it is known as “The Supplier-Induced Demand Theory.” REXFORD E.
Santerre noted:

The supplier-induced demand theory, or SID theory, also focuses on the unique role phy-
sicians play in the allocation of medical services. Consumers are relatively ill informed
concerning the proper amount of medical care to consume because there exists an asym-
metry of information regarding the various health care options available. The asymmetry
forces consumers to rely heavily on the advice of their physicians for guidance. This im-
plies that physicians are not only the suppliers of physician services but also play a major
part in determining the level of demand for those services.

Id.

fortified antikickback law, Congress continued to be concerned that health care costs and utiliza-
responded with amendments to the Medicare law, called the Stark Amendments, which restricted physician ownership in imaging centers, medical laboratories and six other ancillary services. Large numbers of physicians relinquished equity in the enumerated ancillaries. Others used rural and other exceptions to continue ownership.

The Stark Amendments, following a laborious and ambiguous administrative implementation, reduced physician ownership in ancillary services. Federal law accomplished what professional ethics could not. Some physicians had to look elsewhere to meet their target incomes. Medicare officials waited, spread sheets in hand, prepared to measure the cost savings they had promised that Stark I, and later Stark II, would produce. They waited, anticipating an abatement of testing, a rollback of ancillary activity. Instead, ancillary activity increased. Home health care, one of the services excluded from physician ownership, more than doubled in three years after Congressional action, with the number of Medicare-funded home health visits increasing by eighteen per cent annually.

This author’s research of professional self-interest suggests that the restraint on physician investment in ancillary services, imposed by the Stark Amendments, is analogous to bar association restraints on multi-disciplinary practice. They create a void in the market that is quickly absorbed by institutional sellers. When Congress legislated physicians out of the ancillary business, hospitals moved in, vertically integrating laboratories, pharmacies, rehabilitation centers, skilled nursing facilities, home health care agencies and ambulatory care centers. The migration to organized delivery systems was energized by the Stark Amendments’ anti-competitive restraint. Lawmakers failed to appreciate that Medicare fee-for-service payment contained as much lure for hospital systems as it had

24. Id. "These enterprises included radiology centers, clinical laboratories, HMOs, ambulatory surgical centers, hospitals, and durable medical equipment suppliers...[and] the report found that referring physicians who invest in clinical laboratories resulted in 45 per cent more tests for those patients than is the average." Id. (citing D. McCarty Thornton, Impact of the Antikickback Statute and the Stark Amendment on Vertically Integrated Delivery systems in the Health Care Industry, HEALTH CARE FRAUD, Sec. X at 1-2 (ABA 1994)).


for physicians. Volume produced revenue; revenue produced margins, and margins delivered bonuses and capital to the corporate office. It turned out that physicians and their office managers were amateurish compared to health system executives in their ability to work the system, as evidenced by the issuance of numerous "fraud alerts."\(^2\) Similarly, with respect to the potential for consumer exploitation, multi-disciplinary practices may pose a much smaller threat than full-service, integrated financial institutions with established markets.

Elder-Comp contends that medicine and law are past the mid-point of their migration from professionalism to commercialism; a journey not initiated by the professions, but rather undertaken in a para-sympathetic response to market forces. Integrated health care systems and integrated banking systems have a common capacity for aggregating capital. Capital permits the purchase of physicians and lawyers, professional constraints notwithstanding. The legal profession's great debate on multi-disciplinary practice may be akin to spitting into an ocean wind while offshore rigs pump money to their investors. No one, but the tribe, is listening. The "practice of law" is virtually without definable barriers. State medical boards are in retreat.\(^2\) Increasingly state bars are impotent, preoccupied with the personal conduct of their members. "Most believe that despite opposition from some lawyers, the barriers will soon fall, and they agree with the accountants that conflict-of-interests concerns can be resolved."\(^3\)

Elder-Comp's business plan equivocates with respect to lawyer participation. While an elder law practitioner may be an optimal Elder-Comp franchise-holder, financial planning, portfolio management and insurance products are seen as the major profit centers. Smaller margins are forecasted for legal and support services for the elderly. Low return on direct legal services, coupled with market abundance, places lawyers in the unenviable position of dispensability.

IV. THE BUSINESS PLAN\(^3\)

Elder-Comp is grounded in the demographics of an aging society. The numbers confirm the future predicted by Ken Dychtwald in the 1990

\(^{28}\) *WING, supra* note 23, at 930.

In years past, fraud alerts were primarily internal documents used by the Office of the Inspector General of HHS to describe provider conduct that should be considered impermissible and highly susceptible to investigation.... [Now] shifted to financial incentives related to pharmaceutical marketing practices, clinical laboratory services, enhancements provided to physicians, hospitals, and other health care entities by home health agencies. *Id.*

\(^{29}\) JAMES BRALY, FOOD ALLERGY AND NUTRITION xxi (1992). In his book, Braly quotes from Mendelsohn's *Confessions of a Medical Heretic* which "popularized the disturbing reports of decreased patient deaths during the absence of medical care." *Id.*


\(^{31}\) Michael Myers, *ELDER-COMP*, Draft Business Plan, 1121 Washington Street, Centerville, SD 57014 (February 10, 2000). Drafted for use in teaching Elderlaw course at the University of South Dakota and for potential use as a conceptual prototype.
bestseller "Age Wave," wherein he described "[h]ow the most important trend of our time will change our future."  

Dychtwald forecasted that, "[t]he combined effect of the senior boom and the birth dearth in America will create a nation increasingly concerned with the needs and desires of middle-aged and older citizens."  

Elder-Comp targets both, with special focus on the "sandwich generation," persons forty-five to sixty-five tending both children and parents. Often they are working couples with tight schedules, needing assistance in negotiating the complexities of a health care system that can quickly consume a lifetime of savings. They need assistance in planning for the health and financial crises that often accompany old age, and when planning is absent, assistance in their ad hoc engagement of the system.

In most markets there is no recognizable source of high-quality legal, financial support services for the elderly. Consumers are caught in a "grab-bag" dilemma, tapping the nearest lawyer, accountant, social worker, or discharge planner for assistance. Crises-mode decisions are made, often with adverse consequences. In retrospect, there may be regret. The Elder-Comp business plan would identify this void in the market and would fill it with a professional, high-quality response. Some of its highlights include:

Elder-Comp Mission Statement. The purpose of Elder-Comp would be to create and serve a national market for the provision of comprehensive, high-quality integrated legal, financial, and elder support services to seniors and caregivers through company-owned and franchised offices.

Organizational Structure. Elder-Comp would be a limited liability company, operating under the laws of the State of South Dakota, with its principal place of business located in Centerville, South Dakota. Elder-Comp offices, franchisees, and broker-professional arrangements would be marketed to select locations within the parameters of multi-disciplinary practices guidelines. Monte Schatz' research, as reported in his companion article, measures the relative receptiveness of jurisdictions to a multi-disciplinary practice.

Internet and E-commerce. Involvement with the Mayo Clinic's inaugural telemedicine sites a decade ago led this author to the conclusion that, over time, a broad range of services will be delivered personally and professionally, but from remote locations. Elder-Comp could serve its offices with electronic, telecommunications and internet support in the belief that physical presence with clients increasingly will give way to distance counseling and advising. Therefore, Elder-Comp could serve its offices with electronic, telecommunications, and internet support that would

33. Id. at 13.
35. See generally, Schatz, supra note 20.
increase productivity and improve service quality. A web page would be developed to contain a law report, investment and market information, Medicare and Social Security updates, and a consumer data bank listing regional nursing homes and adult living communities. The web page would contain an inventory of area physicians, hospitals and ancillary providers. The Elder-Comp Report Card would award grades to each. The grading scale would contain five categories, patterned after bond-rating agency scores, based upon quality, cost, environment, access, and staff qualifications.

Capitalization and Market Trials. Name recognition and quality responsiveness would serve as the platforms for Elder-Comp strategic planning. The organizational capacity to respond to client needs would have to be established through contractual commitments prior to the creation of market demand. Demand by service line would be measured in Elder-Comp’s first test market, tentatively identified as Minneapolis. A confidential finance section would identify sources of capital, revenue and expense forecasts, plus a preliminary capitalization structure. “Elder-Comp of Minnesota” would therefore be the first on-line office. It would be company-owned.

Trust Company and Product Line Identification. Elder-Comp’s major service categories would be (1) financial and financial-related services; (2) government and social services support; (3) legal services; (4) consulting and education services; (5) asset management; and (6) insurance and annuities. The financial platform would contain comprehensive financial planning services, investment counseling, and portfolio management. The financial-related platform would contain the sale of annuities and insurance products, including long-term care insurance, life insurance, and health care insurance. The legal services platform would contain representation in Medicare, Social Security and other government benefit appeals; trust creation, probate, guardianships, wills, powers of attorney, and advance directives. Non-legal consulting services would include assistance in tax preparation, selection of retirement plans, ERISA information, assistance in selecting an adult living community, and the dissemination of Medicare and Medicaid information.

Financial Plan. Alternative financial projections would be provided for each market location. They would be volume adjusted. The Phase I implementation predominantly would rely upon the initial Elder-Comp referral network, patterned after the “clinic without walls” concept used by physicians in establishing preferred provider arrangements. Elder-Comp would use accelerated name recognition to broker services through its affiliated professionals.

V. ELDER-COMP AND THE MDP DEBATE

Elder-Comp’s market assessment addresses the multi-disciplinary
practice debate, concluding that in the long run, ethical restraint on attorneys will have little impact upon the delivery of integrated legal, financial and elder support services.

Elder-Comp’s market assessment summarizes the highlights of multidisciplinary practice development, from the American Bar Association’s rejection of the 1982 Kutak Commission proposal, to the current employment by the “Big Five” of some 5,000 lawyers in their United States practice. KPMG Peat Marwick has formed alliances with Morrison-Foerster of San Francisco, which has 700 lawyers in offices worldwide, and with Horwood Marcus & Berk, Chicago. Price Waterhouse Coopers reportedly is pursuing alignments with major law firms. Banks, financial services firms, and software developers provide legal services. They include American Express, Century Business Systems, H & R Block and Quicken Family Lawyer. The author observes that such across-the-board incursions into the law practice has met only token resistance from the law profession. Further, he speculates that state legislatures likely will protect accountants and financial services companies from bar association claims alleging unlawful practice of law.

The market assessment contains a list of “consulting services” offered by major accounting firms. Services relevant to Elder-Comp’s service line include tax, estate planning, retirement planning, employment matters and employee benefits, health care, real estate, and insurance. Attorney participation is considered ancillary to the service line. Multidisciplinary practice trains have left the station. Very few lawyers are in the engine car; rather most are in the caboose, waiting to be assigned what the engineers consider to be legal tasks.

VI. CONCLUSION

This article describes a business plan for “Elder-Comp, LLC,” providing one-stop, integrated legal, financial, and elder support services to seniors and caregivers. Its mission and purpose emulates a theme used by health care: “the continuum of care.” In this case, “a continuum of legal,


37. Id.


The ‘personal service organization’... were known as accounting firms. Currently, these firms – especially the Big Five, including PricewaterhouseCoopers, Arthur Andersen, KPMG Peat Marwick, Ernst & Young, and Deloitte Touche Tohmatsu – are branching out beyond traditional accounting. They’re aiming to be one-stop shops for their corporate clients, offering a full-range of consulting services on taxes, computer systems, employee benefits, human resources... and legal matters. They are doing things corporations used to hire law firms to do, such as giving advice on mergers and acquisitions, personnel problems, and expert witness preparation.

Id. at 11.
financial, and elder services” assures high quality, cost-effective services provided by professionals with network knowledge of pensions, Social Security, Medicare and Medicaid, guardianships, trusts and estates, investments, income, estate and inheritance tax, health, life and long-term care insurance, probate, nursing homes, assisted living and adult living communities. This means rejecting the archaic taboo of lawyer isolationism imposed by state bar rules of professional conduct. Opposition to multidisciplinary practice is illusory and misdirected, similar to the opposition to the federal Stark Amendments which have restricted physician ownership of ancillary services. The market void left by federal anticompetitive constraint on physicians was aggressively filled by vertically-integrated corporate healthcare, thereby increasing, not stemming, conflict-of-interest abuse. The market demands integrated legal, financial, insurance and support services for seniors. On the basis of education, knowledge and professionalism, lawyers should lead the Elder-Comps of the marketplace. Lawyer leadership should be encouraged, not stifled.