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Profession in Convergence: Taking the Next Step

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Professions in Convergence: Taking the Next Step

Lowell J. Noteboom[†]

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INTRODUCTION

No issue has so captured the attention of the legal profession in recent years as the current debate on whether to allow lawyers and nonlawyers to jointly own and practice in multidisciplinary practices (MDPs) while sharing each other's profits. While MDPs could include a wide range of nonlawyer professionals,¹ the central debate has focused on accountants (and

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1. The ABA's Commission on Multidisciplinary Practice (hereinafter Commission) defines MDP as follows:

[A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all,

their consulting arms) practicing with lawyers. This Symposium issue of the *Minnesota Law Review* brings together an impressive array of law professors to comment on the threats and opportunities awaiting the legal profession in this new paradigm. They competently examine a range of important issues presented by MDPs, for example, preserving lawyer independence and client confidentiality and avoiding conflicts of interest. This Article looks at the issues from a somewhat different perspective—that of the private practitioner operating amidst the daily competitive pressures in which two professions—lawyers and accountants—are on converging paths. While somewhat limited to date, the clients' expressed preferences are also explored from that vantage point.

I. THE ACCOUNTANTS' PATH

For nearly two decades the services offered by the accounting and legal professions have been converging and, more recently, overlapping. Most practicing lawyers, however, have realized that fact only recently. Lawyers have tended to ignore the fact that, as accountants have expanded beyond their traditional audit and tax functions and developed very profitable consulting practices, they have moved closer to the practice of law—the definition of which remains illusive.²

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 also includes an arrangement by which a law firm joins with one or more other professional firms to provide services, including legal services, and there is a direct or indirect sharing of profits as part of the arrangement.

COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, REPORTER'S NOTES (1999), available at <<http://www.abanet.org/cpr/mdpappendixc.html>> [hereinafter REPORTER'S NOTES].

2. In an appendix to its August 1999 Recommendation to the American Bar Association's House of Delegates regarding MDPs, the Commission defined the "practice of law" as follows:

"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 interests in real or personal property, wills, codicils, 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.

* This definition is based in great part on District of Columbia Rule 49, which the Reporter viewed as a useful model.

COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, APPENDIX A, *available at* <<http://www.abanet.org/cpr/mdpappendixa.html>>. In response to criticism that this definition of the practice of law is too "broad and far reaching," the Commission recently indicated that it is considering whether to include a definition in its final recommendation, given the complexity of lawyer and nonlawyer services offered today. COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, POSTSCRIPT TO FEBRUARY 2000 MIDYEAR MEETING, *available at* <<http://www.abanet.org/cpr/postscript.html>> [hereinafter POSTSCRIPT].

In Minnesota, the legislature has provided a general definition of what constitutes the unauthorized practice of law:

It shall be unlawful for any person or association of persons, except members of the bar of Minnesota admitted and licensed to practice as attorneys at law, to appear as attorney or counselor at law in any action or proceeding in any court in this state to maintain, conduct, or defend the same, except personally as a party thereto in other than a representative capacity, or, by word, sign, letter, or advertisement, to hold out as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor at law, or in furnishing to others the services of a lawyer or lawyers, or, for a fee or any consideration, to give legal advice or counsel, perform for or furnish to another legal services, or, for or without a fee or any consideration, to prepare, directly or through another, for another person, firm, or corporation, any will or testamentary disposition or instrument of trust serving purposes similar to those of a will, or, for a fee or any consideration, to prepare for another person, firm, or corporation, any other legal document, except as provided in subdivision 3.

MINN. STAT. § 481.02(1) (1998).

Five examples of judicially definitions of the practice of law include Minnesota, North Dakota, California, Ohio, and Illinois. The Supreme Court of Minnesota has stated generally that where "a non-lawyer acts in a representative capacity in protecting, enforcing, or defending the legal rights of another, and advises and counsels that person in connection with those rights, the non-lawyer" engages in the unauthorized practice of law. *In re Discipline of Jorissen*, 391 N.W.2d 822, 825 (Minn. 1986). The Supreme Court of North Dakota explained that although "what constitutes the practice of law does not lend itself to an inclusive definition, it clearly includes [the person's] drafting of legal instruments and pleadings and providing legal advice." *North Dakota v. Niska*, 380 N.W.2d 646, 648 (N.D. 1986). The Supreme Court of California has stated that the practice of law means "the doing and performing services in a

Today, if pressed, most accountant/consultants would admit that their goal has been to provide nearly the same range of services and advice offered by full-service law firms, with the exception of (1) direct representation of clients in litigation, and (2) drafting the *final* version of key documents in estate plans, mergers or acquisitions.³ They regularly provide employment law advice, prepare estate plans, consult on a range of regulatory issues, assemble claims of every description, serve as advocates in alternate dispute resolution settings and even provide litigation management services to clients by hiring and managing the lawyers for the client's litigation matters. In the United States, the Big Five accounting firms already employ more than 5,000 attorneys and are continuing to hire at a rapid pace.⁴ Because they purport not to be practicing law, these at-

court of justice in any matter depending therein throughout its various stages," giving legal advice and drafting legal instruments and contracts, whether or not these subjects were rendered in the course of litigation. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 70 Cal. Rptr. 2d 304, 307 (1998). The Supreme Court of Ohio has explained that the practice of law includes counseling clients on the law and drafting legal documents for them. *See Cleveland Bar Ass'n v. Moore*, 722 N.E.2d 514, 515 (Ohio 2000). The Supreme Court of Illinois has provided for a broad definition of "practicing law," indicating that the "practice of law" includes "court appearances, [and] also services rendered out of court . . . [including] the giving of any advice or rendering of any service requiring the use of legal knowledge." *In re Howard, Jr.*, 721 N.E.2d 1126, 1134 (Ill. 1999).

3. In April 1998, the national managing partner of one of the largest accounting firms in the United States addressed the shareholders of the author's law firm. He candidly reported that his accounting firm's scope of services included "everything you are doing except litigation and the final drafts of wills, trusts and deal documents." While CPAs and financial planners have made major inroads into the estate planning process, the lawyer estate planners have thus far retained the exclusive right to draft the final documents. Cases interpreting the "unauthorized practice of law" have protected the drafting process as law practice, but little else is off limits. *See, e.g., Birbrower, Montalbano, Condon & Frank, P.C.*, 70 Cal. Rptr. 2d at 307 (indicating that the drafting of legal instruments and contracts is reserved to attorneys); *Akron Bar Ass'n v. Miller*, 684 N.E.2d 288, 290 (Ohio 1997) (stating that the "practice of law includes the preparation of legal instruments and contracts by which legal rights are secured."); *Drew v. Unauthorized Practice of Law Comm.*, 970 S.W.2d 152, 156 (Tex. Ct. App. 1998) (holding that although defendant could sign and present a petition, "he would need the aid of an attorney to draft the documents."). The same is true in the context of mergers and acquisitions. The case law enforcing rules against the unauthorized practice of law support the lawyers' exclusive right to draft the final merger and acquisition documents. *See In re Van Susteren*, 348 N.W.2d 579, 584 (Wis. 1984) (noting that the practice of law includes "drafting a contract for the purchase of a business").

4. *See generally* W. Bower, *The Big Five's Case For MDPs*, IN-HOUSE

torneys are largely unregulated by the courts and administrative bodies charged with policing the legal profession.

Here in Minnesota the accountants and their consulting arms are pushing the envelope just like their larger international cousins. RSM McGladrey, Inc., a wholly-owned subsidiary of H&R Block, headquartered in the Twin Cities, is currently the eighth largest accounting/consulting firm in the United States.⁵ McGladrey focuses on middle-market clients and includes in its general marketing brochure the following service descriptions, all of which could as easily appear in a law firm marketing brochure:

Conflict Management and Mediation

Contracts and Buy-Sell Agreements

Divestitures

Mergers and Acquisitions

ESOP Design

Bankruptcy and Reorganization

Divorce

Trusts and Estates⁶

McGladrey's 1996 human resources brochure actually promises to "keep [clients] abreast of HR *legal* and compliance requirements—and help you deal with them."⁷

The accountants' broad migration into the practice of law in Europe and around the world is, of course, even more dramatic. Andersen Legal, the global legal services network associated with Arthur Andersen & Co., had legal fee revenues of \$580 million for the fiscal year ending August 31, 1999, a thirty percent increase from the prior year.⁸ As of September 1, 1999, their network had grown to more than 2,700 lawyers located in ninety-two offices in thirty-five countries.⁹

PRAC. & MGMT., ALTMAN WEIL, INC., 1998, at 1.

5. See RSM McGladrey, Inc. *Business Solutions* (visited Apr. 18, 2000) <<http://www.rsmmcgladrey.com/rsmmcgladrey.nsf/pages/contenthomepage>>.

6. See RSM MCGLADREY, INC., BUSINESS RESOURCES (1996) (on file with author).

7. RSM MCGLADREY, INC., HUMAN RESOURCES BROCHURE (1998) (on file with author) (emphasis added).

8. See *Anderson Legal Reports Record Growth in Demand for Legal Services* (visited Mar. 14, 2000) <<http://www.arthurandersen.com/website.nsf/content/mediacenternewsdesk>>.

9. See *id.* The 2,700 lawyers reflects a 300 lawyer increase over a five month period. See *id.*

One author has noted that if the Big Five accounting firms' legal operations were

included in a global comparison of law firms by size, PricewaterhouseCoopers and Arthur Andersen would rank at third and fourth respectively, [while] KPMG would be ninth and Ernst & Young would be eleventh. In Spain, the PricewaterhouseCoopers law network, established through the mergers of two law firms with PricewaterhouseCoopers, is the second largest law firm in that country, [while the number one] law firm in Spain is Arthur Andersen's legal arm, Garrigues & Andersen.¹⁰

Ernst & Young has its own captive law firm, Donahue & Associates, operating in Canada with offices in Ernst & Young's Toronto offices. In the U.S., Ernst & Young boasts more than 700 lawyers (mostly in its tax group).¹¹

In Washington, D.C., the law firm of Miller & Chevalier and PricewaterhouseCoopers are affiliated in a tax practice.¹² Most recently, Ernst & Young made headlines by hiring senior tax partners from King & Spalding and establishing their first affiliated law firm in the U.S., McKee Nelson Ernst & Young.¹³

II. THE LAWYERS' PATH

While the accountants and their consulting arms have been mounting this direct assault on the legal profession, the lawyers have been lethargic but not totally asleep. More than a decade ago, isolated law firms began to expand their practices outside of traditional legal fields and into the consultant arena. In recent years the pace has quickened, and today many law firms are offering a wide array of legal-related and/or nonlegal services to clients. In the most successful of these ventures, the consultant practice is larger and more profitable than the legal practice which spawned it.

10. Richard P. Campbell, *Multi-Disciplinary Practice in the United States*, FED. LAW., Sept. 1999, at 39, 40.

11. See Bart Massey, *Big Six Firms Rival Largest Law Firms in Number of Attorneys* (last modified Dec. 5, 1997) <<http://www.tax.org/snapshots/ss120597.htm>>.

12. See *Tax Report—A Special Summary and Forecast of Federal and State Tax Practices* (visited Mar. 9, 2000) <<http://www.aicpa.org/news/020597a.htm>>.

13. See Tom Herman, *Ernst & Young Will Finance Launch of Law Firm in Special Arrangement*, WALL ST. J., Nov. 5, 1999, at B10; *New D.C. Law Firm Launches Alliance with Ernst & Young, William S. McKee and William F. Nelson Are Founders* (visited Mar. 14, 2000) <http://biz.yahoo.com/bw/991103/dc_mckee_n_1.html>.

While no recent comprehensive survey of law firm ancillary businesses has been done,¹⁴ more than ten percent of the two hundred largest law firms in the U.S. already operate affiliated consulting firms, and the number is increasing. A review of the websites maintained by these two hundred law firms¹⁵ reveals twenty-one¹⁶ whose ancillary businesses fall broadly into the following areas of concentration:

- Accounting/Financial Services/Economic Consulting
- Government Relations/Lobbying
- Environmental Consulting
- Healthcare Consulting
- Employment/HR Consulting
- IP Consulting
- Real Estate Consulting
- Entertainment
- Insurance Consulting

While this activity has been somewhat centered in Boston and Washington, D.C., it is by no means limited to those locations. A description of the practices in twenty-one prominent firms illustrates the breadth of these nonlegal services.

- Hale & Dorr in Boston established Haldor Investment Advisors, L.P., as a subsidiary of the law firm in April 1988.¹⁷ Staffed by full-time investment counselors, the Haldor consultants structure and

14. The *National Law Journal* published a list of thirty-three large firms in 1992 which were believed to be operating ancillary businesses. See Thom Weidlich, *Ancillary Businesses Prospering Quietly*, NAT'L L.J., Dec. 21, 1992, at 1, 31-32. The accuracy of that list today could not be verified.

15. The 200 firms examined were those listed in the *American Lawyer*. See generally *The Am Law 100*, AM. LAW., July 1999; *The Second Hundred at a Glance*, AM. LAW., Aug. 1999, at 66-69.

16. Arnold & Porter in Washington, D.C. until relatively recently would have been part of this list. Arnold & Porter was a pioneer in the creation of law firm ancillary businesses, creating APCO Associates, Inc. in 1984 and operating it for seven years before spinning it off in 1991 to Grey, the sixth largest advertising agency in the world. See *Perspective* (visited Mar. 20, 2000) <<http://www.apcoassoc.com/perspective.html>>. This worldwide public affairs and strategic communications firm now has more than 300 employees. See *id.* Although Arnold & Porter continued to own and operate several other subsidiaries after this spin off, it now no longer has any ancillary businesses. See Telephone Interview with Judy Hurley, Executive Director and Chief Financial Officer of Arnold & Porter (Mar. 9, 2000) (indicating that ancillary businesses of a financial consulting firm called Secura and real estate/housing consultation organization called MPC were spun off).

17. See *Evolving from a Solid Foundation* (visited Mar. 9, 2000) <<http://www.haledorr.com/firm.html>>.

maintain "individually-tailored portfolios for estates, trusts and other fiduciary accounts" for clients of the law firm.¹⁸ As a registered investment advisor Hal-dor offers investment advisory services to non-law firm clients as well.

- Greenberg Traurig, headquartered in Miami, operates Greenberg Traurig Consulting, Inc., which provides consulting services in several specialty areas, including international market development, government relations, investment banking and entertainment (artist and professional athlete management, celebrity endorsements, broadcast syndication, etc.).¹⁹ In addition, its investment banking office in New York arranges project financing and structured financing on projects in the U.S., Europe, Latin America and Asia.²⁰
- McGuire, Woods, Battle & Boothe, LLP operates McGuire Woods Consulting LLC, which provides traditional lobbying service in both state and federal venues from its Richmond, Virginia home office.²¹ The lobbying practice has expanded into public relations and a service the firm describes as "community introductions," assisting businesses who are relocating or expanding into the southeastern United States.²² These consultants work "with other departments within McGuire Woods Consulting and the McGuire Woods law firm to address a full range of legal, public relations, and government relations needs."²³ The consulting firm also offers public affairs services and assists clients with "state and local government relations, economic development, privatization and public-private partnerships, education, and elections and voting rights."²⁴

18. *Id.*

19. See *Greenberg Traurig Consulting, Inc.* (visited Mar. 9, 2000) <<http://www.gtconsulting.com>>.

20. See *Greenberg Traurig Consulting, Inc., Investment Banking* (visited Mar. 9, 2000) <<http://www.gtconsulting.com/investment.htm>>.

21. See *McGuire Woods Services, Business Expansion Services* (visited Mar. 14, 2000) <<http://www.mwcllc.com/os/os-bes.htm>>.

22. *Id.* This is clearly a clever vehicle for connecting the law firm with new businesses arriving in the community.

23. *Id.*

24. *The McGuire Woods Team, Frank B. Atkinson* (visited Mar. 9, 2000)

- Orrick, Herrington & Sutcliffe, headquartered in San Francisco, established an ancillary public finance business in 1989 to handle tax return preparation for municipal bond issues and to advise on compliance with the federal arbitrage laws.²⁵ Twenty-five non-lawyer finance professionals serve municipal clients not only jointly with the attorneys of the law firm but also separately as a stand-alone business.²⁶ The subsidiary business has offices in Los Angeles, New York, San Francisco and Dallas.²⁷
- Howrey & Simon has established three affiliated consulting firms, all based in Washington, D.C. Capital Environmental was formed in 1994 to provide environmental consulting services via a staff of engineers, geologists, hydrologists and toxicologists.²⁸ A separate accounting firm, Capital Accounting, was formed in 1990 and is staffed by CPAs and financial consultants on both the east and west coasts who advise clients on matters such as government contract issues, antitrust matters, international trade and other issues.²⁹ The law firm's third ancillary business, Capital Economics, includes economists, financial analysts and computer specialists.³⁰ Formed in 1985, this group performs financial analysis in connection with mergers and acquisitions and a range of other transactions.³¹
- Perkins Coie operates at least two consulting affiliates in Seattle. William D. Ruckelshaus Associates, chaired by the former EPA Administrator, provides

<<http://www.mwllc.com/mwconsult/tmwt/bio-atki.htm>>.

25. See *Financial Services Group* (visited Mar. 10, 2000) <<http://www.orrick.com/about/prtcarea/areas/FSG/index.htm>>.

26. See *id.*

27. See *id.*

28. See *Capital Environmental* (visited Mar. 14, 2000) <<http://www.howrey.com/cgi-bin/frames.cgi?section=services&page=/cgi-bin/services.cgi?cmd!content^id!300&db=yes>>.

29. See *Capital Accounting Overview* (visited Mar. 14, 2000) <<http://www.howrey.com/cgi-bin/frames.cgi?section=services&page=/cgi-bin/services.cgi?cmd!content^id!300&db=yes>>.

30. See *Capital Economics* (visited Mar. 14, 2000) <<http://www.howrey.com/cgi-bin/frames.cgi?section=services&page=/cgi-bin/services.cgi?cmd!content^id!300&db=yes>>.

31. See *id.*

environmental consulting services.³² The other, The Columbia Group, was formed in 1986 and furnishes research and analysis in the area of economics and public policy and is staffed by a team of economists.³³

- Littler, Mendelson, with headquarters in San Francisco and offices in twenty-nine U.S. cities, has formed one of the largest law-firm-owned consulting businesses in the country, providing training services and related products focused on employment law issues.³⁴ The entity, Employment Law Training, Inc., is a separate subsidiary, but is chaired by a senior shareholder of the law firm.³⁵ Its profits are already approaching the levels of the law firm and are expected to exceed law firm revenues in the near future.³⁶
- Mintz, Levin, Cohn, Ferris, Glovsky & Popeo has established several subsidiary businesses in Boston. ML Strategies includes fifteen multidisciplinary professionals (nonlawyers) who manage the "public sector process" in connection with the development of airports, seaports and other major transportation structures.³⁷ They also consult in connection with large-scale public-private real estate partnerships, urban development, military base reuse and audit projects for environmental health and safety clients.³⁸ A second subsidiary, ML Capital, LLC, provides financial advice to real estate developers and healthcare businesses in connection with the raising of private capital for expansion and development.³⁹ A third subsidiary, Mintz Levin Financial Advisors,

32. See *The Seventy-Five Years Behind Perkins Coie* (last modified June 28, 1999) <<http://www.perkinscoie.com/75yearsold.htm>>.

33. See *id.*

34. See *Employment Law Training, Inc.* (visited Mar. 9, 2000) <<http://www.elt-inc.com/>>.

35. See *id.*

36. See Garry Mathiason, Chairman ELT Inc., Creating, Developing and Managing Law Firm-Owned Subsidiaries, Address at the Fulcrum Information Services, Inc. Seminar (July 11, 1999) (attended by author).

37. *ML Strategies, LLC* (visited Mar. 9, 2000) <http://www.mlstrategies.com/PCGroup/ML_Strategies.htm>.

38. See *id.*

39. See *ML Capital LLC* (visited Mar. 9, 2000) <<http://www.mlstrategies.com/PCGroup/MlCapital.htm>>.

LLC, provides "wealth management services" to high net worth individuals and families.⁴⁰ This includes developing financial plans and investment advice.

- Holland & Knight operates Holland Knight Professionals out of its Miami office. Their consulting services include strategic planning, corporate finance, organizational development, corporate relocation and real estate services.⁴¹ At least some of the services are arranged through "alliances with other highly competent professionals."⁴²
- Buchanan Ingersoll, headquartered in Pittsburgh, has offices in twelve U.S. cities and in London.⁴³ The law firm has established a wholly-owned European subsidiary, Buchanan Ingersoll Ltd. Healthcare Advisors, located in London.⁴⁴ The consulting arm provides financial advice and regulatory support and is touted as having assisted clients with \$11 billion in mergers and acquisitions in the healthcare sector during the past three years.⁴⁵
- Crowell & Moring, with its principle offices in Washington, D.C., and Irvine, California, provides consulting services in the international trade arena via its subsidiary, C & M International Ltd.⁴⁶ According to its website, the subsidiary consults on economic policy and international trade issues for a wide range of Fortune 500 companies, overseas multinationals and domestic and foreign trade associations on issues "ranging from agriculture to intellectual property rights, worker's rights to industrial policy."⁴⁷
- McKenna & Cuneo has six U.S. offices and a Brussels branch. The firm owns and operates Technologies Services Group, Inc., a multidisciplinary consulting

40. *Mintz Levin Financial Advisors, LLC, Service Offering* (visited Mar. 9, 2000) <<http://www.mlstrategies.com/PCGroup/MLFinancial-1.htm>>.

41. *See Holland & Knight LLP, Ancillary Professional Services* (visited Mar. 9, 2000) <<http://www.hklaw.com/whoweare/ancillary/index.html>>.

42. *Id.*

43. *See Buchanan Ingersoll* (visited Mar. 9, 2000) <<http://www.bipc.com>>.

44. *See Buchanan Ingersoll, Healthcare Advisors* (visited Mar. 9, 2000) <<http://www.bipc.com/uk/index.html>>.

45. *See id.*

46. *See Our Services* (visited Mar. 14, 2000) <<http://www.cmintl.com/services.htm>>.

47. *People* (visited Mar. 7, 2000) <<http://www.cmintl.com/people.htm>>.

firm which provides scientific and regulatory expertise to chemical, agri-chemical and pharmaceutical companies, focusing on risk assessment and regulatory compliance.⁴⁸ Their consulting staff includes Ph.D. chemists, toxicologists and certified environmental specialists.⁴⁹

- Choate, Hall & Stewart has two ancillary consulting firms, based in its Boston office. The Choate Group, founded in 1987, provides government relations/lobbying services.⁵⁰ Choate Investment Advisors manages clients' retirement accounts, personal investment portfolios and charitable endowments and currently employs a team of certified financial advisors.⁵¹ The law firm's website describes the interrelationships with its subsidiaries as offering "a seamless array of financial services."⁵²
- Bingham Dana operates two separate ancillary businesses in affiliation with its home office in Boston. Bingham Consulting Group was formed in January 2000.⁵³ Led by former New Hampshire Governor Stephen Merrill, the consulting firm intends to serve corporations in the energy, telecommunications and technology industries by providing project finance, business strategy, regulatory, crisis management and government relations advice.⁵⁴ The second business is a unique joint venture owned 50/50 by the law firm and Legg Mason, Inc.⁵⁵ Created in 1999, Bingham Legg Advisers currently employs seventeen nonlaw-

48. See *TSG Services* (visited Mar. 14, 2000) <<http://www.tsgusa.com/>>.

49. See *id.*

50. See *The Choate Group* (visited Mar. 10, 2000) <<http://www.choate.com/group/home.choate.html>>.

51. See *Fiduciary and Investment Services* (visited Mar. 14, 2000) <<http://www.choate.com/fiduciary/pg.infid.html>>.

52. *Id.*

53. See *Bingham Dana Adds Strategic Consulting Practice* (visited Mar. 10, 2000) <http://www.bingham.com/showdoc_content.asp?docName=documents%2FBingham+Consulting+Group%2Ehtm&docDesc=Bingham+Consulting+Group>.

54. See *id.*

55. See *Legg Mason and Bingham Dana Form Joint Venture* (visited Mar. 10, 2000) <http://www.bingham.com/showdoc_content.asp?docName=documents%2FBingham+Legg+Advisers%2Ehtm&docDesc=Bingham+Legg+Advisers>. Legg Mason is a global investment firm managing over \$90 billion in assets. See *id.*

yer investment professionals and money managers, providing the full range of investment management, with access to all Legg Mason products.⁵⁶

- Duane, Morris & Heckscher, headquartered in Philadelphia, has four separate subsidiaries supporting the law firm's nineteen U.S. offices. Westcott Financial Advisory Group provides investment management and advisory services to both individuals and corporate clients.⁵⁷ The firm's Capitol Licensing Corporation subsidiary assists banking clients with the licensing of their insurance agency subsidiaries.⁵⁸ Another subsidiary, Capitol Corporate Services, Inc., located in Dover, Delaware, provides record filing, search and certification services in the office of the Delaware Secretary of State.⁵⁹ Finally, New Jersey Corporate Services, Inc. provides similar record filing, search and certification services in the offices of the New Jersey Secretary of State and other governmental offices.⁶⁰
- Baker & Daniels in Indianapolis created its "federal relations" subsidiary, Sagamore Associates in Washington, D.C., in 1985.⁶¹ The consulting firm provides legislative drafting and lobbying services at the federal level and purports to have played a key role in obtaining more than \$300 million in federal funding for clients in the past ten years by identifying and pursuing federal grant opportunities.⁶² Sagamore also has a unique practice in Olympic-level sports, helping local organizing committees and governing bodies with planning, bid preparation, licensing assistance and related activities.⁶³

56. *See id.*

57. *See Westcott Financial Advisory Group LLC* (visited Mar. 10, 2000) <<http://www.duanemorris.com/asp/Default.asp?section=5c>>.

58. *See Duane, Morris & Hecksher LLP, Dover, DE* (visited Mar. 14, 2000) <<http://www.duanemorris.com/asp/office.asp?ID=10>>.

59. *See Duane, Morris & Hecksher LLP, Corporate Service* (visited Mar. 14, 2000) <<http://www.duanemorris.com/page5f.html>>.

60. *See Duane, Morris & Hecksher LLP, Cherry Hill, NJ* (visited Mar. 14, 2000) <<http://www.duanemorris.com/asp/office.asp?ID=2>>.

61. *See Sagamore Associates, Inc.* (visited Mar. 10, 2000) <<http://www.bakerdaniels.com/sagamore.htm>>.

62. *See id.*

63. *See id.*

- Palmer & Dodge, operates an unusual entertainment “division” within the Boston-based law firm. The Palmer & Dodge Agency serves as a literary agent on an international basis for authors, screenwriters, cultural institutions, publishers and independent film and television producers.⁶⁴ Their client list includes Robert Pinsky, Poet Laureate of the United States, and several other well-known authors.⁶⁵
- Eckert, Seamans, Cherin & Mellott, headquartered in Pittsburgh, operates a subsidiary (or ancillary) business, called Main Street Capital Holdings.⁶⁶ The law firm’s website describes the ancillary business as having been formed to compliment the firm’s legal services by arranging equity from institutional and private sources for a broad range of clients.⁶⁷
- Womble, Carlyle, based in Winston-Salem with offices in six other Southeastern U.S. cities, has dramatically increased its in-house technology staff in order to provide a full range of technology consulting services to its clients as well.⁶⁸ Full-time project managers, system engineers, programmers and software developers provide a full-range of technology support to clients, including the design and development of websites, secure e-mail systems and document imaging/scanning services.⁶⁹ They also provide medical records management services to healthcare clients, including database systems to inventory and track medical records, x-rays and pathology data.⁷⁰
- Covington & Burling, located in Washington, D.C., has a team of in-house, nonlawyer consultants with

64. See *The Palmer & Dodge Agency* (visited Mar. 10, 2000) <http://www.palmerdodge.com/specialties/individual_specialty.cfm?specID=16>.

65. See *What's New at the Agency* (visited Mar. 10, 2000) <<http://www.palmerdodge.com/about/publicationoutput.cfm?fileID=98>>.

66. See *Additional Business Services* (visited Mar. 14, 2000) <<http://www.escm.com/about/add.html>>.

67. See *id.*

68. See *Womble Carlyle, Client Plus Technology* (visited Mar. 10, 2000) <<http://www.wcsr.com/pages/frames/clientplus.htm>>.

69. See *id.*

70. See *Womble Carlyle, Medical Records Management* (visited Mar. 10, 2000) <<http://www.wcsr.com/pages/frames/medrecords.htm>>.

experience in insurance coverage issues in the U.S. and London markets.⁷¹

- Goldstein & Manello, P.C., which recently merged with Schnader, Harrison, Segal & Lewis (operating in Boston under the name of Schnader, Harrison, Goldstein & Manella), operated a professional sports agency until very recently.⁷² The wholly-owned subsidiary, Interpro Sports and Entertainment, Inc., represented more than twenty NFL players, as well as several baseball and basketball players.⁷³ The subsidiary was apparently closed down prior to the merger.

With more than 10% of the nation's largest firms openly marketing ancillary services on their websites, one can reasonably assume that an even greater percentage of firms are actually offering some form of extra-curricular service to clients. Here in Minnesota, at least four Twin Cities-based firms have announced ancillary business services in the past twelve months.⁷⁴

This convergence of the accountants and lawyers will continue regardless of the outcome of the American Bar Association's (ABA) current debate over MDPs. The next step, when it finally occurs, will undoubtedly be some version of what the ABA's Commission on Multidisciplinary Practice calls the "fully integrated model."⁷⁵ Without diminishing the importance of that eventual decision, the foregoing examples of what both professions are already doing leave little doubt that the accounting and legal professions are already moving toward total

71. See Covington & Burling, *In-House Consultants & Resources* (visited Mar. 10, 2000) <<http://www.cov.com/practice/insurance/34.shtml>>.

72. See Telephone Interview with Jeffrey L. Musman, former Managing Partner at Goldstein & Manella, now Schrader, Harrison, Goldstein & Manella (Apr. 6, 2000).

73. See *id.*

74. Halleland, Lewis, Nilan, Sipkins & Johnson has operated a separate Halleland Health Consulting business since 1998, advising clients on policy and healthcare product design. See *Health Care & Insurance Law* (visited Mar. 14, 2000) <<http://www.hl原因.com/healthcare.htm>>. Fredrikson & Byron established a healthcare consulting service in late 1999. See *Fredrikson & Byron Launches New Health Care Consulting Services* (visited Mar. 10, 2000) <<http://www.fredlaw.com/whatsnew/pressreleases/pr111699.html>>. Moss & Barnett offers financial advisory services and Mackel Crounse & Moore has established MCM Consulting, which provides HR consulting services. See Marketing Materials (on file with author).

75. See *infra* notes 136-40 and accompanying text.

convergence of their scope of services. The accountants are not doing litigation, and the lawyers are not doing audits, but nearly everything else is fair game in both camps.

III. HOW IMPORTANT IS THE ISSUE?

Until very recently, the ABA was surprisingly silent on this subject. The ABA's 1982 Kutak Commission attempted to open the door by proposing a model rule that would have permitted lawyers and nonlawyers to practice together in a single firm, provided that all participating lawyers honored the professional responsibilities under the rules.⁷⁶ However, the ABA House of Delegates rejected that proposal in 1983 and seemed to go to sleep on the subject for fifteen years. It was during that period, of course, that the major accounting firms began to acquire lawyers and law firms in Europe and around the world. As the media picked up on these developments, the lights began to come on at the ABA and within the legal profession.

In early 1998, then ABA President Jerome Shestack appointed a "Working Group on Accountants and the Legal Profession," which began addressing MDP issues.⁷⁷ The first article in the *ABA Journal* to address the subject appeared in February of that year.⁷⁸ In August 1998, incoming ABA President Phillip Andersen appointed the current Commission on Multidisciplinary Practice (hereinafter Commission).⁷⁹

Since that time, much has been written on the subject of MDPs.⁸⁰ The Commission met throughout late 1998 and early

76. See Anna Marie Kukec, *A Bit of History—MDP Roots Extend to 1980s*, B. LEADER, Summer 1999, at 14, 14.

77. John Gibéaut, *Squeeze Play*, A.B.A. J., Feb. 1998, at 45, 45.

78. See *id.* at 42.

79. See Kukec, *supra* note 76, at 14.

80. See generally Richard P. Campbell, *Multi-Disciplinary Practice in the United States*, FED. LAW., Sept. 1999, at 39; Jill Schachner Chanen, *MDP: The View From Main Street*, A.B.A. J., Dec. 1999, at 76; Lawrence J. Fox, *Rethinking Lawyer Professional Regulation: The Argument Against Change*, EXPERIENCE, Summer 1999, at 5; Geoffrey C. Hazard, Jr., *MDPs: No Real Revolution*, NAT'L L.J., Jan. 17, 2000, at A19; M. Peter Moser, *Rethinking Lawyer Professional Regulation: The Argument for Change*, EXPERIENCE, Summer 1999, at 4; Del O'Roark, *MDP: Multidisciplinary Practice or Mass Destruction of the Profession?*, KY. B. ASS'N BENCH & B., Sept. 1999, at 37; Robert Pack, *Lawyers, Nonlawyers, and the Future of the Practice of Law*, WASH. LAW., Sept.-Oct. 1999, at 24; William G. Paul, *To MDP or Not to MDP*, A.B.A. J., Dec. 1999, at 6; *Roundtable: The Future of the Multidisciplinary Practice*, LONDON CALLING: SPECIAL ADVERTISING SUPPLEMENT TO AM. LAW., Nov. 1999, at 15.

1999 and received testimony from fifty-six witnesses and written submissions from others.⁸¹ Many state bar associations are now engaged in their own fact gathering and analysis. For example, the Minnesota Bar Association's MDP Task Force will report its findings and recommendations at the Association's June 2000 convention.⁸²

A. A THREAT TO OUR CORE VALUES?

In this relatively short period of time, a wide range of views have developed within the legal profession, including noticeable differences as to the importance of the issue. The current ABA President, William G. Paul, has described it as "an issue of profound significance to our profession and to the public we serve."⁸³ He suggests that the allowance of MDPs would impact "our treasured core values," including "[l]awyer independence, avoidance of conflicts of interest, zealous representation [of clients] and the attorney/client privilege."⁸⁴ Others have characterized the issue as being as "important as anything members of the legal profession will consider in the next 20 years and certainly as important as anything the American Bar Association has considered in the past 20 years."⁸⁵ The Pennsylvania Bar Association describes it as perhaps "the most important issue to ever face our profession."⁸⁶

Lawrence Fox, a partner at the Philadelphia law firm Drinker, Biddle & Reath, is an articulate opponent of MDPs who views the threat to the profession as profound indeed. Fox entitled his presentation to the Commission: "You've Got the Soul of the Profession in Your Hands."⁸⁷ Fox has stated: "I did not think I exaggerated when I viewed my speech as the most

81. See REPORTER'S NOTES, *supra* note 1. Witnesses continue to appear before the Commission following release of its Report in July of 1999. These additional testimonies and written remarks are available at the Commission's website. See *Commission on Multidisciplinary Practice* (visited Apr. 4, 2000) <<http://www.abanet.org/cpr/multiwm.html>>.

82. See *MSBA Weighs ABA's Report on Multidisciplinary Practice* (last modified Jan. 7, 2000) <<http://www2.mnbar.org/mdp/mdp.htm>>.

83. Paul, *supra* note 80, at 6.

84. *Id.*

85. *Id.* at 25.

86. *Id.*

87. Hearings Before the Commission on Multidisciplinary Practice (Feb. 4, 1999) (written remarks of Lawrence J. Fox, Drinker, Biddle & Reath LLP), available at <<http://www.abanet.org/cpr/fox1.html>>.

important I've ever delivered."⁸⁸ In Fox's view, the issue is nothing less than the very independence of the profession.⁸⁹ At least one thoughtful law professor here in Minnesota shares this view, describing the issue as "the most important question to face the profession" in his lifetime.⁹⁰ Others across the country and around the world seem to agree. The Bar of England and Wales believes MDPs would bring a fundamentally unacceptable change to the profession and would threaten its fundamental independence.⁹¹ In his presentation to the Commission, the Chair of the British Bar stated that his colleagues had considered and unequivocally rejected MDPs.⁹²

The Canadian Bar has a similar view. In September of 1998, a special working group on multidisciplinary partnerships appointed by the Law Society of Upper Canada issued its report opposing full-service MDPs in Canada, even if the MDP is "in the effective control of lawyers."⁹³ The working group proposed a model which would allow partnership between lawyers and nonlawyers only where the partnership offers legal services exclusively and is effectively controlled by lawyers.⁹⁴

88. Lawrence J. Fox, *You've Got the Soul of the Profession in Your Hands*, 3 PROF. RESP. NEWS No. 2 (The Federalist Society for Law and Public Policy Studies, Washington, D.C.), Summer 1999, at 1, 1.

89. See Fox, *supra* note 80, at 8.

90. Neil W. Hamilton, *A Look at the Issue of Multidisciplinary Practice*, MINN. LAW., Oct. 11, 1999, at 2, 2. In a 1999 e-mail to the Minnesota State Bar Association, Professor Hamilton enlarged upon this thought saying:

I urge you to make the decision regarding MDP not on the basis of what "customers" want. Make it on the basis of how we can preserve one [of] the great learned professions that is committed (albeit imperfectly) to serving justice. If we lose some business to accountants, perhaps this is best. The question is not protecting our base of business, the question is how to build a profession that serves justice and realizes that it must restrain self-interest to some degree in doing so.

E-mail from Neil Hamilton, Professor, William Mitchell College of Law, to the Minnesota State Bar Association, forwarded to author (Sept. 20, 1999) (on file with author) [hereinafter Hamilton E-mail].

91. See Hearings Before the Commission on Multidisciplinary Practice (Aug. 8, 1999) (paper supporting the oral submissions by Daniel Brennan Q.C., Chairman of the General Counsel of the Bar of England and Wales) (on file with author) [hereinafter Brennan Paper]. For a summary of Daniel Brennan's oral comments, see Hearings Before the Commission on Multidisciplinary Practice (Feb. 4, 1999) (testimony of Daniel Brennan Q.C., Chairman of the General Counsel of the Bar of England and Wales), available at <<http://www.abanet.org/cpr/brennan.html>>.

92. See Brennan Paper, *supra* note 91 (on file with author).

93. Working Group on Multi-Discipline Partnerships, at 9-10 (visited Mar. 22, 2000) <<http://www.lsuc.on.ca/services/MDPOct98.pdf>>.

94. See *id.* at 10.

However, even as the members of the Law Society of Upper Canada were rejecting full-service MDPs, they acknowledged the potential value to the client of such arrangements:

A client may be able to provide information at less cost to a coordinated team of professionals including for example accountants and lawyers. A team of professionals who belong to the same firm may also be able to better produce solutions to the clients' problems by combining their areas of expertise on a continuing basis. Professionals working on a file may more efficiently divide their functions and provide more creative and comprehensive services. The efficiency gains of multidisciplinary firms can only be confirmed by a detailed empirical analysis beyond the scope of this paper. It is noteworthy, however, that a market seems to be emerging for such services, which perhaps suggests the market's recognition of the efficiency-promoting characteristics of multidisciplinary services.⁹⁵

95. *Multi-Disciplinary Practices and Partnerships: Policy Options*, at 8-9 (visited Apr. 6, 2000) <http://www.lsuc.on.ca/services/mdp_policy_options_sept1998.pdf>. The Canadian view is similar to a short-lived position adopted by the ABA in 1991 when the ABA's House of Delegates adopted Model Rule 5.7 prohibiting law firms from providing nonlegal services ancillary to the practice of law unless (1) the services were provided by law firm employees to firm clients and (2) were furnished in connection with the provision of legal services. See Dennis J. Block et al., *Model Rule of Professional Conduct 5.7: Its Origin and Interpretation*, 5 GEO. J. LEGAL ETHICS 739, 801-07 (1992).

The rule was short-lived and was repealed in 1992, with no state having adopted it. See COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, BACKGROUND PAPER ON MULTIDISCIPLINARY PRACTICE: ISSUES AND DEVELOPMENTS (1999), available at <<http://www.abanet.org/cpr/multicomreport0199.html>> [hereinafter BACKGROUND PAPER]. In its place the ABA House of Delegates adopted the current version of Rule 5.7 entitled "Responsibilities Regarding Law-Related Services:"

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7 (1994).

Five states—Pennsylvania, Maine, North Dakota, Indiana and Massachusetts—have adopted the new Rule 5.7. Pennsylvania has modified it slightly. See BACKGROUND PAPER, *supra*.

B. OR MERELY THE NEXT STEP IN THE CONVERGENCE?

At least some U.S. lawyers in private practice seem to have a less dramatic (and arguably more pragmatic) view of what is going on. If "opportunity" is the other side of most "threats," perhaps these American practitioners see opportunity here—for their clients and themselves.

In any event, not everyone thinks the sky is falling. One member of the Commission, Carolyn Lamm, has said that permitting MDPs will not change "the rules lawyers have to live by, other than the prohibition on fee-splitting with nonlawyers and a few tinkering-type things."⁹⁶ In her view, the obligation to the public for lawyers in MDPs will remain the same.⁹⁷ Paul J. Sax, current Chair of the ABA's Tax Section and senior partner in the 500 plus lawyer firm of Orrick Harrington and Sutcliff in San Francisco "supports the legalization of MDPs and [believes] they already exist . . . in fact, if not in name."⁹⁸ In Sax's view, once the bar understands "the reality of today's legal market—that thousands of lawyers are practicing law in the Big Five firms—the ABA House of Delegates and the state bar associations will begin to address it meaningfully."⁹⁹

Likewise, George Jones, a partner in Sidley & Austin's Washington, D.C. office, maintains that "those who argue that the profession will be damaged or destroyed by MDPs are . . . overreacting."¹⁰⁰ Citing as an example the debate over whether MDPs will threaten the attorney-client privilege, Jones observes that "attorneys already share privileged information with accountants, private investigators and other non-lawyers working on cases with them and that an MDP will not be much different."¹⁰¹ James Jones, the former Managing Partner of Arnold & Porter, is of the same view:

A careful examination of [the MDP] issues and the ethical precepts that underlie them will lead to the conclusion . . . that nothing in these affiliations per se causes unique or insurmountable ethical problems. Moreover, far from undercutting the professionalism of

96. Pack, *supra* note 80, at 29.

97. *See id.*

98. *E&Y First of Big Five in U.S. Market to Ally with Law Firm*, J. ACCT., Jan. 2000, at 11, 11.

99. *Id.*

100. Pack, *supra* note 80, at 30.

101. *Id.*

lawyers, these affiliations actually support and enhance the efficient and cost-effective delivery of legal services.¹⁰²

Geoffrey Hazard, Jr., a professor at the University of Pennsylvania Law School and a member of the Commission has long been a leading voice within the legal profession on issues of ethics and professional responsibility. Professor Hazard predicts the debates over MDPs will come to nothing.¹⁰³ In his view, MDPs are already "entirely permissible under present rules, with certain adjustments."¹⁰⁴ As he notes, "[a]ll kinds of professionals work for lawyers, and lawyers work for all kinds of people, including professionals . . . so the MDP dilemma really has nothing to do with 'one-stop shopping.'"¹⁰⁵ As he puts it, the only real issue for lawyers is the competitive threat of the big accounting firms. His article in this Symposium issue of the *Minnesota Law Review* discounts the arguments of those who view MDPs as the death-knell of lawyer independence.¹⁰⁶ Another member of the Commission, Steven Craig Nelson, of the law firm of Dorsey & Whitney, also seems to accept the inevitability of MDPs, noting that "[i]t isn't a matter of whether to do something about MDPs, but what to do about them."¹⁰⁷ Other authors in this Symposium are generally of that view.¹⁰⁸

Even this limited sampling illustrates that thoughtful observers reach very different conclusions about the seriousness of the issue—ranging from strong warnings of impending disaster to the notion that MDPs are simply the next step in a progression that has been ongoing for sometime. This latter view that MDPs are the "next step" in a somewhat disordered progression over the past two decades, is the more rational view.

102. James W. Jones, *Lawyer-Nonlawyer Affiliations: Current Practices and Ethical Issues*, in ABA GUIDE TO LEGAL MARKETING 119, 145 (1995).

103. See Hazard, *supra* note 80, at A19.

104. *Id.*

105. *Id.*

106. See Geoffrey C. Hazard, Jr., *Foreword: The Future of the Profession*, 84 MINN. L. REV. 1083, 1090-92 (2000).

107. Jane F. Pribek, *Local Attorney Plans to Speak out on MDPs*, MINN. LAW., Aug. 23, 1999, at 10, 10.

108. See generally Peter C. Kostant, *Breeding Better Watchdogs: Multidisciplinary Partnerships in Corporate Legal Practice*, 84 MINN. L. REV. 1213 (2000); John H. Matheson & Edward S. Adams, *Not "If" but "How": Reflecting on the ABA Commission's Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269 (2000); Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469 (2000); Charles W. Wolfram, *The ABA and MDPs: Context, History, and Process*, 84 MINN. L. REV. 1625 (2000).

IV. MARKETPLACE PRESSURES AND THE MDP DEBATE

Both the proponents and opponents of MDPs recognize that the issue is playing out on a stage where enormous change has occurred over the past two decades and that the rate of change has accelerated dramatically in the last half dozen years. Competition in the legal marketplace is intense on all fronts. Lawyers compete with each other and with the accountants to attract and retain clients. In the recruiting arena, law firms compete not only with each other but with the investment bankers, the dot-com companies and the big accounting firms for the best law graduates each year. As a result, starting salaries for the best young law graduates are skyrocketing. Finally, law firms compete to keep valuable rain-maker partners. Perhaps most importantly, firms that do not compete well on all fronts are crashing and burning.¹⁰⁹

What is the relevance of all this to the MDP debate? Simply stated, in this highly competitive, rapidly changing environment, legal service delivery systems must change and adapt to the realities imposed by the competition and preferred by the clients. MDPs are part of that change. Ironically, the lawyers in solo practices and small firms seem to understand this better than their colleagues in the large firms.

109. See, e.g., *Defections Forcing Venerable Seattle Law Firm to Close*, NEWS TRIB. (Tacoma), Feb. 5, 1999, at B4, available in LEXIS, News Library, News Tribune File (noting that a 173-lawyer firm closed its doors on March 31, 1999); Laura Goldberg, *Houston Firm Closing its Doors*, HOUSTON CHRON., Dec. 4, 1999, available in LEXIS, News Library, Houston Chronicle File (reporting that Butler & Buntion closed its doors in December of 1999); Patrick Kennedy, *Popham Haik Taking on a New Form—Attorneys Will Reorganize as Twin Cities Office of Chicago Law Firm*, STAR-TRIB., May 17, 1997, at D1, available in 1997 WL 7566859 (discussing the end of a firm once ranked 103rd largest in country); David Phelps, *Doherty Rumble to Close Doors After 140 Years*, STAR-TRIB., June 3, 1999, at D1, available in 1999 WL 7500184 (reporting on a 90-attorney firm closing its doors); Travis E. Poling, *Old San Antonio Law Firm Breaks Up*, SAN ANTONIO EXPRESS-NEWS, May 6, 1999, at 1E, available in LEXIS, News Library, San Antonio Express-News File (reporting break up of 60-year old law firm of Lang, Ladon, Green, Coghlan & Fisher); Daniel Wise, *Final Approval for Finley Kumble Bankruptcy Plan Resolution Nearly 4 Years in Making; Judge Praises Counsel Role of Milbank Tweed*, N.Y. L.J., Dec. 10, 1991, at 1, 1 (discussing bankruptcy of a 680 lawyer firm); Ward Bower, *Is Law Firm Dissolution Really Necessary?* (visited Mar. 9, 2000) <http://www.altmanweil.com/publications/articles/body_mgt2a.htm> (noting law firm failures of Gaston & Snow of Boston, Webster & Sheffield of New York, Lord, Day of New York, Shea & Gould of New York, and Mudge Rose of New York).

The small firms' perspective was presented to the Commission by Larry Ramirez, Chair of the ABA's General Practice, Solo and Small Firm Section.¹¹⁰ Noting in his testimony that solo and small firm lawyers comprise two-thirds of the nation's lawyers, Ramirez summarized several recommendations from his section:

- That multidisciplinary practices be accepted in some form;
- That rules against fee sharing with nonlawyers be relaxed;
- That a regulatory structure be instituted to protect clients.¹¹¹

The debate is, of course, too important to be left solely to practitioners who are besieged daily by competitive pressures and the intrusion by accountants onto attorneys' turf. There may well be a tendency by those of us practicing in (and managing) major law firms to fail to fully understand or guard against the broader risk to the profession. However, the view from main street cannot be ignored. The practitioners know what the clients prefer (and demand). It is as naïve to assume that these marketplace realities can be ignored as it would be to totally abdicate to the marketplace. There must be thoughtful dialogue that takes into account the lawyer's need to provide the full range of services that clients want. As is often true in these great debates, the solution lies somewhere in the middle.

V. AVOIDING THE PERILS SUFFERED BY PHYSICIANS AND "CAPTIVE" INSURANCE DEFENSE LAWYERS

It is understandable that at least some of the academics who oppose MDPs have not focused on, or have chosen to disregard, market pressures in their efforts to preserve one of the great learned professions and have urged that we ignore client preferences or the competitive threat posed by the accountants.¹¹² In the summer of 1999, Lawrence Fox argued that

110. See Hearings Before the Commission on Multidisciplinary Practice (Feb. 6, 1999) (testimony of Larry Ramirez, Chair of the General Practice, Solo and Small Firm Section), available at <<http://www.abanet.org/cpr/ramirez1.html>>.

111. See *id.*

112. See, e.g., Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV. 1097, 1101, 1108-11 (2000); Hamilton, *supra*

taking the next step, i.e., allowing accountants and other non-lawyers to share in the ownership and control of law practices would threaten the very independence of our profession: "[A]s soon as the power rests with nonlawyers not trained in, not dedicated to, and not subject to discipline for our ethical principles, you will see the independence of the profession fall away."¹¹³ He labeled as "Philistines at our gates" those accountants and others who suggest that lawyers' independence will not be compromised in this new program.¹¹⁴ In support of his position, he offered two examples of lost professional independence: (1) the medical profession's relaxation of the rules which previously prohibited physicians from working for non-physicians and (2) "captive" lawyers hired by insurance companies to represent insureds.¹¹⁵ Fox described the physicians' current condition as follows:

[W]here are the physicians today? Can you find a happy doc? Of course not, and why would one expect to? Having sold out to Mammon, they now find themselves acting as supplicants in endless phone calls with high school clerks who decide for the physicians which medicine to prescribe, which procedures to undertake and how soon their patients are thrown out of their hospital beds.¹¹⁶

His characterization of the defense lawyers in "captive" law firms who work exclusively for a particular insurance company was similar:

Nowhere to date have we seen more interference with independent professional judgment than what has occurred as these economic behemoths have retained counsel, on a take it or leave it basis, to undertake these important engagements. Here it is not billing clerks but claims adjusters working on compensation incentives that have nothing to do with effective representation and everything to do with minimizing costs on a macro basis who tell lawyers if and when they can take depositions, whether they can engage experts, what motions to file and whether they can bill for in-house conferences.¹¹⁷

note 90, at 2 ("Our transcendental purpose as a profession is justice. . . . Our fiduciary duties to our clients and to the system of justice, and the moral meaning and function of our profession far transcend the current emphasis on 'what the customers want.'"); Hamilton E-mail, *supra* note 90 ("If we lose some business to accountants, perhaps this is best. The question is not protecting our base of business, the question is how to build a profession that serves justice and realizes that it must restrain self-interest to some degree in doing so.")

113. Fox, *supra* note 80, at 8.

114. *Id.*

115. *See id.*

116. *Id.*

117. *Id.*

Fox's reliance on those two examples seems inapt to the MDP debate. In both instances, the outside "controllers" he describes are economically motivated to restrict service in order to minimize professional fees and maximize profitability. The HMO, left unchecked, would arguably charge even higher premiums to patients with even more restricted services, resulting in higher profits for the HMO. Likewise, the liability insurance carrier presumably shapes the defense strategy on macro economic considerations (i.e., cost considerations based on thousands of cases rather than any one case in particular), while ignoring all of the other factors which are equally or more important to the particular insured client.

It does not follow, however, that the accounting and consulting firms who aspire to offer legal services in MDPs would behave like the HMOs or the liability insurance carriers. To the contrary, they would seem to be economically motivated to provide more, not fewer, services. Left to their entrepreneurial and profit-driven worst, the nonlawyer owners of MDPs would presumably prefer to have their lawyer employees providing more service at higher rates rather than the opposite. The point, of course, is not that more services at higher rates are good for clients, but rather that the MDP model would not lead naturally to less independence or more restrictive services to clients as Fox suggests.

MDP opponents might argue (1) that the accounting/consultancy pricing model frequently includes lump sum pricing for service bundles that have become "products" or "commodities," (2) that legal services dispensed by MDPs controlled by accountant/consultants will likewise become commodities or products and (3) that once the client has agreed to a fixed price for the product, the MDP's management will be motivated to provide less service for the fixed price in order to thereby realize a larger profit. Indeed, the large accounting and consulting firms have been enormously successful in developing and marketing service packages that are priced and delivered as products.¹¹⁸ Logically, then, if lawyers were now thrust into this environment as part of an MDP controlled by the accountants, the legal "product" would be subject to pressures to provide less service in order to realize higher profits.

118. A review of the marketing literature of the Big Five accounting/consulting firms reveals descriptions of hundreds of service packages which are typically provided to clients on a lump sum basis, not an hourly rate.

The argument, however, is flawed in two respects. First, there is no information, anecdotal or statistical, to suggest that the accountants or consultants have priced their current products in ways which motivates them to do less, rather than more, for their clients. To the contrary, the accountants usually charge as much (or more) as lawyers do for similar services and have been far more creative than lawyers at inventing new products and services for clients to purchase.

Second, lawyers are already engaging in non-hourly pricing models of their own, including fixed fees and contingent fees.¹¹⁹ There would be no greater economic pressure in an accountant-controlled MDP than already exists in the current lawyer-controlled environment with identical pricing structures. Indeed, if this is a bad pricing model which impairs lawyers' independence from the client's perspective, it is equally bad in lawyer-controlled firms. The issue is not MDPs.

For all these reasons, the suggestion that MDPs will take us down the same road as the physicians and insurance defense lawyers is too simplistic. None of this is meant to suggest, however, that the legal profession should be indifferent to the potential imposition of controls upon us by nonlawyers in an MDP environment. In any new MDP arrangement, lawyers must be allowed to decide what they can and should do for their clients. Nevertheless, to suggest that a lawyer working for an international accounting or consulting firm with several thousand professionals on staff will be inherently less independent than an attorney working in an international law firm with several thousand lawyers is, at the very least, greatly overstated.¹²⁰

119. The legal management literature is filled with information about a multitude of fee arrangements, including fixed fees, currently being utilized by perfectly independent lawyers and law firms. See generally, e.g., Peter D. Zeughauser, *The Use of Alternative Fee Arrangements to Achieve Smart Results and Improve Outside Counsel Relationships*, in 8TH ANNUAL INSTITUTE ON CORPORATE LAW DEPARTMENT MANAGEMENT: HOW TO MANAGE CHANGE 49 (1994); Richard C. Reed, *The Fixed Fee: The Favorite Alternative Billing Method*, L. PRAC. MGMT., May/June 1996, at 22; S J Berwin's *New Fixed Fees Old Hat, Say Lawyers*, INT'L COM. LITIG., May 1999, at 4; Peter D. Zeughauser, *Using Alternative Fee Arrangements to Improve Client Relationships, Law Firm Profitability and Results*, L. PRAC. MGMT., Apr. 1997, at 22.

120. According to the *American Lawyer*, the five largest law firms in the United States have lawyer populations ranging from 2,487 to 955. See Laura Pearlman, *The Global 50*, AM. LAW., Nov. 1999, at 89, 92-93. The five are Baker & McKenzie (2,487 lawyers) based in Chicago; Skadden, Arps, Slate, Meagher & Flom (1,347) based in New York; Jones, Day, Reavis & Pogue

VI. THE ABA COMMISSION'S FIVE MODELS—STEPS TOWARD CONVERGENCE

The Commission developed five practice models, representing a range of integration between the lawyers and non-lawyers in a professional practice. The first three are not MDPs, the other two are. A brief summary of each follows:

Model 1: The Cooperative Model

This model reflects the current reality in the United States and is not an MDP as defined by the Commission.¹²¹ The lawyers either employ nonlawyer professionals directly to assist them in advising clients or work cooperatively with the non-lawyer professionals who are independent contractors retained by the lawyers or by the client.¹²² In this arrangement, the law firm partners take steps to insure that the nonlawyer is compatible with the professional obligations of the lawyer—the lawyer is in charge and is personally responsible for insuring that all members of the team play by the rules.¹²³

(1,239) based in Cleveland; Morgan, Lewis & Bockius (962) based in Philadelphia; and Latham & Watkins (955) based in Los Angeles. *See id.* On a global scale, the numbers increase to 2,487 to 1,237. *See id.* The five largest firms in the world are: Baker & McKenzie (2,487); Clifford Chance (1,958) based in London; Skadden, Arps, Slate, Meagher & Flom (1,347); Jones, Day, Reavis & Pogue (1,239); and Eversheds (1,237) based in London. *See id.*

121. *See* REPORTER'S NOTES, *supra* note 1.

122. *See id.*

123. *See id.* This does not mean that the clients' communications with nonlawyer professionals are cloaked in the attorney-client privilege, except in those cases where a confidence is necessarily disclosed to the nonlawyer for purposes of allowing him/her to assist the lawyer in connection with a privileged matter. *See, e.g., In re Bieter Co.*, 16 F.3d 929, 938-40 (8th Cir. 1994) (extending privilege to consultants); *Attorney Gen. v. Covington & Burling*, 430 F. Supp. 1117, 1121 (D.D.C. 1977) (finding attorney-client privilege covered disclosures made by client to agents of attorney when a confidence is involved). Nor does it mean that the nonlawyer working as an independent contractor (whether retained by the lawyer or by the client) must conform to the lawyer's conflict of interest rules. *See* COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, REPORT (1999), available at <<http://www.abanet.org/mdpreport.html>> (noting difference between lawyer's obligation to clients and ethical rules of other professions); Fox, *supra* note 80, at 9 (comparing attorney conflict of interest rules with those of the Big Five accounting firms). It does mean, however, that the lawyer must insure that the nonlawyer's activities do not cause the lawyer to violate those rules.

Model 2: The Command-And-Control Model

This model takes the next step and allows the lawyer and nonlawyer to form a partnership and to share legal fees, provided: (1) the organization has as its sole purpose the provision of legal services; (2) the nonlawyer agrees to abide by the lawyers' rules of professional conduct; (3) the lawyers with managerial authority are responsible for the nonlawyers under Rule 5.1¹²⁴ to the same extent as if they were lawyers; and (4) all of these conditions are set forth in writing.¹²⁵ This model is based on an amended version of Rule 5.4 adopted in the District of Columbia. Under that amended rule, nonlawyer professionals must be active participants in the enterprise and not passive investors.¹²⁶ As the comments to that rule note:

[Amended Rule 5.4] does not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes. It thus does not permit a corporation, an investment banking firm, an investor or any other person or entity to entitle itself to all or any portion of the income or profits of a law firm or other similar organization. Since such an investor would not be an individual performing services within the law firm or other organization.¹²⁷

As noted, the Commission does not deem Model 2 to be an MDP within its definition.¹²⁸

Model 3: The Law-Related Services/Ancillary Business Model

In this model, a law firm operates an ancillary business that provides professional services to clients.¹²⁹ The Commission says this model is likewise not an MDP within its definition. It is a permitted business enterprise under Model Rule 5.7 if it is operated within certain parameters. Specifically, the

124. See generally MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1983). Rule 5.1 provides that a partner in a law firm shall make reasonable efforts to ensure that the firm has measures in place to assure the conformity of all lawyers to the Model Rules. See *id.* It further provides that a lawyer with supervisory authority must make reasonable efforts to ensure the lawyers under his supervision conform to the Model Rules. See *id.* In addition, a lawyer is responsible for another lawyer's rule violation if the lawyer orders or ratifies the conduct, or if a partner or lawyer with supervisory authority knows of conduct at a time when its consequences can be avoided or mitigated, yet the attorney fails to take remedial steps. See *id.*

125. See REPORTER'S NOTES, *supra* note 1.

126. See D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1990).

127. *Id.* Rule 5.4 cmt. 8.

128. See REPORTER'S NOTES, *supra* note 1.

129. See *id.*

ancillary business must inform clients that the business is distinct from the law firm and does not offer legal services.¹³⁰ Lawyers and nonlawyer professionals may be partners in the ancillary business and share fees and jointly make management decisions in that business, but the nonlawyer professionals cannot be partners in the law firm.¹³¹

Model 4: The Contract Model

This model contemplates that a nonlegal professional service firm would contract with an independent law firm.¹³² Currently in wide use by the Big Five accounting firms outside the United States to deliver legal services to the accounting firms' clients, this model typically includes the following:

- The law firm agrees to identify its affiliation with the professional services firm on its letterhead and business cards and in its advertising.
- The law firm and professional services firm agree to refer clients to each other on a non-exclusive basis.
- The law firm agrees to purchase goods and services from the professional services firm (such as staff management or communications technology) and also agrees to lease its office space and equipment from the professional services firm.¹³³

In this model, the law firm remains "independent" in the sense that is controlled and managed by lawyers and will also accept as clients businesses or individuals who have no connection with the professional services firm. The model, of course, could be an "exclusive" arrangement whereby neither of the parties has similar arrangements with any other firm or it might simply be part of a larger network.¹³⁴ The Commission considers Model 4 to be a true multidisciplinary practice in which there is "direct or indirect sharing of profit as part of the arrangement."¹³⁵

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.*

135. *Id.*

Model 5: The Fully Integrated Model

This model involves the full integration of the law firm and the professional service firm.¹³⁶ Indeed, in this model "there is no free-standing law firm."¹³⁷ There is only a single professional services firm which includes "organizational units such as accounting, business consulting and legal services."¹³⁸ As the Commission noted, this is the "classic" multidisciplinary practice.¹³⁹ It advertises itself as providing a seamless web of services, including legal services and would include clients who (1) seek only legal services, (2) seek only nonlegal services or (3) seek both types of services.¹⁴⁰

VII. THE ABA COMMISSION'S RECOMMENDATIONS

The Commission's August 1999 Final Report included recommendations for a relatively straightforward and pragmatic approach to the MDP issue.¹⁴¹ In brief, the Commission recommended that:

- The legal profession adopt new rules regarding MDPs that would allow lawyers to share legal fees with nonlawyers and to deliver services via an MDP which includes both lawyers and nonlawyers as owners and which delivers both legal and nonlegal services.¹⁴²
- Nonlawyers in such an MDP would be prohibited from delivering legal services.¹⁴³
- All lawyers in the MDP who are delivering legal services would be bound by the traditional rules of professional conduct, even if it required conduct contrary to what a nonlawyer supervisor in the organization might direct or require.¹⁴⁴

136. *See id.*

137. *Id.*

138. *Id.*

139. *See id.*

140. *See id.*

141. *See* COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, RECOMMENDATION (1999), available at <<http://www.abanet.org/cpr/mdprecommendation.html>>.

142. *See id.* Recommendations 2, 3.

143. *See id.* Recommendation 4.

144. *See id.* Recommendations 5, 6.

- All rules of professional conduct which currently apply to law firms would also apply to these new MDPs.¹⁴⁵
- The traditional conflict of interest rules would apply broadly to all clients of the MDP, whether they were seeking legal services or nonlegal services.¹⁴⁶
- The clients of these MDPs would be informed as to the differing rules of confidentiality that apply regarding communications with the lawyers in the MDP vis-à-vis the nonlawyers in the same firm.¹⁴⁷
- If the MDP were not *controlled* by lawyers, then the MDP would be required to submit itself (by written undertaking signed by the CEO) to the jurisdiction of the highest court with the authority to regulate the legal profession in each state where the MDP provides legal services.¹⁴⁸

It is perhaps indicative of the middle ground selected by the Commission that the reactions from those at both ends of the debate spectrum have been critical.¹⁴⁹ The ABA House of

145. *See id.* Recommendation 7.

146. *See id.* Recommendation 8.

147. *See id.* Recommendation 9.

148. *See id.* Recommendation 14.

149. The consumer groups that have supported the fully integrated MDP option believe the Commission's approach is far too restrictive. *See, e.g.,* Hearings Before the Commission on Multidisciplinary Practice (Mar. 11, 1999) (testimony of Laura H. Weber, President and Director, Consumers Alliance of the Southeast), *available at* <<http://www.abanet.org/cpr/weber1.html>>. Ms. Weber says the Commission's recommendations looked good at first, but are less satisfactory upon closer inspection. *See* Laura H. Weber, *ABA Recommendation Fails to Meet Consumer Needs*, B. LEADER, Summer 1999, at 21, 21. She is troubled by the "new regulatory burden" that would be placed upon MDPs which are not controlled by lawyers and which she believes will prevent the formation of such MDPs. *Id.* She noted that:

Commission members were extraordinarily receptive to consumer input during their deliberations. But the final product fails to meet consumer needs. It is my hope that the Commission will revisit the issue to ensure that true multidisciplinary practices are available to accomplish that goal.

Id.

Fox, on the other hand, read the Report "with a combination of delight, disappointment and dismay." Letter from Lawrence J. Fox to the Commission on Multidisciplinary Practice (July 8, 1999), *available at* <<http://www.abanet.org/cpr/fox4.html>>. He congratulated the Commission for its endorsement of the profession's core values and its unwillingness to compromise the historic standards governing confidentiality, conflicts of interest and other ethical proscriptions. *See id.* He expressed disappointment, how-

Delegates, apparently believing the Commission had gone too far too fast, placed the entire matter on hold "unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's traditions of loyalty to clients."¹⁵⁰

In February 2000, the Commission responded by issuing a "PostScript" to the ABA's February 2000 midyear meeting.¹⁵¹ Recognizing that many commentators had expressed concern about the Commission's June 1999 recommendations, particularly the increased likelihood of loss of independence when a nonlawyer supervises a lawyer, the Commission announced it was considering some revisions of its recommendations.¹⁵² Specifically, as this issue of the *Minnesota Law Review* goes to press, the Commission has invited comment on the following possible modifications:

- Model 2, The Command-and-Control Model, would be modified to allow the nonlawyers to participate as partners in the partnership and to share fees with the lawyers, *provided* the partnership had as its *principle* purpose the provision of legal services to its clients.¹⁵³ If adopted, this would really be a variation of the arrangement currently permitted in the District of Columbia pursuant to Rule 5.4 of the D.C. Rules of Professional Conduct.¹⁵⁴ Under the D.C. Rule, the partnership's *sole* purpose must be the provision of legal services.¹⁵⁵ The Commission has said

ever, at the Commission's failure to condemn the "systematic civil disobedience in which the Big 5 accounting firms have engaged." *Id.* He castigated the Commission for compromising professional independence and labeled the proposed new framework for MDPs as being "elaborate and unworkable." *Id.* In particular, he totally rejected the Commission-approved paradigm in which lawyers could be employed in MDPs in which they have no ownership or control. *See id.* Finally, he condemned the Commission for its analogy to the lawyers in in-house legal positions, pointing out that they have a single client and no pressure to compromise their loyalty. *See id.*

150. Florida Bar Recommendation Before the House of Delegates, at the Am. Bar. Ass'n Annual Meeting in Atlanta (Aug. 10 1999), *available at* <<http://www.abanet.org/cpr/flbarrec.html>>.

151. *See* POSTSCRIPT, *supra* note 2.

152. *See id.*

153. *See id.*

154. *See id.* *See generally* D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1990).

155. *See* D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1990).

that, if it recommends these changes to its Model 2, it may also require that the MDP be controlled by a majority or super-majority (67% or 75%) of lawyer owners.¹⁵⁶

- Model 5, The Fully Integrated Model, would be changed to provide (a) that the lawyers in such a fully integrated MDP would be organized in an entirely separate unit from the other practices of the MDP and (b) that the lawyers would be required to report to a lawyer-supervisor, who would be responsible for fixing their compensation, terms of employment, allocation of support staffing and issues of professional responsibility.¹⁵⁷
- The Commission will apparently revise its recommendations to be more clear that a "MDP should not be allowed to deliver legal and auditing services to the same client."¹⁵⁸
- The Commission will probably withdraw its simplistic definition of "the practice of law" and has acknowledged that "such a definition may best be left to each individual jurisdiction."¹⁵⁹

Even while the Commission's actions on these possible modifications were pending, the Commission released an additional "draft of a possible Recommendation to the ABA House of Delegates."¹⁶⁰ The Recommendation, which will be debated at the July 2000 Annual Meeting of the ABA, reads as follows:

RESOLVED, that the American Bar Association amend the Model Rules of Professional Conduct consistent with the following principals:

1. Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services. "Nonlawyer professionals" means members of recognized professions or other disciplines that are governed by ethical standards.

156. See POSTSCRIPT, *supra* note 2.

157. See *id.*

158. *Id.*

159. *Id.*

160. COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, DRAFT RECOMMENDATION (Mar. 2000), available at <<http://www.abanet.org/cpr/marchrec.html>>.

2. This Recommendation must be implemented in a manner that protects the public and preserves the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest and *pro bono publico* obligations.

3. To protect the public interest, regulatory authority should enforce existing rules and adopt such additional enforcement procedures as are needed to implement the principals identified in this Recommendation.

4. This Recommendation does not alter the prohibition on nonlawyers delivering legal services and the obligation of all lawyers to observe the Rules of Professional Conduct. Nor does it authorize passive investment in a Multidisciplinary Practice.¹⁶¹

The Commission is apparently preparing an extensive report which explains and supports these new Recommendations.¹⁶² However, that report will not be released until after this issue of the *Minnesota Law Review* goes to press. Curiously, the Recommendation does not address all of the issues raised by the Commission in its earlier PostScript.¹⁶³ For example, there is no suggestion that the lawyers in an integrated MDP would be organized in an entirely separate unit from the other consulting practices or that the lawyers would be required to report to a lawyer-supervisor responsible for fixing their compensation, terms of employment, etc. Rather, the Commission seems to have stepped away from suggesting specific structural solutions and has instead offered only more broadly-stated principals. While that may make the proposal more politically acceptable within the ABA ranks, it really provides no guidance as to how the various principals would be implemented.

VIII. THE CLIENTS' PERSPECTIVES

Unfortunately, the extensive debate on this topic over the past eighteen months has included surprisingly little about what clients are saying. As noted earlier, some of the academics who have addressed the issue tend to reject the clients' perspective as irrelevant or uninformed.¹⁶⁴ While no comprehensive survey has been undertaken to solicit client data in a

161. *Id.*

162. *See id.*

163. *See* POSTSCRIPT, *supra* note 2.

164. *See supra* note 112 and accompanying text.

meaningful way, there is, nevertheless, significant information available which bears on the subject.

A. IN-HOUSE LAWYERS IN MAJOR CORPORATIONS

Perhaps the most informed group of clients to speak thus far are themselves lawyers—the 10,000 in-house lawyers in America's corporate businesses who are members of the American Corporate Counsel Association (ACCA). On February 6, 1999, the ACCA's Board of Directors adopted the following position favoring MDPs:

The American Corporate Counsel Association supports a broader range of choice for clients to select from service providers capable of formulating comprehensive solutions which address not only the legal aspect of their problems but various other facets as well. Subject to resolving important issues of ethics and professionalism in the best interests of the client and the public, such a broader range of choice could include multidisciplinary practices wherein lawyers are affiliated with nonlawyers.¹⁶⁵

Only one such general counsel actually testified before the Commission. Steven Bennett,¹⁶⁶ the former General Counsel of Banc One, encouraged the Commission to consider rule changes which would "enlarge the ability of lawyers, with or without accountants, to deliver . . . solutions to business problems in a fashion that runs parallel to what other nonlawyer consultancies have already done."¹⁶⁷ He described the evolution of the need for multi-professional services in the banking industry as follows:

Fifteen years ago, we identified a smaller bank merger partner, arrived at a cash price, then had the lawyers do the paperwork, which was relatively straightforward. Today, the transactions require numerous multidisciplinary teams because the deals are in the billions of dollars, are usually stock for stock, have as many as seven or eight interested regulators at the state and federal levels and are accounted for as poolings of interest.¹⁶⁸

165. *Multidisciplinary Practice* (last modified Mar. 10, 2000) <<http://www.acca.com/gcadvocate/multi.html>>.

166. Bennett came out of a private law firm in Dallas, Texas, before spending 10 years as an attorney and manager for Banc One, one of the nation's 10 largest bank holding companies. See *Hearings Before the Commission on Multidisciplinary Practice* (Nov. 13, 1998) (written remarks of Steven Alan Bennett, former General Counsel of Banc One Corporation), available at <<http://www.abanet.org/cpr/bennett.html>>.

167. *Id.*

168. *Id.*

Noting that in most significant business transactions today, the legal aspect of the deal is simply one facet of a complicated mix of considerations, Bennett pointed to the blurring of lines between what lawyers and accountants each do in a merger:

In today's highly acquisitive environment, pooling of interests is often the preferred method of accounting for merger transactions. Because the questions that arise in this area are complex and reside at the intersection of securities law, merger law, the rules of the Securities and Exchange Commission and the pronouncements of the Financial Accounting Standards Board, corporations generally do not approach pooling of interests issues with lawyers alone. Rather, a multi-disciplinary team in which accountants might outnumber lawyers, deals with the issues. When such teams meet, whether the non-lawyer accountants or the non-accountant lawyers are practicing the other's profession at any given moment can be impossible to discern.¹⁶⁹

Urging the Commission to recognize the importance of one-stop shopping, Bennett said the present rules are simply out of date:

American businesses, to an ever greater extent are seeking comprehensive solutions from their professional advisors. . . . American accounting firms have seized upon this reality to create broadbased consultancies that span a variety of areas. In doing so, they have come much closer to offering comprehensive solutions to their clients than law firms. . . . The current rules, rather than permitting law firms to become the purveyors of comprehensive, multi-disciplinary solutions to the great business problems of our age, not only inhibit the accounting firms from achieving this end, they even more thoroughly restrict law firms from doing so. . . . As a result, when contrasted with the dazzling array of services and convenient delivery of the accounting firms, law firms have . . . product offerings that are inconvenient to obtain and difficult to integrate.¹⁷⁰

B. CONSUMER GROUPS

It is not just the large sophisticated clients who are urging that MDPs be permitted—several consumer groups offered testimony before the Commission and uniformly supported the move to MDPs. Laura Weber, President and Executive Director of the Consumer's Alliance of the Southeast¹⁷¹ offered this

169. *Id.*

170. *Id.*

171. The Alliance is a coalition of consumer groups, community leaders and small-business owners active in 12 southern states and taking public positions in support of consumers on a variety of issues. See Hearings Before the Commission on Multidisciplinary Practice (Mar. 11, 1999) (written remarks of Laura H. Weber, President and Executive Director, Consumers Alliance of the Southeast), available at <<http://www.abanet.org/cor/weber1.html>>.

perspective on why consumers have not already been demanding MDPs:

[T]he average consumer isn't aware that there is the possibility of getting legal services any way other than the current way—walking into a law firm or calling a lawyer and asking for help. Most consumers, in other words, aren't aware of what they are missing. But if you lift the restrictions barring multidisciplinary practices, I think you'll find just how great that hidden demand is Most of the people I speak with have never thought about the possibility of having different kinds of professionals working together with a lawyer on their behalf. But it is clearly an idea that appeals to most people [I]f you could visit one office and the professionals there could offer a complete package of services to buy a home, wouldn't many people want to take advantage of it?¹⁷²

Ms. Weber imagined a much better future where lawyers, accountants, financial planners, tax advisors, experts in information technology resources, graphic designers and website designers would all be together in one professional service entity helping the small-business entrepreneur to launch a new business.¹⁷³ She noted:

This is not a debate about lawyers and where they can or cannot practice their trade. This is, or at least it should be, a debate about the best way to provide services to consumers. And from that perspective, it is clear that integrated services—multi-disciplinary practices—are the wave of the future. Consumers want more choices. . . . Give consumers more choices by permitting lawyers to work side by side with non-lawyers who have different kinds of expertise. The end result, I believe, will be a legal system that is strengthened, not weakened; more consumer-friendly, not less.¹⁷⁴

Wayne Moore, the Director of the Advocacy Group for the American Association of Retired Persons (AARP) shared Ms. Weber's views. He cited a 1994 ABA Legal Needs Survey indicating that "61% of moderate-income and 71% of low-income people who could benefit from an attorney's services did not consider using one."¹⁷⁵ Moore supported the MDP concept as a helpful solution to this problem because, if the person seeking advice goes to someone associated with a lawyer, the referral of legal problems is far more likely to occur.¹⁷⁶ He also noted that

172. *Id.*

173. *See id.*

174. *Id.*

175. Hearings Before the Commission on Multidisciplinary Practice (Mar. 11, 1999) (testimony of Wayne Moore, Director of the Legal Advocacy Group for the American Association of Retired Persons), *available at* <<http://www.abanet.org/cpr/mourel.html>>.

176. *See id.*

many people, especially in the elderly community, seek problem-solvers other than lawyers in the first instance.¹⁷⁷ As to the risk of more conflicts of interest in these multidisciplinary practices, Mr. Moore recommended clear disclosure requirements and suggested that the conflict rules "are really based on old delivery methods" which can and should be changed.¹⁷⁸

James L. Brown, Director of the Center For Consumer Affairs at the University of Wisconsin-Milwaukee, made a similar plea on behalf of consumers:

A major problem within the law profession, in my view, is that it continues to hold onto the archaic notion that people have only distinctly, uniquely, legal problems that can be solved only by lawyers. . . . In the end, what matters to consumers is that whatever problems they have get solved. How they get solved is much less important. . . . No one wants to spend all day driving around town stopping at the offices of four different professionals to get advice and then struggling with the often difficult task of coordinating the disparate advice or services they may have received. But by keeping lawyers out of the mix of service providers that can work together in a single entity, you are limiting the ability of consumers to get efficient, comprehensive and coordinated solutions to their problems.¹⁷⁹

Jim Conran, the President of Consumers First, a California-based consumer education and advocacy organization, also urged approval of fully integrated MDPs.¹⁸⁰ Reinforcing the theme of "one-stop shopping," he argued that allowing lawyers to practice in MDPs would help ordinary people.¹⁸¹ He also urged the Commission to "go back to the drawing board and come up with sensible rules that better reflect today's way of doing business and, more importantly, that better serve today's consumers."¹⁸²

177. *See id.*

178. *Id.*

179. Hearings Before the Commission on Multidisciplinary Practice (Mar. 10, 1999) (written remarks of James L. Brown, Director of the Center for Consumer Affairs at the University of Wisconsin-Milwaukee), *available at* <<http://www.abanet.org/cpr/brown1.html>>.

180. *See* Hearings Before the Commission on Multidisciplinary Practice (Feb. 1, 1999) (written remarks of Jim Conran, President, Consumer's First), *available at* <<http://www.abanet.org/cpr/conran.html>>. Jim Conran, the organization's founder and current President, was previously Director of the California Department of Consumer Affairs under Governor Pete Wilson, where he was responsible for the largest consumer affairs regulatory agency in the department. *See id.*

181. *See id.*

182. *Id.* Another consumer group, the Washington Legal Foundation (WLF), also favored an expansion of the rules to allow multidisciplinary practices, but did not necessarily urge adoption of the fully integrated model. *See*

C. INFORMAL SURVEYS OF MINNESOTA-BASED CLIENTS

As this Article goes to press, a task force of the Minnesota State Bar Association (MSBA) is involved in a year-long study of the MDP issue. An integral part of that study is an effort to solicit the views of businesses and individuals who consume legal services in the state of Minnesota.¹⁸³ On February 24, 2000, an initial meeting was held with the Board of Directors and senior staff of the Greater Minneapolis Chamber of Commerce to discuss the MDP issue. Unfortunately, other similar sessions will occur too late to be included in this Article. Nevertheless, the February 24 meeting provides some further insight on the issue.¹⁸⁴

While 42% of the participants had some concern about increased risk of conflicts of interest and loss of independence in the MDP context, the other 58% were not concerned. Illustrative of the majority's view were the following comments: "As long as the conflicts are disclosed, I would not be concerned about the issue," "The quality of the service is what matters," "This may improve the business quality of law, i.e., price, service and breadth of service." The majority were likewise unconcerned about fee sharing "as long as it is discussed in advance."

The participants were then asked whether they would consider it to be a benefit to have a single entity providing legal services in an MDP context with, accountants, financial planners, investment advisors and insurance brokers. Sixty-nine percent said yes. It was less clear, however, that if the choice were available they would actually choose to retain an MDP. Rather, the participants were largely of the view that the legal profession should allow MDPs to be created and then allow the marketplace to work by permitting clients to choose on a case-by-case basis between the MDPs and the traditional law firms. As noted in their written comments: "The new economy demands it . . . allow it to happen and let us choose."

Letter from Daniel J. Popeo, Chairman and General Counsel of WLF, and Paul D. Kamenar, Executive Legal Director of WLF, to the Commission on Multidisciplinary Practice (Apr. 6, 1999), *available at* <<http://www.abanet.org/cpr/wlfmdp.html>>.

183. The author currently chairs the Subcommittee of the MSBA/MDP Task Force charged with soliciting clients' views on MDPs.

184. The description in this text is based on the author's review of questionnaire responses from the participants and his participation in those conversations.

CONCLUSION—MEETING THE CLIENTS' NEEDS IN A COMPETITIVE MARKETPLACE

Like it or not, the practice of law is *both* a profession and a business. In today's highly-competitive legal marketplace, everything is far more client-driven than it was in the past, and clients must be listened to in this MDP debate. Clients want more choices and the unrestricted freedom to choose. The MDP question must be resolved in a way that addresses both the business and professional dimensions of the issue. That means preserving lawyer independence while also allowing true one-stop shopping.

While the accountants and consultants have been a major force in creating our current competitive environment, it is too large a leap to conclude that clients' interests will be seriously compromised when the next step is taken and lawyers, accountants and consultants are all practicing together in a single MDP. Our focus must be not on whether to allow MDPs, but rather to develop a reasonable set of rules to address the two fundamental issues that need to be reconciled in this new paradigm: (1) imputation of conflicts of interest and (2) lawyer independence. The Commission's recommendations are a helpful step in that direction, particularly if the modifications in the February 2000 PostScript are added. It is time to listen carefully to our clients and take the next step.