



Multi-Disciplinary Practice

Fall Traveling Seminar
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THE ABC'S OF MDPS

(and other ethics-related topics)

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“Everyone overestimates the amount of change that will occur in the next 2 years and underestimates the amount of change that will occur in the next 10 years.” Bill Gates

1. Introduction
 - a. What are MDP's?
 - b. Why don't they exist now?
 - c. What changes would allow MDP's?
2. Ethics Rules – Recent Developments:
 - a. Proposed changes in advertising rules
 - i. Application and hearing
 - ii. Specific rules affected:
 1. Rule 105
 2. Rule 113
 - b. Recent Iowa Supreme Court case re DR 2-108
 - i. *Donnelly v. Brown Winick* (9/9/99)
3. Proposal to change to Model Rules
 - a. From Model Code of Professional Responsibility (1969)
 - b. To Model Rules of Professional Conduct (ABA, 1983)
4. Differences under the Model Rules
 - a. Successive conflicts
 - b. Lawyer as a witness
 - c. Imputation of disqualification
 - d. Disclosure of client perjury or fraud
5. Other ethics changes on the horizon
 - a. Ethics 2000 revisions
 - b. Restatement of the Law Governing Lawyers (ALI)
 - c. MDP's
6. Model Rule 5.4 and DR 3-101 to 3-104
 - a. “(a) A lawyer or law firm shall not share legal fees with a nonlawyer . . .
 - a. A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
 - b. A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services

- c. A lawyer shall not practice with or in the form of a professional corporation of association authorized to practice law for a profit, if:
 - i. a nonlawyer owns any interest therein
 - ii. a nonlawyer is a corporate director or officer
 - iii. a nonlawyer has the right to direct or control the professional judgment of a lawyer.
 - b. General Explanation of MDPs
 - i. Five models
 - ii. Fully integrated model

7. Roots of MDPs

- a. 1982 Kutak Commission proposal
 - i. recommended revision of Model Rule 5.4
 - ii. ABA rejected it
 - iii. D.C. Bar adopted it, but limited to MDPs formed for legal services
- b. AICPA study concluding auditing business reached saturation point
 - i. AICPA's "Vision Statement for 2011 and Beyond" – the market demands more "value-added consulting services"
- c. Expansion of accounting firms into "consulting services" (not called *legal services*)
 - i. Tax (incl tax litigation) (today more volume than lawyers)
 - ii. Mergers and Acquisitions
 - iii. Estate planning
 - iv. Intellectual property
 - v. Environmental
 - vi. Retirement plans and ERISA compliance
 - vii. Employment matters and employee benefits
 - viii. Health care
 - ix. Construction
 - x. Real estate
 - xi. Insurance
 - xii. Litigation support (document assembly, witness prep, etc.)

(Growth in consulting services has been 25% per year)
- d. Large accounting firms started offering *legal services* in Europe in the early 1990's, due to more relaxed regulatory atmosphere
 - i. Arthur Anderson, Price Waterhouse, Ernst & Young, and Deloitte all set up law firms in Germany, in France, and in Belgium
 - ii. KPMG formed its own law firm in London (called "K-Legal")
 - iii. Arthur Anderson acquired major law firms in Toronto and Hong Kong
 - iv. By early 1998, Arthur Anderson had subsidiaries openly practicing law in France, Spain, England, and Australia, and counted 1500 lawyers in 27 countries
 - v. KPMG now practices law in nine European countries plus Australia, with 988 lawyers on staff
 - vi. PriceWaterhouseCoopers has over 1633 business lawyers in 39 countries

- vii. Deloitte Touche has 586 lawyers in 14 countries
- viii. Ernst & Young now has 851 lawyers in 32 countries, and its law firm in Toronto grew to 25 lawyers overnight

- e. Developments in the U.S.
 - i. Big 5 accounting firms now have 5000 lawyers on their staffs in U.S.
 - ii. The accounting firms now hire significant portion of each year's law school grads in U.S.
 - iii. KPMG in August announced a "strategic alliance" with Morrison Foerster in San Francisco (Mo-Fo has 700 lawyers in 15 offices worldwide).
 - iv. KPMG is forming another "strategic alliance" with Horwood Marcus & Berk in Chicago
 - v. PriceWaterhouseCoopers is looking for "a major U.S. firm"
 - vi. And banks, other financial services firms, and software developers now offer and provide legal services and advice –
 - 1. American Express
 - 2. Century Business Systems
 - 3. H & R Block
 - 4. Quicken Family Lawyer
- 8. Lawyers Fiddling While Rome Is Burning
 - a. All this has happened while lawyers have watched
 - b. As Sherwin Simmons laments, "not one Bar Association has gone after them"
 - c. Texas tried to go after Quicken Family Lawyer, but lost
 - i. Texas also tried to go after Arthur Anderson and Deloitte&Touche, but lost
 - d. Possible reasons: no stomach for it, plus no clear definition of practice of law
- 9. In meantime, public's impressions of lawyers have grown less and less favorable
 - a. Harris Polls show number of people expressing "confidence in or admiration of" lawyers in steady decline since 1973:
 - i. 1973 – 24%
 - ii. 1978 – 18%
 - iii. 1988 – 14%
 - iv. 1992 – 11%
 - v. 1993 - 8% (per ABA Hart Survey)
 - b. So don't count on the public to be our allies in any fight
 - i. "No one thinks as much of the tribe as the tribe does of itself" (Professor Robert Fellmer)
- 10. Developments at the ABA
 - a. Early 1998, Pres. Jerome Shestack appointed the Working Group on Accountants and the Legal Profession
 - i. Explored accountant's "consulting services" and got into MDP issues
 - b. August, 1998, Pres Phil Anderson took the issue to the next level by appointing the 12-member Commission on Multidisciplinary Practice

- i. Chaired by Sherwin Simmons of Miami, former Chair of ABA Tax Section
- ii. Consisted of prominent practitioners, judges, and law professors

11. The Work Of The Commission

- a. Held hearings, twice in Washington, D.C., once in Los Angeles, and Atlanta
- b. Heard from 56 witnesses who provided sixty hours of testimony
- c. Among those who favored modifying Model Rule 5.4 to permit MDPs were –
 - i. ABA General Practice, Solo and Small Firm Section
 - 1. Felt it would benefit small-town lawyers by enabling them to affiliate with insurance agents, tax return preparers, financial planners, and real estate agents to share overhead
 - ii. ABA Section on Taxation
 - 1. Felt the only way to rein in the accounting firms was to subject them to the same ethical rules
 - iii. Consumers Alliance of the Southeast
 - 1. Likes idea of “one-stop shopping” for consumers
 - iv. National Conference of Lawyers and CPAs (official liaison group between ABA and AICPA)
 - v. American Association of Attorney-CPAs
 - vi. AICPA (emphasized clients’ desires for “one-stop shopping”)
- d. Commission posted five MDP models on its website and invited comment
 - i. Ranging from “affiliations” to fully-integrated MDPs

12. The Commission’s Report and Recommendations (issued June, 1999)

- a. 15 specific recommendations ([see Appendix A attached](#))
- b. First four would authorize MDPs (the fully-integrated model)
- c. Remaining 11 would control them
- d. Last two are directed at the CPA firms

13. Reaction to Commission’s Report and Recommendations

- a. Firestorm of protest
- b. Much misunderstanding (nonlawyers practicing law)
- c. Concerns about “core values” of the profession
 - i. conflicts of interest and imputation of conflicts
 - ii. client confidentiality
 - iii. lawyer independence vs. nonlawyer control
 - iv. supervision of nonlawyers
 - v. advertising and solicitation
 - vi. feeder businesses (tow-truck drivers)
 - vii. lawyer discipline
 - viii. unauthorized practice of law

14. D-Day in Atlanta (Aug., 1999)

- a. Four separate meetings on MDPs
 - i. NCBP panel discussion and workshops
 - ii. Business Law Section panel discussion, incl European lawyers
 - iii. MDP Commission’s final public hearing
 - iv. House of Delegates meeting (3 hours of debate)
 - 1. Many state bar associations supported deferral and more study

- a. NY, Calif, Ohio, Alabama, Georgia, Kansas, Kentucky, Maryland, New Hampshire, Oregon, South Carolina, Minnesota, Indiana, Iowa
2. NY County Bar Assn issued a report and testified in favor of it, advocating that MDPs be limited to firms owned and controlled by lawyers, with a 67% minimum ownership threshold.
3. Martha Barnett, Pres-Elect of ABA from Florida: “Once we cross the Rubicon, there’s no return.”
4. Phil Anderson’s reply: “I don’t like it either, but that won’t make it go away.”
 - a. Is convinced if we don’t do something, mid-sized law firms will disappear
 - b. And that we cannot remain members of the Flat Earth Society
5. Bill Paul agrees with Phil Anderson
6. Jerome Shestack is adamantly opposed – believes our core values cannot be preserved in MDPs
7. Thus, a split exists at very highest levels of ABA
8. Many speakers argued that we need to preserve our core values
9. Ramon Bulliard of Barcelona: defeat MDPs, preserve core values, the rest of the world is watching us as a model
10. Rejoinder was: the public doesn’t care about our core values, they are important only to us
11. Other debaters: the tide is coming in; like King Canute, we cannot stop it; so we had better swim with it or it will wash over us
12. Opponents’ rejoinder: just because something exists (practice of law by accounting firms) is no reason to sanction it by regulating it
 - a. Should continue to prohibit them, not bless them by regulation (example: burglary and theft)
13. Still others: we cannot repeal the laws of economics that hold in a free marketplace, the marketplace itself will determine the winners and the losers
 - a. In today’s marketplace, the big get bigger and the small disappear
 - b. Price and value determine the winners
- b. Vote was taken: 68% voted to defer and study further; 32% opposed deferral
 - i. Of the 32%, probably half wanted to kill MDPs forever
 - ii. Other half (16%) wanted to approve MDPs on the spot

15. Shifting Sands

- a. Major shift in focus detected
- b. Formerly, thrust of MDP proponents was on creating new opportunities for lawyers (Recommendations 1 – 4)
- c. Now, major focus seems to be on asserting control over the de facto MDPs that already exist – the practice of law by the accounting firms (Recommendations 14 – 15)
 - i. Query whether that’s possible (horse is out of the barn)

16. Where Do We Go From Here

- a. Deferral motion contemplates further study by State Bars, as well as by MDP Commission
 - i. MDP Commission was reappointed for another year
 - ii. Sherwin Simmons indicated willingness to do so, and to speak on it
 - iii. Will be addressed in Dallas in Feb., and in NYC next July
 - iv. But, in meantime, Simmons warns “No one has called a time-out”
 - v. AICPA’s 7/15/99 position paper on the MDP Comm. Report strenuously objects to the Comm’s definition of the practice of law, and to the audit and certification requirements of Rec. #14..
 - vi. Calls them “inappropriate and overreaching” and “unnecessarily burdensome”
 - vii. The Legal Electronic Data Exchange Standard Oversight Committee, a legal profession consortium, recently named two new members, one of whom was Arthur Anderson
 - viii. Both MDP proponents (Simmons) and opponents (Tom Rice, Pres. of 67,000 member NY State Bar Assn) predict Big 5 firms will now take the issue into the legislative arena
 - ix. Both predict introduction of pre-emptive federal legislation that would authorize CPA firms to perform their “consulting services”
 - x. CPA firms are no strangers to lobbying
 - xi. PriceWaterhouseCoopers earned \$6 million in lobbying fees last year
 - xii. as well as legislation at state level, by amendments to Accountancy Act or Chapter 496C
 - xiii. May set the stage for huge clash between lawyers and accountants, as well as constitutional clash between legislatures and state supreme courts, as to who defines and controls the practice of law
 1. Query whether Bar is handicapped in the battle by absence of a definition of the practice of law?
 2. Or, whether adoption of a definition now would amount to a Maginot Line that would be outflanked

17. What The Bar Needs To Do

- a. Have its position well thought out
- b. Rally behind it and speak with one unified voice
- c. Let the public know why the Bar’s position is in their best interests
 - i. If our arguments come off as turf protection and economic protectionism, they won’t be listened to
 - ii. Remember that public doesn’t think well of us anyhow
 - iii. and many legislators are anti-lawyer to begin with
- d. Get the state supreme courts on board as our best allies

18. Closing Food For Thought

“It’s easy to think that if we do things as we have in the past, things will work out as they have in the past. The assumption that the world around us can change while we remain the same is dangerous and leads quickly to stagnation and obsolescence.”

- a. Not from the ABA MDP Comm., but from “The CPA Vision Project – 2011 and Beyond,” a collaborative effort between state CPA societies and the AICPA to chart the future of the CPA profession, which concludes that “the market demands less audit and accounting and more value-adding consulting services.”

“Lawyers are 100% for progress and 100% against change.” Thomas Jefferson

“Until the pain of staying the same becomes greater the pain of succumbing to change, no change will occur.” Anonymous

“New ideas are first ridiculed, then violently opposed, then accepted as self-evident.”
Schopenhauer (German philosopher):

Additional Articles

American Bar Association Commission on Multidisciplinary Practice report to the House of Delegates

Multidisciplinary Practices: Service Package of the Future? “Wisconsin Lawyer”
By Dianne Molvig

Defend Our Clients, Defend Our Profession “The Pennsylvania Lawyer”
By Lawrence J. Fox

Putting Clients, Needs First “The Pennsylvania Lawyer”
By Thomas S. Clay

Room to Get Along “The Pennsylvania Lawyer”
By Lewis E. Elicker III

The Accountants Are Coming! New Competition is Here to Stay. What Should you do?
“Legal Management”, By John Smock