Multidisciplinary Practices (MDPs): Public Need or Provider Greed?

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In August 1998, in the aftermath of news stories that the "Big Five" accounting firms were acquiring or forming partnerships with law firms in Europe, American Bar Association (ABA) President Philip Anderson appointed a Special Commission to Study Multidisciplinary Practices (MDPs). The commission represents a diverse cross-section of the legal community.[1] The commission submitted its report to the ABA House of Delegates at the August 1999 meeting of the American Bar Association in Atlanta. The commission recommended that the Rules of Professional Conduct prohibiting fee sharing and partnerships with nonlawyers[2] be amended to allow lawyers to share legal fees with nonlawyers and deliver legal services through a multidisciplinary practice (MDP).[3] An MDP is a partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has one, but not all, of its purposes the delivery of legal services to a client (other than the MDP itself) or that holds itself out to the public as providing non-legal, as well as legal, services. The MDP is an arrangement by which a law firm joins with other professional groups to provide services, including legal services, and there is a direct or indirect sharing of profits.[4]

In August, 1999, approximately two-thirds of the ABA delegates were opposed to adopting the recommendations of the MDP commission. Instead, by a vote of 3 to 1, the House adopted a substitute motion offered by the Florida delegation, a succinct resolution providing:

> RESOLVED, that the American Bar Association to make no change or amendment to the Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until further study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients.[5]

Illinois State Bar Association President Cheryl Niro testified before the MDP Commission on February 12, 2000, that the majority of the state bar organizations still remain opposed to MDPs and would call for enforcement of existing ethical and UPL rules prohibiting such practices.[6] More than 40 different bar organizations are studying the issue, concerned about whether the legal profession's core values (confidentiality, loyalty and independence) could survive in an MDP environment. The commission has, for the time being, concluded its public hearings, having collected oral and/or written statements from 76 witnesses over the course of eight full days. These witnesses included lawyers from big and small firms, tax lawyers, CPAs, consumer advocates, small business owners, state bar officials, international lawyers, antitrust lawyers, European lawyers, corporate counsel, representatives of the "Big Five" accounting firms and public interest groups.

The ABA's Commission on Multidisciplinary Practices has concluded that the legal profession cannot simply ignore this development nor can the organized bar rely upon existing ethics and unauthorized practice rules to stop this new, consumer-driven paradigm that has emerged. Key elements of the commission's proposal include:

- All rules of professional conduct which apply to law firms should apply to MDPs.
- MDPs should be regulated by the highest court in each state through an agency responsible for monitoring each MDP for assurance that the lawyers in an MDP comply with the Rules of Professional Conduct.
- Lawyers working in MDPs would be bound by the Rules of Professional Conduct, especially those rules concerning conflicts, confidentiality and professional independence.
- Fee-sharing and partnering with nonlawyers would only be permitted in the context of an MDP which is properly registered with the supreme court in each state, and certifying that its lawyers are bound by the Rules of Professional Conduct.
- Allowing lawyers to deliver legal services through MDPs would not otherwise change the prohibition against nonlawyers practicing law.
- All MDP clients would be treated as clients of the lawyers for purposes of conflicts of interest.

Are MDPs in the public interest or simply in the financial interest of their proponents? Obviously the "Big Five" accounting firms think there is a market for MDPs. Much has been said about their growth in Europe. Most recently, the ABA commission observed that PriceWaterhouseCoopers employs over sixteen hundred lawyers in forty-two different countries, in pursuit of its announced intention of being one of the world's largest law firms by the year 2004.[7] The accounting firm has named its network of law firms "Landwell."[8] Even in the United States, the "Big Five" accounting firms have already established a market for "consulting services" which, in addition to taxation, includes areas such as mergers and acquisitions, telecommunications, energy, environmental issues, health care, banking, business management, litigation support, intellectual property and other complex law-related matters.

Quoting the Senior Vice President and General Counsel at Hildebrand, Inc., a legal consulting firm, a legal newspaper reported:

> The Big Six are recruiting at the major law schools, and not only tax lawyers. They are telling students that if they come with them, they will be doing M&A, litigation and other kinds of work that goes well beyond tax counseling.[9]

In November 1999, five lawyers left the Atlanta and Washington D.C. offices of King & Spalding and formed a separate law firm

in Washington D.C. The law firm has entered into a relationship with Ernst & Young in which the latter has agreed to furnish a significant amount of start up capital to the firm and to lease it space in a building it owns. In exchange, the law firm holds itself out as McKee Nelson Ernst & Young. District of Columbia's Rule 5.4 permits partnering of, and fee sharing between, lawyers and nonlawyers, but the firm's sole purpose must be the practice of law. The firm name, McKee Nelson Ernst & Young, according to D.C. ethics rules, is lawful as a trade name. Presumably, Ernst & Young refers its clients to the new law firm for legal services. The two firms assert that they are separate entities, but some observers are suspicious of the affiliation. They view this action as an attempt by the accounting firm to establish a multidisciplinary partnership that includes legal services. As Professor Bernard Wolfman told the commission on February 12, 2000, neither Ernst & Young nor the law firm has been willing to make public their formation or underlying documents. Professor Wolfman charged the commission to conduct a factual investigation of the purported debt arrangement, to rule out the possibility that Ernst & Young is in reality an equity partner as opposed to a lender, as it claims. The commission chair, Sherwin P. Simmons, responded that the commission does not have such investigative authority.

Considerable debate continues over whether clients actually want "one-stop shopping" for legal and affiliated services. Professor Wolfman has called the MDP commission's attention to a survey of the 350 largest corporations in Britain, published in London's *Commercial Lawyer* on June 21, 1998, indicating that 88 percent want their accounting and legal firms to be separate. The commission cited a less comprehensive survey conducted by the Financial Times (London) of one hundred senior executives at large companies and financial institutions in the United States and the United Kingdom. This survey showed that the corporate executives preferred the option of choosing legal services from MDPs, if they could lawfully offer such services.

To date, with few exceptions, most purchasers of legal services that have appeared before the commission say they would prefer the option of choosing MDPs over traditional law firms for the delivery of legal services. A small business owner[10] told the commission that the debate among lawyers over whether the practice of law is a "business" or a "profession" exists solely within the legal profession and is not a public issue. As far as the public is concerned, he said, the practice of law is a business and legal services are a product or commodity. The consumer wants choice, convenience and effectiveness. Moreover, the small business owner wants an advisor he can trust. Small business owners need advice from a number of professionals to start up and operate a business, including accountants, lawyers, financial advisors, bankers, insurance agents, human resource specialists, Internet and telecommunications advisors, etc. The small business owner's most valuable asset is his time, and time spent consulting with separate professionals, bringing each up to speed, is not an efficient nor coordinated usage of his time. Some small business owners would prefer a business consulting firm with integrated services that can develop a coordinated business plan. Presently no one firm can provide this. While trust is important, so is competence and effectiveness. A "team approach" to problem solving may be of more practical benefit to a small business owner than the client protections of confidentiality and avoidance of conflicts.

Nonlawyers already provide a number of law-related services which could expand the growth of a traditional law firm. These services include: title insurance, financial planning, accounting, mediation, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax return preparation and patent, medical or environmental consulting.

MDP adversaries have asked the commission for an empirical study to ascertain whether the consumer of legal services in fact wants "one-stop shopping." The commission's response is logical and well-reasoned:

> First, in a society where people are free to make choices about the goods and services they purchase, there is no sure way of accurately estimating whether the market will favor a new type of service until it is available. Second, the criticism ignores all the positive support for MDPs from general counsels, consumer groups, and two Sections of the ABA.[11]

At its most recent hearing on February 12, 2000, the commission received even more evidence from nonlawyers that integrated services are sought after and desirable. Ted Debro, an executive officer for Affordable Consumer Services of Alabama testified that low and middle income persons need choice, fairness and affordability in purchasing legal and other related services. An injured worker and his family, for example, in addition to needing medical and legal services, could use the advice of a psychologist for his emotional trauma, an insurance specialist to help him file for benefits, a social worker to counsel the family and perhaps some financial counseling. Team approaches are used in the public sector already where district attorneys, health workers, social workers and psychologists work together on child and spousal abuse cases. Poor people, he said, lack the means and resources to travel to different offices to consult with the different professionals that may be of help. They are often intimidated by lawyers, he said, and the informal, casual setting of a multidisciplinary practice may prove helpful.

Melanie Merck, a tax planning manager in the Washington, D.C. office of Ernst & Young, has a law degree from Duke University and an L.L.M. in Taxation from Georgetown Law Center. She holds an active license to practice law. She gave an example to the commission about a client who consults with her about an estate plan which involves annual gifting and the transfer of real estate. Despite the client's request that she do so, the Ernst & Young attorney cannot prepare any legal instruments to implement her client's estate plan. Instead, the client must be referred to an attorney practicing in a traditional law firm. Moreover, Ms. Merck claims, Ernst & Young requires that its attorneys not hold themselves out as attorneys and they may not even place the designation "J.D." on their business cards or letterhead stationery.

But the issue of MDPs is not simply about consumer choice. At its hearing on February 12, 2000, the commission observed that approximately 5,000 lawyers are working in accounting firms, seemingly outside the regulatory tent of the state bars which

admitted them to practice. At the risk of being disciplined for ethical violations, these lawyers are denying that they are practicing law, when it is obvious that they are doing so. Paul Sax of San Francisco, chairman of the ABA's Taxation Section, asserts that lawyers practice law at accounting firms, unnoticed by the state bars and free from the more stringent confidentiality and conflict-of-interest rules adhered to by licensed tax lawyers in traditional practice.[12]

The state bars must decide, among other things, whether they have the resolve and resources to prosecute these lawyers and the accounting firms that employ them. Most bars are at peak capacity in terms of prosecuting attorney misconduct in traditional practice settings. Moreover, they are thinly budgeted or have no funds for prosecuting UPL. Texas, one of the more aggressive bars in terms of prosecuting UPL,[13] has the luxury of a $100,000 budget for UPL enforcement. Even the Texas bar's resources are inadequate to litigate against the big accounting firms and the law firms that will represent them. According to William D. Elliott, the Texas lawyer who drafted the complaint against Arthur Anderson:

> In vigorously denying it practiced law, Arthur Andersen hired Weil, Gotshal & Manges, along with two other law firms, which took aggressive measures against the investigation and narrowly interpreted document requests. The volunteer lawyer running the UPL investigation was a private practitioner with a family, who had to handle the investigation virtually by himself; he was overwhelmed. Only two subpoenas to Dallas-based corporate clients of the accounting firm were issued and then the Texas UPL committee decided to terminate its investigation because it did not have sufficient proof of UPL violations. Mr. Elliott maintained that it was a lack of will, not a lack of proof, which thwarted the investigation; that the State Bar is not equipped to take on the big cases.[15]

After eleven months of investigation, the Texas Bar decided not to prosecute UPL charges against Arthur Anderson.[16] A successful campaign could require state bars to raise members' dues considerably. Even if successful in the courts, the "Big Five" accounting firms can turn to the legislature to overrule adverse decisions, just as Parsons Technology did with the Texas legislature.[17]

On Sunday, February 13, 2000, ABA President William Paul conducted a "town meeting" to discuss multidisciplinary practices which, was attended by 200 persons in the audience and simulcast over the Internet. In her opening remarks, former IRS Commissioner Margaret Milner Richardson, now an Ernst & Young partner, stated that "there is a lot of hyperbole and anecdotal information" being published about MDPs. She added that it is important to have a "dialogue and to find out what the facts are." Hopefully, the big accounting firms will be more forthcoming with information regarding how they handle multiple client conflicts, confidentiality of client information and professional independence, particularly given the disclosure requirements when an accounting firm is performing auditing or attestation functions. The Securities and Exchange Commission has already made clear its position that the MDP's roles as a consultant and an auditor for the same client are incompatible.[18]

As stated above, much attention has been directed to the growth of nonlawyer controlled MDPs in Europe. The CCBE (the consultive organization of the bar organizations of the European Union and other European states) submitted its report in December to the ABA commission, with some rather negative statements regarding the presence of MDPs in Europe:

> CCBE . . . concludes that, in the jurisdictions with which it is familiar, the problems inherent to integrated co-operation between lawyers and nonlawyers with substantially differing professional duties and corresponding different rules of conduct, present obstacles which cannot be adequately overcome in such a manner that the essential conditions for lawyer independence and client confidentiality are sufficiently safeguarded, and that inroads upon both, as a result of exposure to conflicting interests served within the relevant organization, are adequately avoided . . . .
>
> The legal profession is a crucial and indispensable element in the administration of justice and in the protection available to citizens under the law. Safeguarding the efficacy and integrity of this factor within a democratic society, is a matter of the highest concern and priority. It is part of CCBE's mission to ensure that both are given their due.
>
> CCBE consequently advises that there are overriding reasons for not permitting forms of integrated co-operation between lawyers and nonlawyers with relevantly different professional duties and correspondingly different rules of conduct. In those countries where such forms are nevertheless permitted, lawyer independence, client confidentiality and disciplinary supervision of conflicts-of-interests rules must be safeguarded.[19]

In an effort to compromise, some lawyers propose that MDPs be permitted, provided that lawyers are majority or supermajority owners of the practice. However, Professor Wolfman warned the commission that if an MDP composed of accountants and lawyers were to be formed, at least 51% of the firm would have to be owned by the CPAs. The AICPA is lobbying the state legislatures to impose such a requirement by law. According to Professor Wolfman, about 20 states have now adopted such a requirement.[20] There is a bill pending in the Virginia House of Delegates, SB 136, having already passed through the Senate, amending Virginia Code § 13.1-549.1 to provide that: "*A corporation rendering the services of accounting shall issue not less than fifty-one percent of its capital stock to individuals duly licensed or otherwise legally authorized to render the services of accounting, and the remainder of said stock may be issued only to and held by individuals who are employees of the corporation, whether or not such employees are licensed or otherwise authorized to render professional services.*"

Can we expect nonlawyer controlled MDPs to safeguard the legal profession's core values? We need to be mindful of that often repeated restatement of the *Golden Rule*: "He who has the gold makes the rules." The "Big Five" firms have the gold. PriceWaterhouseCoopers alone made $15.3 billion in revenue last year,[21] $4 billion of which it attributes to its management consulting services (MCS) division.[22] There are other reasons to be skeptical. Professor Wolfman, who appears receptive to *lawyer-controlled* MDPs, told the ABA commission on February 12, 2000:

> We know from the SEC and from undisputed press accounts, those in the *Wall Street Journal* and the *New York Times*, for example, that PwC [PriceWaterhouseCoopers], the largest of the "Big Five," is in gross, flagrant violation of the SEC rule in effect since 1933 that prohibits the accountants in a firm that certifies a client's financial statement to own stock in that company. The SEC reports that 85% of PwC's partners were in violation of that prohibition. The immediate response from a PwC spokesman and from a Deloitte & Touche commentator as well was that the report shows that the rules need to be changed. After all, a "Big Five" spokesman said that the rules had been rejected when put to the AICPA for adoption; they're merely rules of the SEC. These immediate responses, if nothing more, should give serious pause to entrusting the care and control of our profession to those who have demonstrated such indifference to the law and such lack of fidelity to long established ethical norms and values as the "Big Five" have. To be sure, just days ago the AICPA announced that the SEC's rules on the subject of ownership of client stock will now be its rules, an acknowledgment almost 70 years late in coming. And one can only wonder whether the AICPA has been stimulated by the fact that this Commission is sitting, here and now, and that the SEC is conducting investigations of the practices of the other "Big Five" firms, PwC having only been the first.[23]

However, the MDP issue is not just about the "Big Five" in competition with large law firms. To be sure, this is what is driving the debate for the most part. However, MDPs have the potential to change entirely the landscape of the practice of law. As one commentator notes:

> For both large and small firms, MDP could increase opportunities for cross-selling and the ability to provide more services to clients at a lower cost, says Larry Ramirez, chairman of the ABA's General Practice, Solo and Small Firm Section and a sole practitioner in Las Cruces, N.M. Potentially, the combination of professionals and services is unlimited, he says. He lists a few: engineers, doctors and physical therapists. Gaynes, the lawyer-accountant, sees the potential for law firms to become part of an overall financial package involving financial planners, estate planners, insurance agents and banks.[24]

Members of the Virginia State Bar need to consider these issues and voice their views. President Scott Street has appointed a special committee to study MDPs which has met and will continue to meet, study, report and make recommendations to bar leadership concerning multidisciplinary practice. In addition, on Saturday, June 17, 2000, at the Annual Meeting of the Virginia State Bar in Virginia Beach, there will be a showcase program on MDPs, featuring recognized experts who will provide their insights into one of the most significant developments in the legal profession's history. Any thoughts, comments or issues you would like to have addressed should be sent to:

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ENDNOTES

1 Unfortunately, the commission does not include any state bar officials who would be responsible for enforcing the proposals which the commission is recommending. A similar oversight occurred with the appointment of members to the ABA's Special Committee to Evaluate the Rules of Professional Conduct ("Ethics 2000").

2 Va. R. P. C. 5.4 (a) and Va. R. P. C. 5.4 (b) currently prohibit lawyers from sharing legal fees and forming partnerships with nonlawyers.

3 15 Law. Man. Prof. Conduct 250, 323 (1999). The vote was 304-98 in favor of the Florida proposal. Janet L. Conley, "ABA Postpones its Decision on Multidisciplinary Practices," *New York Law Journal*, Aug. 11, 1999.

4 ABA Commission on Multidisciplinary Practice, Report to the House of Delegates (June 1999) at 1, found at http://www.abanet.org/cpr/mdprecommendation.html.

5 "ABA Refuses to Change Ethics Rules Unless Studies of MDPs Dispel Concerns," 15 Law. Man. Prof. Conduct 396 (1999).

6 Ms. Niro based her conclusion on a consensus that developed during the Meeting of State Bar Presidents held in Dallas in conjunction with the ABA Mid-Year Meeting in February, 2000, during which an informal poll was taken. About 25 to 30 state bars were represented at that meeting. The Ohio State Bar Association circulated to other state bars its Recommendation and Report for consideration by the House of Delegates a resolution calling for each jurisdiction "to establish and implement effective procedures for the discovery and investigation" of violations of UPL statutes and "to pursue active enforcement of those laws." Commission on Multidisciplinary Practice, Updated Background and Informational Report, posted 12/15/99 at http://www.abanet.org/cpr/febmdp.html.

7 *Id.*, citing Jean Eagleshaw, *PwC reorganizes global network of legal firms*, Fin. Times (London), Oct. 11, 1999, at 8; Konstantin Richeter, *Managers & Managing: Pricewaterhouse Renames Legal Unit, Adopting Landwell as Brand*, Wall St. J. Eur., Oct. 12, 1999, at 30, 1999 WL-WSJE 27641212.

8 *Id.*

9 David Rubenstein, *Accounting Firm Legal Practices Expand Rapidly. How the Big Six Firms Are Practicing Law in Europe: Europe First, Then the World?*, Corp. Leg. Times, Nov. 1997, at 1.

10 George Abbott, Omaha, Nebraska, testifying before the commission on February 12, 2000.

11 Commission on Multidisciplinary Practice, Updated Background and Informational Report, *supra*.

12 Nathan Koppel, *Texas Lawyer*, "Rift on MDP Shows at ABA's Midyear Meeting," February 15, 2000, at http://www.lawnewsnetwork.com/stories/A16148-2000Feb14.html.

13 In addition to Arthur Anderson, the Texas UPL Committee has waged war with Parsons Technology, publishers of Quicken Family Lawyer; Nolo Press, publishers of legal self-help books; and Nationwide Insurance Company for owning and operating "captive" law firms which defend their insureds.

14 Presentation by James D. Blume, Esquire, former Chairman, Texas Unauthorized Practice of Law Committee at the National Organization of Bar Counsel, Mid-Year Meeting, Dallas Texas, February 10, 2000 ("Blume").

15 Testimony of William D. Elliott before the ABA Commission on Multi-disciplinary Practice, November 13, 1998, summarized at http://www.abanet.org/cpr/elliott1198.html.

16 Blume, *supra*.

17 *Id.*

18 The ABA Multidisciplinary Practices Commission has noted:
In a letter from the Office of the Chief Accountant (OCA) of the Securities and Exchange Commission (SEC), this Commission was advised that the SEC has asked the Independence Standards Board (ISB) to place the topic of legal advisory services on its agenda. The SEC intends to look to the ISB for leadership in establishing auditor independence regulations applicable to the audits of the financial statements of SEC registrants. According to the letter, the SEC auditor independence regulations specifically state that the roles of auditors and attorneys under federal securities laws are incompatible. The OCA would consider an auditing firm's independence from an SEC registrant to be impaired if that firm also provides legal advice to the registrant or its affiliates.

ABA Multidisciplinary Practices Commission, Final Report to House of Delegates (June 1999), n. 3, found at http://www.abanet.org/cpr/mdpreport.html.

19 Written Statement of Professor Bernard Wolfman, submitted to the ABA Commission on Multidisciplinary Practice, February 12, 2000 at 6-7.

20 *Id.* at 8.

21 PriceWaterhouseCoopers, Fact Sheet, found at http://www.pwcglobal.com/gx/eng/about/press-rm/fact.html.

22 PriceWaterhouseCoopers, Introducing MCS, found at http://www.pwcglobal.com/us/eng/careers/mcs/index.html.

23 Written Statement of Professor Bernard Wolfman, submitted to the ABA Commission on Multidisciplinary Practice, February 12, 2000 at 4.

24 Janet Conley, "MDPs: Collision or Harmony," *Fulton County Daily Report*, Aug. 4, 1999.