

**A Paradigm Shift from Client Protection  
by William R. Rakes**

# MDP

The multidisciplinary practice (MDP) debate has come to Virginia now that the joint commission appointed by the presidents of the Virginia State Bar and The Virginia Bar Association has issued its report recommending that our Rules of Professional Conduct be amended to permit fully integrated MDPs. The report opens with the observation that the debate on MDPs may be the most important issue the bar has faced in the last century. It also states that MDPs have the potential to change significantly the way lawyers practice law and the manner in which consumers obtain professional services.

I became interested in this subject through my service on the board of governors and as a member of the house of delegates of the American Bar Association while MDPs were considered and rejected there. It is with regret that I oppose the report issued by the joint commission, as I have great respect for those members of the commission whom I have known and worked with over the years. However, I hold strong views on this subject and believe the recommendation of the commission is wrong for Virginia and not in the best interests of the public or the bar. I believe most of the practicing lawyers in Virginia will also reject the proposal upon reviewing both sides of the issue.

The joint commission's report is currently before the Council of the Virginia State Bar. It is expected that the council will vote in June on whether to recommend to the Supreme Court of Virginia that our rules be changed to allow MDPs.

## Background

In recent years, the "Big Five" accounting firms have been developing various forms of affiliations with law firms in Europe and have added legal services to their list of client offerings. In the United States, accounting firms are hiring lawyers from law firms and law schools to work on corporate issues. They proclaim that these lawyers are not practicing law but are offering consulting services.

Some lawyers see the offering of legal services by entities other than law firms as inevitable. Others believe that the marketplace should decide how, and from whom, it wants to purchase legal services. Some say such arrangements will offer opportunities for both small and large firms. Yet others say our rules smack of turf protection.

Opponents argue that MDPs are incompatible with the legal profession's core values of independence, confidentiality and loyalty. They also argue that there has been no meaningful

showing of a need by the public, which would justify such a revolutionary change.

Four years ago, the American Bar Association appointed a commission to study MDPs. That commission issued a report recommending rule changes to permit MDPs. The matter was debated in the house of delegates in August of 1999 and sent back to the commission for further consideration with the admonition that no change should be made with respect to allowing multidisciplinary practice ". . . unless additional 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."

The ABA commission conducted further study and hearings and distributed a new draft recommendation that limited those non-lawyers with whom lawyers could share fees to members of recognized professions or other disciplines that are governed by ethical standards. It also suggested that lawyers should have the control and authority necessary to assure lawyer independence in the rendering of legal services.

At the 2000 annual meeting of the ABA, the house of delegates soundly rejected (by a vote of 3 to 1) the commission's proposals and determined that it is in the public interest to preserve the core values of the legal profession. The ABA recommended that state bars should vigorously enforce the laws governing lawyers and the laws prohibiting the unauthorized practice of law by nonlawyers.

A recent update on the ABA Web site indicates that there has been little activity favoring MDPs. Thirteen state committees have recommended some form of MDP. Twenty-five jurisdictions have either directly rejected MDPs or are doing nothing with regard to considering a change. Only two states—Minnesota and Utah—have sent recommendations for change to their supreme courts and the rules committee of the Minnesota Supreme Court has stated its opposition to MDP. No jurisdiction has adopted MDPs since the debate began four years ago.

## The Joint Commission's Report

Upon first reading, the joint commission's report seems rather benign. All things being equal, who can object to giving clients and lawyers maximum choice in the manner in which they obtain and provide legal services? But are all things equal? Are there unacceptable costs associated with the revolutionary changes being proposed?

*against MDP continued on page 37*

No other state committee has issued a report that is more far reaching or liberal than that of the joint commission. The report rejects a number of safeguards that were considered by the ABA commission and other state committees. For example, most state committees that have recommended some sort of MDP have required that lawyers must control the MDP, an effort to address the independence issue. The commission saw majority ownership as turf protection rather than insuring independence of the lawyers in the MDP. The Virginia report concludes that it is difficult to define the practice of law and makes no recommendations on this issue. It concludes that it would be difficult, if not impossible, to regulate an MDP entity and its nonlawyer members and employees, so it recommends that there be no registration or regulation. The commission said it would be difficult to determine which professionals could associate with lawyers in an MDP, so the recommendation is that there be no restriction. The commission concluded that the unauthorized practice of law is difficult and expensive to prosecute. Its recommendations would legalize the activities of those now calling law practice consulting by allowing entities other than law firms to offer and provide legal services to the public.

There are many important issues identified by the commission that the recommendations do not address and, undoubtedly, are beyond the charge given the commission.

What, then, was the impetus for the study and the report? As indicated, the ABA and most other states have addressed the issue. But other than the Big Five and some large law firms, some legal economics/let-the-marketplace-decide-type of law professors and some bar leaders and bar executives, who do not want to be seen as participating in lawyer turf protection rather than protecting the public, who is demanding such revolutionary reform?

In my opinion, the impetus is money-driven by those who cannot now participate in the legal services industry and a minority of lawyers within the profession for varying reasons. The impetus is clearly not from the public. There is anecdotal (not empirical) evidence of some special interest clients who may think MDPs are a good idea, but there is clearly no groundswell of support for MDPs from the public.

The joint commission and all other jurisdictions that have studied MDP have concluded that MDP should not be permitted unless it can be implemented consistent with preserving the core values that define the legal profession. Many who support MDP pay lip-service to the profession's core values and say lawyers should be trusted to abide by the Rules of Professional Conduct regardless of the setting within which they practice. The opponents of MDP say there is a fundamental incompatibility between the profession's core values and practice in an MDP.

## Core Values

The cost of making changes to the rules to permit MDPs would be great. The rules under which law is practiced represent core values of the legal profession, and changing them would change our definition of what it means to be a lawyer and offer legal services to the public.

It is the independence of practicing lawyers that is the most fundamental safeguard for protecting the profession's core values. Rule 5:4 states that a lawyer shall not practice in a professional association that practices law for a profit if "a nonlawyer has the right to direct or control the professional judgment of the lawyer." Unlike a department store type of MDP, which offers professional services ranging from insurance to accounting, to real estate to law, even the largest law firm is managed and controlled by lawyers, who are officers of the court and who owe fiduciary obligations to all of the clients of the firm. All law firms are owned and controlled by lawyers who are licensed by the courts, who are subject to the direct regulation and supervision of the courts, and who have duties to defend the judiciary and protect the legal system.

The joint commission cites in-house counsel as an example of lawyers who practice in entities controlled by nonlawyers. It should be noted that whether in house lawyers work for a corporation or a government agency, they only serve one client. They do not serve clients drawn from the public. The problem with allowing MDPs not headed by officers of the court is that it creates a structure where those in control are neither employed by the client nor are officers of the court. It follows that the lawyer's professional independent judgment will almost certainly be compromised.

In recent years, both the medical and accounting professions have suffered because of a loss of independence. Physicians have sold their practices to hospitals or other chain providers. They have become employees with their practices controlled by nonphysicians to the detriment of both the medical profession and their patients.

Accountants have expanded the services they render to clients to the point where their audit function has been compromised with resultant damage to their credibility, as well as to those whom they owe duties in addition to their clients. The Enron debacle points up the problems created by the accounting profession. Recent articles have suggested that the role of the accountants in the Enron collapse will result in new regulations governing accountants and the separation of audit work from consulting. This would represent a move away from "one-stop shopping." Two recent articles in *The National Law Journal* are entitled "Scandal Seen as Blow to Outlook for MDP" and "Rest in Peace, MDP." According to a February 3, 2002, piece in *The New York Times*, there has been significant fallout from Enron overseas. It is suggested that the tight-knit relationship between accounting and legal practices in Europe is being re-examined and may be recast. In addition, the March 1, 2002, edition of the *ABA Journal* includes an article on the status of MDPs in Europe entitled "MDP-FREE EUROPE? European High Court Rules Against Multidisciplinary Practice." The case involved Dutch attorneys who wanted to partner with PriceWaterhouseCoopers and Andersen Legal. The Netherlands bar rules prohibit MDPs, and the Court upheld the rules, leaving Germany and Italy as the only countries within the European Union that permit MDP.

Clients expect their lawyers to adhere to the highest level of confidentiality, and they expect to be able to invoke the attorney-client privilege to protect that confidentiality. It is unrealistic to expect that these core values can be maintained in an MDP where both lawyers and other professional service providers are engaged in the “representation” of the client. Even more problematic are the conflicting duties of professionals regarding disclosure issues. For example, the lawyer may be prohibited from disclosing certain client information, while the accountant is required to disclose the same information.

The recommendations of the joint commission require lawyers who practice in MDPs to consider all clients of the MDP for purposes of avoiding conflicts of interest. No other profession has conflict rules as strict as those of the legal profession. For example, accountants have never embraced the legal profession’s concept of firm-wide imputation of conflicts of interest. Under the commission’s recommendation, lawyers would be expected to adhere to their conflicts rules at the same time their partners are adhering to their different set of rules. According to the commission, the lawyer’s (but not the MDP’s) compliance will be ensured by the lawyer practicing in an MDP, obtaining from the MDP “. . . a written statement, which shall be filed with the Virginia State Bar, acknowledging the lawyer’s professional independence and ethical responsibilities.” The effectiveness of such a procedure is dubious at best.

## Legalizing UPL

Virginia and all other jurisdictions have unauthorized practice of law rules, and most jurisdictions have a definition of the “practice of law” either by rule or statute. All jurisdictions agree that the purpose of such rules is to protect the public against the rendition of legal services by unqualified persons. The introduction to the Virginia Unauthorized Practice Rules states, “The public is best served in legal matters by lawyers. A client is entitled to be served disinterestedly by a lawyer who is not influenced by any allegiance other than to the client and our system of justice.”

The accounting profession says the legal profession’s concern about “public protection” is rhetorical and motivated by self-interest and “turf protection.” As the Joint commission points out, accountants and other professionals perform services for their clients which were traditionally performed exclusively by lawyers. It is undisputed that accounting firms want to expand the services they offer to clients to include the full range of legal services. Today, most accounting firms, not just the Big Five, offer “consulting” which looks a lot like law practice in many instances. While there are many areas which are gray, presently accounting firms cannot draft articles of incorporation or other corporate documents, nor can they draft wills and trust. Accounting firms and their professionals cannot represent their clients in court (although under limited circumstances, they can represent their clients before the Internal Revenue Service and certain other agencies permitted by federal law).

If MDPs are permitted, accounting firms will be able to do all of the things any law firm can do. Their lawyers will not have to call themselves consultants and can offer the full range of legal

services that any law firm can offer. Much of what we now consider and what the Joint commission has indicated is the unauthorized practice of law will be legalized. And it will not be by just the Big Five; it will be by regional and local accounting firms, and other business entities who can hire some lawyers and offer their clients “one-stop shopping” including all legal services—not just tax advice or other consulting advice.

When various professions are practicing together in an MDP department store of professional services, how will it be determined who is practicing law and whether nonlawyers are practicing law? In law firms, the lawyers are responsible for supervising the work of nonlawyer staff and are responsible for the work. In MDPs, it is likely that the lawyers in the MDP will not be able to determine or control what others in the MDP are doing. Will accountants and others in the MDP follow the legal profession’s definition of what constitutes practicing law? Who will decide what work gets done in an MDP by lawyers and what work will be done by nonlawyers? If the joint commission’s proposal is accepted it will be the accountants or other professionals in the MDP who will decide—not the lawyers.

Is this model in the best interest of the public or the legal profession? The answer, when all of the problems of lawyers and nonlawyers practicing together are considered, is self-evident.

Proponents of the report of the joint commission insist that the MDP debate is not about the unauthorized practice of law and is not about accountants. I respectfully disagree. The report states that “Enforcement of restrictions on UPL, in the Joint commission’s view, is simply not a viable way for the profession to address MDP.” Neither is MDP a viable way to address UPL. As one knowledgeable opponent of MDP puts it, “The commission has run up the white flag of surrender and declared victory.”

## Homogenization of the Legal Profession

Substantial concern has been expressed by opponents of MDP that lawyers practicing in MDPs will be blended into the multi-disciplines represented in the professional department store with the result that lawyers and law firms will lose their distinctiveness and indeed their identity as independent professionals. The joint commission’s proposal allows a lawyer to practice and partner with anyone in any line of work, not just licensed professionals.

Programs on professionalism mandated by the Supreme Court and conducted by the Virginia State Bar teach that lawyers are not just another set of service providers and that our conduct must be at a higher level than that set by the marketplace. It is these standards of conduct and their enforcement by the Supreme Court that distinguishes the legal profession from the world of auditors, bankers, insurance agents and other service providers. In programs conducted in law schools, we tell law students that the law is a higher calling and requires adherence to a higher set of principles than is practiced in the marketplace. There are important implications to lawyers not being distinguished from other professionals. If we are like other professionals and not distinctive as a profession, what is the basis for con-

*Against MDP continued on page 40*

tinued self-regulation as part of the judicial branch of government? Some may question why all professional service providers and the MDPs in which they practice should not be regulated by some agency within the executive branch of either the state or federal government or both.

In addition, this loss of distinctiveness will undoubtedly result in a diminishment of the value of licensure and bar membership.

## Enforcement Considerations

The joint commission tells us that lawyers who practice in MDPs must abide by the Rules of Professional Conduct but their non-lawyer professional partners are not required to abide by the rules of the legal profession. The joint commission offers no guidance on how the bar will enforce the Rules in the absence of registration by the MDP or any authority over or ability to require the MDP to provide information or take any action.

The problem of enforcement is even greater when it comes to UPL. With legal and non-legal services commingled in an MDP, how will the bar determine which work is being performed or supervised by a lawyer and which by a nonlawyer? The commission affirms that legal work cannot be performed by a non-lawyer, even in an MDP, but does not address how the bar should deal with this additional UPL challenge.

MDP proponents argue that the bar does not have the resources to take on the big firms that practice law and call it consulting. If that is so, how can the bar expect to take them on when their lawyers violate the Code of Professional Responsibility? It is likely that upset clients will file ethics charges against lawyers who work in MDPs, their nonlawyer partners and the MDP itself. It will then fall to the disciplinary department of the Virginia State Bar to sort out the complaints without any ability to require the cooperation of the nonlawyers and the MDP involved. When the client files a suit, it is likely that it will be against lawyers, nonlawyers and the MDP. Has anyone evaluated malpractice coverage issues?

## Conclusion

We must ask ourselves what is best for the public? As it relates to MDP, I believe what is best for the public is also best for the legal profession. That is, the public is best served by a strong, independent legal profession regulated by the courts. We should not allow the desire to offer maximum choice to the consumer and the dictates of the marketplace to trump the core values which define our profession. MDP should be rejected.

I have heard it said that law enforcement would be much more efficient and effective if we repealed the Fourth, Fifth and Sixth Amendments. Likewise, if we repeal Rule 5:4 and let lawyers partner with accountants, financial planners, tow truck drivers and morticians, the delivery of "professional" services to consumers might be more convenient, efficient and possibly less expensive. But, the resulting compromise of independent judgment, confidentiality and loyalty would be as great a loss to the public as repealing the constitutional protections. Only an inde-

pendent bar can protect both our constitutional rights and our client centered Rules of Professional Conduct. Permitting MDP would represent a paradigm shift from client protection. ☺



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