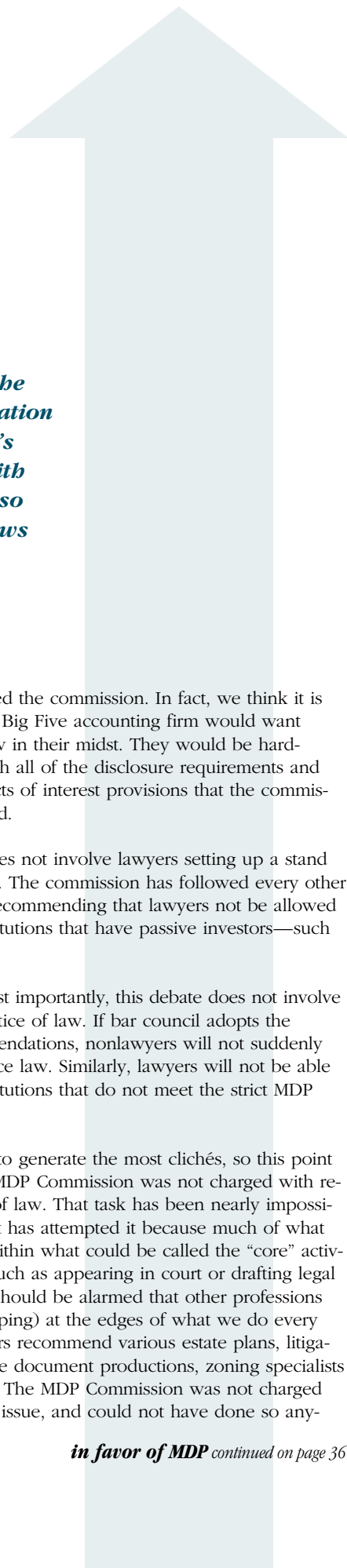


MDP



In June, the Bar Council is expected to decide on whether to accept the recommendations of the Joint Virginia State Bar/Virginia Bar Association Commission on Multidisciplinary Practice (MDP). If the commission's recommendations are adopted, the commission would be charged with writing proposed amendments to the Rules of Professional Conduct so that lawyers may ethically practice law in an MDP. Here are two views of the issue from distinguished members of the bar.

To Serve Clients in New and Better Ways by Thomas E. Spahn

The most difficult challenge facing those of us who favor MDPs is to persuade Virginia's lawyers to focus on the substantive issues. Reasonable lawyers can disagree about the merits of MDPs. However, we hope that all of our colleagues will deal with the arguable points on both sides—instead of resorting to clichés (“if the profession was good enough for my grandfather, it is good enough for me”) or overblown warnings about “Big Five” (or perhaps the soon-to-be “Big Four”) accounting firms taking over the world.

What the MDP Issue Does Not Involve

When I speak to groups about MDPs, I usually start with a list of what the MDP debate does not involve.

First, this is not a debate about liberal or conservative ideology. Political conservatives (like me) support MDPs, and so do many politically liberal participants in legal services organizations who have advised the Joint VSB/VBA Commission to Study Multidisciplinary Practices that its poorer constituents would benefit the most from the efficiencies that MDPs would bring. The undeniably liberal American Bar Association has twice rejected MDPs, while the undeniably conservative Arizona Bar has endorsed them.

Second, this debate is not a “big firm-small firm” issue. I practice at a big firm, but many MDP supporters are solo practitioners. The solo practitioners see great opportunity in being able to partner with other professionals (such as financial consultants, psychologists, etc.) to better serve their clients—and prevent the further erosion of their practices.

Third, this debate does not involve the Big Five accounting firms muscling lawyers out of their traditional role. No Big Five

accounting firm lobbied the commission. In fact, we think it is very unlikely that any Big Five accounting firm would want lawyers to practice law in their midst. They would be hard-pressed to comply with all of the disclosure requirements and (especially) the conflicts of interest provisions that the commission has recommended.

Fourth, this debate does not involve lawyers setting up a stand at your local Wal-Mart. The commission has followed every other state study group in recommending that lawyers not be allowed to practice law in institutions that have passive investors—such as stockholders.

Fifth, and perhaps most importantly, this debate does not involve the unauthorized practice of law. If bar council adopts the commission's recommendations, nonlawyers will not suddenly be permitted to practice law. Similarly, lawyers will not be able to practice law in institutions that do not meet the strict MDP guidelines.

The UPL issue seems to generate the most clichés, so this point bears emphasis. The MDP Commission was not charged with re-defining the practice of law. That task has been nearly impossible for every state that has attempted it because much of what we do does not fall within what could be called the “core” activities that define us—such as appearing in court or drafting legal documents. All of us should be alarmed that other professions are nibbling (or chomping) at the edges of what we do every day—financial planners recommend various estate plans, litigation managers organize document productions, zoning specialists suggest strategies, etc. The MDP Commission was not charged with dealing with this issue, and could not have done so any-

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way. In fact, no state bar has demonstrated either the financial resources or (more importantly) the political power or will to fight what could be seen as these encroachments. This is in large part because: Consumers are not complaining about any of this, and seem not to be hurt by it; the encroachers do not appear to be breaking any laws; and if they were, state legislatures would probably change those laws.

Anti-MDP speakers often end their presentations with rousing speeches about defending the ramparts of our profession, but in reality the anti-MDP voices sound less like Winston Churchill than like Don Quixote. In any event, the debate over MDPs does not involve the UPL issue—although the partnering of lawyers with nonlawyers might actually reduce the latter's incursion into what has traditionally been the legal profession's sole turf.

Allowing MDPs would also serve the beneficial goal of bringing back into our profession those lawyers who are now working in consulting firms, businesses, accounting firms, etc., and giving advice to their clients that could arguably be considered the "practice of law." Those lawyers now must essentially renounce their membership in our profession or else risk criminal prosecution as committing the unauthorized practice of law. It makes more sense to let those lawyers who are arguably practicing law in institutions that will meet the MDP requirements to acknowledge that they are practicing law and bring themselves under the bar's guidelines and discipline.

What the MDP Debate Does Involve

Having discussed what the MDP debate does not involve, now let me turn to what the issue is.

At its heart, the MDP issue is really quite simple. Turn your mind back to law school, when you heard about two rules for the first time: Lawyers cannot share their fees with nonlawyers, and lawyers cannot have partners who are not lawyers. In other words, if I want to have an engineer assist me in defending a construction case, I cannot share my fees with that engineer. If I find that the engineer would be enormously helpful on every case I handle, I could not form a partnership with that engineer. (Actually, I could form a partnership, but I would be committing a crime if I practice law while having an engineer as one of my partners.)

Now try to remember your first reaction to those rules. Did you wonder why those things are prohibited? Most lawyers still cannot articulate why. Honest lawyers will acknowledge that in large part the rules stem from the guild-like approach that lawyers have always taken to protect their turf. That motive seems more and more hollow as others are gobbling up our supposedly sacred "turf."

MDP simply involves allowing lawyers to share their fees with nonlawyers (if and only if their clients consent after full disclosure), and allowing lawyers to have partners who are not lawyers (under certain very specific and onerous guidelines). That is all that the MDP debate involves—no more and no less.

The Key Question

The debate about whether MDPs will inalterably damage our profession really boils down to one key question: Can lawyers who share their fees with, or partner with, nonlawyers be trusted to act in accordance with our profession's core values? In other words, will lawyers who practice law in partnership with engineers (or social workers, or financial consultants, etc.) be trusted to: give independent legal advice to their clients? avoid adversity to their other clients?; keep confidential what they learn from their clients? That is the issue. If the answer is yes, then our profession's core values are safe. If the answer is no, the next question is whether those lawyers' compliance can be enforced through the disciplinary rules or tort remedies. If the answer to that question is yes, then the core values are safe.

Ironically, we do not really need to speculate about the answer to these key questions. To a certain extent, we already know the answers.

First, many lawyers are practicing today in institutions that (like MDPs) have nonlawyers in management positions, or even are totally controlled by nonlawyers. Examples include in-house lawyers, staff counsel for insurance companies, labor union lawyers, public interest group lawyers who serve at the pleasure of nonlawyer boards, etc.

There is not a scintilla of evidence that these lawyers are any more likely than the rest of us to violate our profession's core values. In fact, even in large law firms there can be pressures to do the wrong thing, yet all but a handful of lawyers stay the ethical course despite pressures to the contrary. Indeed, all lawyers face the temptation every day to stray from the core values. A young solo practitioner trying to raise a family must resist the temptation to comply with a lucrative client's urging to cut ethical corners. Every lawyer faces the temptation to lie about hours, take advantage of some information, or otherwise stray. We currently trust lawyers to make the right decision, and we punish those few who do not. In fact, the ethics rules and the disciplinary process have always focused on the individual lawyer—not on the institution in which the lawyer practices. The commission's emphasis on individual lawyer accountability simply represents a continuation of this approach.

The second reason we know the answer to the key question (of whether lawyers can be trusted to follow the core values regardless of the context in which they practice) is that lawyers seem to be staying the ethical course even as new relationships proliferate. Many law firms have nonlawyers on their staff to help the firm's clients. All of us hire other professionals on an *ad hoc* basis, and enter into referral arrangements with nonlawyers. Some firms (such as mine) own law-related subsidiaries. These relationships create just the kind of temptations that lawyers will face in MDPs, and the record indicates that consumers are not harmed, and that lawyers do not stray from the core values when facing those temptations.

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Incidentally, the proliferation of these new relationships could also be seen as a sign that consumers want the kind of “one stop shopping” that MDPs can offer. That would seem the logical conclusion, but the commission viewed this point as largely irrelevant. If consumers want one stop shopping, the market will supply it—one way or the other. The commission believes that the best way is for institutions offering such multiple services to include lawyers—because that would actually foster our core values rather than erode them. On the other hand, it may be that clients will not want to obtain their services from lawyers who practice law with nonlawyers. That would be fine, too. In Europe, many companies have chosen to purposely hire lawyers who are independent from all of their other advisors—precisely to obtain an independent approach. Clients who might want to sacrifice the efficiency of one-stop shopping to gain such independence will, of course, be free to do so. The point here is that those favoring MDPs should not have to prove that clients want them—the clients themselves will decide that eventually.

Let me make one more point about our current situation. As true MDPs have developed in Europe, and as MDP-like relationships have proliferated in the United States, there has been one striking element that all of us should keep in mind—clients are not complaining about lawyers in these new contexts. The lack of client complaints is like the proverbial dog that did not bark in the Sherlock Holmes novel. If MDPs were harming clients, surely we would see complaints from those who are using the expanding relationships in the U.S., or true MDPs in Europe. One cannot help but be skeptical about lawyers’ dire predictions of client harm—when the clients themselves seem quite happy with these new arrangements.

What the Future Might Look Like

Lawyers sometimes ask me what the future holds if Virginia allows MDPs. I answer (honestly—as required by our core values) that I do not have a clue. Perhaps nothing will change. No lawyer will be forced to practice with nonlawyers. Some lawyers undoubtedly will end their careers just like they started them—practicing law only with other lawyers. But the future could also hold exciting possibilities that will expand both the opportunity to assist our clients, and to prosper financially. A family law lawyer might form a partnership with financial planners, psychologists, mediators, and marriage counselors. Elder law lawyers could share their fees with insurance agents, social workers, and geriatric care managers. A lawyer might decide to practice law in an engineering firm, so she can assist that firm’s clients in filling out government forms, filing patent applications, etc.

Now back to the key question. Are lawyers in those new settings likely to follow their ethical obligations—or can they be compelled to do so by the threat of bar discipline or tort liability? Those of us who support MDPs say the answer to that question is yes.

Giving Clients the Freedom to Choose

And that brings me to my final point. As an MDP supporter, I not only trust all (or most) of my fellow lawyers to do the right thing regardless of where they practice law, I have an even more profound trust in the wisdom of the American people to

wisely purchase legal services in settings that they deem to be in their best interests.

Absent some compelling and demonstrable evidence to the contrary, we believe that clients seeking legal services should not be forced to purchase those legal services only from a narrow range of institutions that we, the profession, dictate. That approach might have worked in an age where choice was less important, and where guilds thrived.

However, we are already seeing that consumers will seek solutions to their problems from nonlawyers when it suits them. Indeed, that is what is causing the alarming trends I mentioned above. Why would we continue to prohibit the American public from buying our services in other settings that they choose? Personally, the only reason I can see is pure turf-protection, which can be temporarily sustained with rhetorical flourishes about our grandfathers, but which ultimately will be overtaken by what has always been the genius of the American economy—that consumers can (and therefore should) be trusted to make their own decisions about when, where, and how to purchase what they want and need.

Let me close with one more optimistic point. Some lawyers have come to me after a program about MDPs to tell me that they support the commission’s proposals—but only because they see the inevitability of MDPs. I tell them that none of us should view the development of MDPs as some glum surrender to an inevitable historical trend that will weaken our profession.

On the contrary, MDPs will allow lawyers to serve their clients in new and better ways (as I explained above). Even if lawyers decide to practice law in an MDP owned or controlled by others, why do opponents of MDPs think that those lawyers will be the downtrodden servants of others? Throughout our profession’s history, lawyers have risen to the top of every organization they join—from state legislatures to huge corporations to neighborhood associations. Why would we expect any less of lawyers practicing law in MDPs?

As I see it, MDPs represent a classic win-win situation. Lawyers are given new worlds to conquer, and clients are given the freedom to obtain legal services in different settings from which they can choose. 🙏



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