

Understanding the Debate Over Multidisciplinary Practice (MDP)

The Virginia State Bar and The Virginia Bar Association Joint Commission on Multidisciplinary Practice (MDP) unanimously adopted ten recommendations that would permit lawyers to practice law in what are called MDPs—multidisciplinary practice entities. The joint commission said that its recommendations will maximize consumer and lawyer choice while preserving the legal profession's critical "core values" of independence, loyalty and confidentiality.

The debate over MDPs does not involve nonlawyers practicing law. Nonlawyers will continue to be prohibited from practicing law. Instead, the joint commission's recommendations would permit lawyers in certain situations to share their fees with nonlawyers, and practice law in institutions that are partially or wholly owned by nonlawyers.

Changing Nature of Professionals. In recent years, the lines have blurred between professionals such as lawyers, financial advisors, consultants, stockbrokers, estate planners, accountants, etc. Other professions are increasingly performing tasks that lawyers once exclusively performed. This trend has been exacerbated by the near impossibility of precisely defining the meaning of "practicing law."

This convergence has impeded vigorous enforcement of the "unauthorized practice of law" (UPL) criminal statutes and rules. The joint commission did not view strict UPL enforcement as a viable option.

Current MDP-Type Developments. As part of these trends, lawyers are increasingly helping their clients obtain non-legal services by arranging referral networks with other professionals, hiring other service providers as part of the law firm staff or as independent contractors, starting firm-owned ancillary businesses and other methods.

Another accelerating trend is that of lawyers practicing law in institutions that are owned, controlled or managed by nonlawyers. They include in-house lawyers, staff counsel for liability insurance companies, counsel for legal services organizations, labor union and public interest group lawyers and government lawyers. The absence of consumer complaints about these lawyers' behavior suggests that lawyers can preserve their independence, loyalty and confidentiality while reporting to nonlawyers.

MDPs in Other Jurisdictions. As a result of many European accounting firms' acquisitions of European law firms, the ABA established a special commission to study MDPs in the United States. Although the ABA ultimately rejected any changes in the Model Rules that would allow MDPs, most states are now studying the MDP issue. So far, several state commissions have adopted a

pro-MDP approach. However, the task forces in many states have either rejected MDPs outright or have approved MDPs only if controlled by lawyers. Very few states have taken final action.

The Virginia Joint Commission. The Virginia Joint Commission began its work early last year, and has met monthly since August, 2000. The joint commission studied the issues, met with many groups and conducted a limited survey of Virginia's lawyers. The joint commission operated with the presumption that consumers and lawyers should be given the greatest possible freedom to obtain and deliver legal services as long as the profession's core values are preserved.

Consumer Demand for MDPs. The joint commission said that several facts point in the direction of consumer demand for obtaining multiple professional services from a single entity: the ABA commission's findings; the joint commission's meetings with public interest groups and others; the growth of ethically permitted MDP arrangements and the increased provision of services by nonlawyers that were once exclusively provided by lawyers.

Protecting the "Core Values." The joint commission concluded that lawyers sharing their fees with nonlawyers, or working for entities wholly or jointly owned by nonlawyers, can maintain the core values of independence, loyalty and confidentiality.

First, lawyers currently working in institutions owned or managed by nonlawyers (mentioned above) have maintained their independence. The paucity of consumer complaints speaks to their success. Second, lawyers' duty of loyalty can be maintained by insisting that lawyers in MDPs consider all of the MDP's clients as the lawyer's clients for conflicts of interest purposes. Third, the duty of confidentiality can be satisfied by requiring that lawyers explain to all of their clients (in writing) the different confidentiality duties that apply to the client's communications with nonlawyers in the MDPs. The joint commission said that lawyers practicing in MDPs will have to take special precaution in performing intake functions, so that the initial communications with MDP clients will be protected by the attorney-client privilege (to be followed, where appropriate, by non-privileged communications between the clients and nonlawyers in the MDPs).

Appropriate MDP Forms. The joint commission considered four particular issues about the appropriate form of MDPs. First, like all of the other state commissions that have taken a pro-MDP position, the joint commission believes that all MDP owners should be active participants in the MDP, thus prohibiting passive investment in, or public ownership of, MDPs. This means that lawyers will not be able to practice law while employed by publicly owned banks or retail stores such as Wal-Mart. The joint commission recommends that disbarred/suspended lawyers not

be allowed to have any ownership of an entity in which lawyers practice law. Second, the joint commission stated that requiring MDPs to register with the state would create an unnecessary bureaucracy and inappropriately involve the Supreme Court in corporate government. Third, as tempting as it is to require that MDPs be majority-owned by lawyers, the joint commission concluded that such a requirement would restrict consumer and lawyer choice without a showing that the restriction is necessary to preserve the core values. Fourth, the joint commission found that specifying that MDPs can be owned only by certain licensed professionals would generate a dispute about the selection of the professionals, ignore the market's role in deciding which combination of professionals is appropriate and be inconsistent with the best approach focusing on the individual lawyer's compliance with ethics duties (especially the core values) regardless of where the lawyer practices law.

At its meeting in October 2001 in Wintergreen, Virginia, the Virginia State Bar Council had an opportunity, for the first time,

to review and discuss the *Joint Commission's Report and Recommendations*. The views expressed by members of council regarding MDP were diverse, ranging from enthusiastic support to vehement opposition. Other members were undecided and want more information. Some grudgingly accepted MDP as inevitable, but not necessarily desirable.

The council will study and discuss the Joint Commission's Report and Recommendations at its next meeting in February 2002. The full report and recommendations of the Joint Commission can be found on the Internet at the Virginia State Bar's Web site. The address is www.vsb.org/mdp/report_100101.html. When the council will be called upon to act on the commission's report, and approve or disapprove the joint commission's recommendations, has not yet been identified.

Finally, to help members of the bar become acquainted with the arguments in favor of and against MDP, a "Point-Counterpoint" summary of the debate is set out below.

Point

1. Limiting lawyers to practice only in law firms is overly restrictive and impairs client choice. Clients should be able to choose a professional service firm that offers integrated, interdisciplinary services in addition to legal services. Clients want "one stop shopping" for multidisciplinary professional services. Proof of this can be found in the convergence of the banking, insurance and securities brokerage service industries and the early success of MDPs where they have been permitted to practice.

2. The prohibition against fee-sharing with nonlawyers is archaic and does not protect the client.

3. MDP is inevitable. The bar does not have the resources to prohibit MDP. The prevailing market forces, driven by globalization, consolidation, competition, convergence and technology, will dictate the manner in which professional services are delivered. In the final analysis, the economic and market forces which drive the MDP movement will prevail over the legal profession's efforts to prevent nonlawyer entities from providing law-related services.

4. Lawyers can share legal fees with nonlawyers and still be independent and act in the client's best interest. Lawyers can be trusted and already work in settings where nonlawyers have control and influence. Examples include corporate counsel, insurance company staff attorneys, union lawyers, public interest staff attorneys, government lawyers and legal aid lawyers. Few, if any, complaints have been made about lawyers practicing in these settings. These examples also provide some

Counterpoint

1. There has not been any significant consumer or client demand for MDP. The MDP issue is really a marketing ploy by large professional service firms to compete with lawyers. The MDPs are merely a business strategem to make money and ignores what is in clients' best interests. The legal profession must remain autonomous and committed to serving the public. MDPs will drive the small and solo firms out of business and, ultimately, consumers will have fewer alternatives from which to choose.

2. The prohibition against fee-sharing with nonlawyers protects clients and promotes a lawyer's independent professional judgment.

3. To say that MDP is already here and the forces behind it are too strong to oppose it is to ignore the real problem—our lack of courage to stand up for those values that have clearly identified the legal profession. Black letter rules and effective enforcement will protect the public, not "marketplace ethics."

4. Lawyers must maintain control and authority over professional service firms to ensure their independence and ability to adhere to the high professional and ethical standards. How will the legal profession maintain its independence and culture in an unrestricted MDP environment where many lawyers' daily colleagues and partners come from professions with different functions and values? How will lawyers resist pressures from their non-lawyer colleagues to cut ethical corners, reduce pro bono

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empirical evidence that lawyers can be trusted to honor the profession's core values in institutions owned (in whole or in part) or managed by nonlawyers.

5. Stepped-up enforcement of UPL and ethics rules to prevent nonlawyers from working with lawyers will prove expensive to the bar and costly to the public image of the legal profession. The public and legislature will likely view such a campaign as mere "turf protection" rather than public protection. Defining the "practice of law" is increasingly problematic as nonlawyers encroach into law-related areas. The wiser approach is to attempt to regulate lawyers practicing in an MDP rather than prosecuting an MDP for UPL. UPL violations are difficult to police, particularly where the clients are well-served and do not complain, which is often the case. The overwhelming majority of UPL is reported not by the clients, but rather by attorneys who act under a notion that they are ethically required to report UPL.

6. MDP already exists in *de facto* form and is rapidly growing. Lawyers and nonlawyers have referral networks through which members of different professional disciplines refer clients to one another. Lawyers and nonlawyers have already established referral systems with financial arrangements or rewards that the bar cannot police. Pre-paid legal service plans and for-profit lawyer referral services are permitted. Various types of strategic alliances between law firms and other service providers exist and are increasing. Law firms own separate "ancillary businesses" to provide other services to the public in addition to legal services. Examples include lawyer-owned title companies and governmental relations consulting firms. For many years, lawyers have been trusted to ethically serve as dual professionals, offering both legal and non-legal services to clients. They must adopt procedural safeguards to ensure that their legal and non-legal services are separately conducted, and that the clients are adequately protected and understand the different roles.

Counterpoint

commitments or relax professional standards? How will disciplinary bodies determine whether a lawyer's independent professional judgment has been improperly influenced or displaced by the concerns of nonlawyer partners or stockholders?

5. Our existing rules are worth enforcing because they protect our clients and the public. Our survival as an independent self-regulating profession is dependent upon our ability to carry out our special role in society to protect the public, the rule of law and the integrity of the legal system. Amending the Rules of Professional Conduct to allow lawyers to practice in MDPs will not stop the "Big Five" accounting firms from engaging in UPL. They will continue to use nonlawyers to provide "consulting" services and continue their denial that they are practicing law. Lawyers practicing in MDPs will continue to argue that they are not practicing law and, therefore, are not subject to the rules of professional conduct that presume an attorney-client relationship. Lawyers in the "Big Five" accounting firms will continue their "civil disobedience" and will resist the regulatory approach recommended by the commission. If fully integrated MDPs are permitted to commingle legal and non-legal services under the same roof, UPL enforcers will find it difficult to challenge a defense by a nonlawyer that his or her work product was "supervised" or "reviewed" by an MDP lawyer. Although the commission says that nonlawyer MDP employees cannot provide legal services, it will be difficult to hold MDP lawyers accountable if they do perform legal work when not under the lawyer's supervision or control.

6. Some types of *de facto* MDPs may exist, but this does not prove that MDPs are in the public's interest or that the bar should permit MDPs controlled wholly by nonlawyers. MDPs owned and controlled by nonlawyers are unnecessary. Lawyers can already offer interdisciplinary professional services through ancillary businesses and referral arrangements under the existing ethics rules and maintain control and professional independence. Permitting nonlawyers to exercise control over the delivery of legal services threatens lawyer independence. Proof of this can be demonstrated by the insurance industry's attempts to limit a defense attorney's representation of an insured in order to save costs. The bar declared such efforts conflicted with the lawyer's duty to the client—the insured. LEO 1723. Permitting MDPs would only exacerbate this problem. The commission's reliance on the practice settings of the corporate, government and legal aid lawyers is misplaced. Attorneys in those practice settings are not under the same pressures as lawyers in private practice and their experiences are too different to compare.

Point

7. There are no reported lawsuits or complaints against MDP lawyers for breach of ethics, despite the fact that MDPs have operated in Europe for nearly ten years.

8. It is far better for the bar to regulate MDP lawyers providing legal services in an MDP, than to allow lawyers who currently work in nonlawyer professional service firms to deny that they are practicing law and remain unregulated.

9. The attorney-client privilege is owned by the client and the client has the right to waive the privilege. It is the lawyer's responsibility to warn the client about the risks of losing the privilege, just as lawyers do now when they associate nonlawyer professionals to work jointly on a client's matter. Lawyers in MDPs can provide adequate disclosure and warnings to clients and implement intake and screening procedures in an MDP to protect confidential client information or communications.

10. "Chinese Walls" and "ethics screens" can be used to address conflicts of interests, along with prospective waivers. Big law firms have been employing these practices in the U. S. for years.

Counterpoint

7. The European experience with MDP is not persuasive evidence that MDPs will work in the U.S. Our legal history, culture and system is so different that any decision about MDP must consider the legal system in this country and our uniquely litigious society. Significantly, most state bars in the U.S. that have studied MDP have concluded that MDP is not in the best interest of the public or the profession. Only two state bars—Arizona and Colorado—have actually adopted their respective task force's recommendations to allow fully-integrated MDPs. Another state bar—Minnesota—has authorized lawyer-controlled MDPs for licensed professionals only. Although a number of state bar task forces have recommended some form of MDP, the governing bodies in those states have rejected those reports. These states are Florida, Maryland, Oregon, Pennsylvania and Utah. State bars that have either rejected MDP or disbanded their task force without recommendation are Arkansas, Connecticut, Delaware, Idaho, Illinois, Kansas, Kentucky, Michigan, Mississippi, Missouri, Nebraska, New Jersey, New York, Ohio, Rhode Island, Tennessee, Texas and West Virginia. Task forces in the following states have issued pro-MDP reports that have not been adopted by their governing authority: California, the District of Columbia, Georgia (lawyer-controlled, professions only), Indiana (lawyer-controlled, professionals only), North Carolina (lawyer-controlled, recognized professions only), South Carolina (licensed and regulated professions only) and Virginia.

8. This proposal assumes that the bar will be able to successfully regulate lawyers in MDPs and that such lawyers and their firms will not resist the bar's efforts to regulate MDP. What incentive will an MDP lawyer have to obtain and maintain a law license?

9. Clients, as consumers of legal services, especially unsophisticated clients, will not likely appreciate that they will be risking waiver of the attorney-client privilege and diluted loyalty if they choose instead to go to the shared business offices of a real estate broker, an accountant and a lawyer. There is a great likelihood that the unsophisticated client will receive compromised legal representation.

10. In Virginia "Chinese Walls" are no substitute for informed client consent to a conflict. The commission's proposal that "clients" of nonlawyer professionals in an MDP shall be treated as "clients" of the lawyer will greatly restrict the MDP lawyer's practice, placing the MDP lawyer at a significant disadvantage. The nonlawyer MDP professionals are not bound by our conflicts

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11. Clients want choice. The fact that MDP firms are organized and making profit is some evidence of consumer demand. The American Corporate Counsel Association (ACCA) officially adopted a position in favor of MDPs as providing more choice, despite all of the regulatory impediments which highlight the potential harm to public and clients arising from such organizations. ACCA, consists of in-house lawyers in corporations, who are responsible for hiring outside professional service firms and therefore more likely to recognize the “dangers” of MDPs quicker and more thoroughly than any other group.

12. Attempts by the organized bar to curtail nonlawyer business activity in law-related areas will likely be challenged under the antitrust laws as an unreasonable restraint on trade by those who view Rule 5.4 and the UPL rules as “turf protection.” Absent empirical evidence that consumers will be harmed by MDP firms, state bars may be unable to convince courts and legislature that such restrictions advance any significant government interest.

13. Allowing lawyers to partner with nonlawyers in MDPs will give both lawyers and clients more options in the delivery of professional services.

Counterpoint

rules. The commission’s proposal only regulates MDP conflicts of interest through the lawyer—only the lawyer will be required to decline or withdraw from a conflicting engagement. The MDP lawyer will not be able to control which engagements his nonlawyer colleagues accept if the nonlawyers have the control and authority in the MDP.

11. The ACCA does not represent the interests of the individual client or unsophisticated consumer of legal services. Moreover, the ACCA’s position is arguably challenged by the views of corporate counsel and executives in the UK where MDP has existed for at least 5 years. According to *Commercial Lawyer*, in a survey it conducted of the FTSE 100 companies, an overwhelming 75% preferred to use independent firms over an MDP. Of the top 300 private companies, 78% responded that they would rather keep their legal and accounting service providers separate.

12. We may need to raise money, enforce our rules, explain our position and commit ourselves to what we believe is right for the protection of our clients. If we are right, then our rules will withstand challenge. If we believe that our rules are reasonable and necessary, we should be prepared to defend them. Otherwise our commitment to professional independence will wither and disappear.

13. Our profession will lose its identity and independence if we allow nonlawyer business persons to control the delivery of legal services. One need only look to how managed health care in the U.S. has compromised the medical profession’s independence, forcing it to lobby Congress for a patient’s bill of rights and the right to organize unions.

Conclusion

The decision to allow lawyers to practice in MDPs controlled, in whole or in part, by nonlawyers is an important one for the bar and cannot be taken lightly. Members of the bar should try to educate themselves on this important issue and express their opinions

to their respective representatives on council. Members of the joint commission and the office of the ethics counsel at the Virginia State Bar should be contacted for further information, questions or comment. ☺