

CHAPTER 2

The Work of the ABA Commission on Multidisciplinary Practice*

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§ 2.01 Introduction

In comparison to foreign responses to MDPs, the American Bar Association was relatively slow to respond to the MDP phenomenon. After it was finally convened, however, the ABA Commission on

* This Chapter is substantially based on Terry, "A Primer on MDPs: Should the "No" Rule Become a New Rule?," 72 Temple L. Rev. 869, 902-918 (1999). Complete references and citations can be found in that document.

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Multidisciplinary Practice (“the Commission”) engaged in an extensive fact-gathering process, assembled information from around the world, issued numerous useful documents, and created an Internet website¹ that continues to serve as a tremendous mechanism for education about MDPs. Although both of the Commission’s proposals were soundly defeated by the ABA House of Delegates, proponents and opponents of the Commission’s proposals lauded the ABA Commission for its efforts.

Section 2.02 of this chapter presents the history of the Commission’s activities. Section 2.03 explains the “Hypotheticals and Models” set forth by the Commission because that language has now permeated the MDP debate. Section 2.04 provides additional detail about the Commission’s two proposals. Section 2.05 reviews some of the criticisms of the Commission’s work. Section 2.06 concludes with a brief summary of activities that have occurred subsequent to the discharge of the ABA Commission.

¹ The website of the ABA Commission on Multidisciplinary Practice is found at <http://www.abanet.org/cpr/multicom.html> (hereafter “Commission website”). This website is a tremendous resource and contains all of the items referred to in this chapter.

§ 2.02 A Brief History of the ABA MDP Commission

In August 1998, then-ABA President Philip S. Anderson created the ABA Commission on Multidisciplinary Practice (“the Commission”). The Chair of the ABA Commission was Sherwin P. Simmons, a partner and chair of the Tax Department in the Miami, Florida law firm of Steel, Hector & Davis, and a past chair of the ABA Section of Taxation and former member of the ABA Board of Governors. The other eleven members of the Commission included:

- **Carl O. Bradford**, a judge of the Maine Superior Court and a past member of the ABA Board of Governors.
- **Paul L. Friedman**, a judge of the U.S. District Court for the District of Columbia and a past chair of the ABA Commission on Homelessness and Poverty;
- **Phoebe A. Haddon**, a professor at Temple University School of Law and a member of the ABA Standing Committee on Professionalism.
- **Geoffrey C. Hazard Jr.**, a professor at the University of Pennsylvania School of Law, director of the American Law Institute and the reporter for the ABA Model Rules of Professional Conduct;
- **Roberta Reiff Katz**, senior vice president, general counsel and secretary of Netscape Communications Corp. in Mountain View, Calif., and author of *Justice Matters: Rescuing the Legal System for the 21st Century*
- **Carolyn Lamm**, a partner in the Washington, D.C., office of the law firm of White & Case and a member of the ABA House of Delegates;
- **Robert H. Mundheim**, senior executive vice president and general counsel of Salomon Smith Barney Holdings, Inc., based in New York City, and a member of the Council of The American Law Institute;
- **Steven C. Nelson**, a partner in the law firm of Dorsey & Whitney in Minneapolis, Minn., and a past chair of the ABA Section of International Law and Practice;
- **Burnele V. Powell**, dean of the School of Law of the University of Missouri at Kansas City, and chair of the ABA Center for Professional Responsibility Governing Committee;
- **Michael Traynor**, a member of the San Francisco law firm of Cooley Godward, 2nd Vice President of the American Law Institute and Fellow of the American Bar Foundation; and
- **Herbert S. Wander**, a partner in the law firm of Katten Muchen & Zavis, Chicago, Ill., and a past chair of the ABA Section of Business Law.

The Reporter was Mary C. Daly, a Professor of Legal Ethics at Fordham University School of Law and the Director of the law school's Stein Institute of Law and Ethics. The counsel to the Commission was Art Garwin, a staff lawyer at the ABA Center for Professional Responsibility. The liaisons from the ABA Board of Governors attended the Commission's hearings and appeared, to outsiders, no different from Commission members. The liaisons were Joanne M. Garvey, an attorney with Heller Ehrman White & McAuliffe in San Francisco, California, and Seth Rosner, who is Of Counsel with Jacobs Persinger & Parker in New York City.¹

The Commission's first set of multi-day hearings took place in Washington, D.C., in November 1998. In January 1999, the Commission issued a document entitled *Background Paper on Multidisciplinary Practice: Issues and Developments*. This lengthy document summarized MDP developments outside the U.S., explained initiatives by accounting firms in the U.S. with respect to legal services, set forth the current ethical framework in the U.S. that governs MDPs, and solicited responses to several specific questions. The Commission held its second set of hearings in February of 1999 at the ABA midyear meeting in Los Angeles. In March 1999, the Commission posted a document on its website entitled "Hypotheticals and Models." The ABA Commission held its third set of hearings in Washington, D.C. in March 1999. Approximately two months later, on June 8, 1999, the Commission issued its *Report and Recommendation*.

The Commission's *Report* was considered at the ABA Annual Meeting in Atlanta in August 1999. Following a debate, the House of Delegates effectively rejected the Commission's recommendation and approved a resolution that sent the Commission "back to the drawing board." By a vote of 304-98,² the ABA House of Delegates passed a resolution that:

[T]he American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until 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.

¹ See, e.g., *Background Paper on Multidisciplinary Practice: Issues and Developments*, available on the Commission's website, § 2.01 N. 1 *supra*.

² See Van Duch, "ABA Honchos Differ Over MDP Vote," *Nat'l L. J.* Aug. 23, 1999 at A6.

While its June 1999 recommendation was pending, the Commission held a fourth set of public hearings in August 1999 during the Annual Meeting. In October 1999, in connection with the meeting of the ABA General Practice, Solo and Small Firm Section, the Commission held a fifth set of public hearings. Finally, in February 2000, at the ABA Midyear Meeting in Dallas, the Commission held a sixth and final set of public hearings.

Meanwhile, in December 1999, the Commission issued an *Updated Background and Informational Report and Request for Comments*. This report highlighted post-August 1999 developments in the United States and abroad, provided the Commission's preliminary response to post-report comments and criticisms, and explained possible alternative approaches. Thereafter, the Commission posted on its web page a document entitled "Postscript to the February 2000 Dallas Midyear Meeting," which highlighted the issues about which the Commission sought input. In March 2000, the Commission posted on its website a *Draft Recommendation to the ABA House of Delegates*, which significantly modified and simplified the Commission's earlier June 1999 *Recommendation*. The March 2000 recommendation became a final Commission recommendation—its second—in May 2000. This second recommendation met with a similar fate as the first—it ultimately was defeated by the ABA House of Delegates.

In July 2000, by a 3-1 margin and after vigorous debate, the ABA House of Delegates affirmed the current ban on MDPs, disbanded the ABA Commission on Multidisciplinary Practice, and recommended that the ABA Standing Committee on Ethics & Professional Responsibility consider whether changes were necessary in order to assure that there are safeguards in the ethics rules related to strategic alliances and contractual arrangements between lawyers and non-lawyers. The full text of this resolution, which was approved by a vote of 314 to 106,³ states:

Illinois State Bar Association
New Jersey State Bar Association
New York State Bar Association
The Florida Bar
Ohio State Bar Association
Bar Association of Erie County
Cuyahoga County Bar Association

³ See Davis, "ABA Emphatically Rejects MDPs," Nat'l L. J., July 24, 2000, at A5; Rosenberg, "Accounting Legal Affiliates Criticize ABA's Proposal to Restrict MDPs," Nat'l L. J. July 31, 2000, at B6.

RECOMMENDATION 10F

RESOLVED, that each jurisdiction is urged to revise its law governing lawyers to implement the following principles and preserve the core values of the legal profession:

1. It is in the public interest to preserve the core values of the legal profession, among which are:

- a. the lawyer's duty of undivided loyalty to the client;
 - b. the lawyer's duty competently to exercise independent legal judgment for the benefit of the client;
 - c. the lawyer's duty to hold client confidences inviolate;
 - d. the lawyer's duty to avoid conflicts of interest with the client;
- and
- e. the lawyer's duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.
 - f. the lawyer's duty to promote access to justice.

2. All lawyers are members of one profession subject in each jurisdiction to the law governing lawyers.

3. The law governing lawyers was developed to protect the public interest and to preserve the core values of the legal profession, that are essential to the proper functioning of the American justice system.

4. State bar associations and other entities charged with attorney discipline should reaffirm their commitment to enforcing vigorously their respective law governing lawyers.

5. Each jurisdiction should reevaluate and refine to the extent necessary the definition of the "practice of law."

6. Jurisdictions should retain and enforce laws that generally bar the practice of law by entities other than law firms.

7. The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.

8. The law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised.

FURTHER RESOLVED that the Standing Committee on Ethics and Professional Responsibility of the American Bar Association shall, in consultation with state, local and territorial bar associations

and interested ABA sections, divisions, and committees undertake a review of the Model Rules of Professional Conduct (“MRPC”) and shall recommend to the House of Delegates such amendments to the MRPC as are necessary to assure that there are safeguards in the MRPC relating to strategic alliances and other contractual relationships with nonlegal professional service providers consistent with the statement of principles in this Recommendation.

FURTHER RESOLVED that the American Bar Association recommends that in jurisdictions that permit lawyers and law firms to own and operate nonlegal businesses, no nonlawyer or nonlegal entity involved in the provision of such services should own or control the practice of law by a lawyer or law firm or otherwise be permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person.

FURTHER RESOLVED that the Commission on Multidisciplinary Practice be discharged with the Association’s gratitude for the Commission’s hard work and with commendation for its substantial contributions to the profession.

In adopting this resolution, the ABA House of Delegates defeated a motion to substitute a competing resolution to the effect that the ABA take no further actions to discourage further discussion of MDPs and that MDPs be included within the jurisdiction of the ABA Committee on Research into the Future of the Legal Profession.

Although a number of organizations around the world have considered the issue of MDPs, including the Canadian Bar Association, the Law Society of Upper Canada, the Law Society of England and Wales, the Law Council of Australia, New South Wales, and the European Bar Association known as the CCBE, the Commission’s work is particularly useful for those interested in learning about MDPs. One reason why the Commission’s work has been so useful is because it has been extremely “transparent.” The Commission maintains an Internet web site on which it has posted all of the materials described above. In addition to the Commission’s own materials, the website includes links to other significant work on MDPs, such as the almost 400 page report prepared by the New York State Bar Association Special Committee on Multidisciplinary Practice and the Legal Profession.

The Commission’s work also is quite useful because of the breadth of witnesses from which it heard. Because of the importance of the United States legal market, witnesses from around the world came to

provide testimony. Although some criticized the Commission for not hearing a wider range of views, witnesses included consumer representatives;⁴ bar counsel;⁵ state and local bar representatives;⁶ actual or potential MDP clients;⁷ Big Five and accounting organization representatives;⁸ lawyers working for ancillary businesses or in a nonlegal capacity;⁹ private legal practitioners from very large firms¹⁰ and very small firms;¹¹ in-house counsel;¹² lawyers and judges who had observed the Big Five's lawyer and nonlawyer work product;¹³ rep-

⁴ See oral testimony of William A. Bolger (Executive Director, National Resource Center for Consumers of Legal Services) (Mar. 11, 1999); Oral remarks of Wayne Moore (Director, AARP) (Mar. 11, 1999); Written remarks of James Turner (Executive Director, H.A.L.T.) (Feb. 5, 1999); Written remarks of Lora H. Weber (Consumers Alliance of the Southeast) (Mar. 11, 1999).

The "testimony" referred to in this note and the other notes in this chapter are found as links from the ABA Commission website, § 2.01 N. 1 *supra*. To locate the testimony, find the appropriate set of hearings, by date, on the Commission's webpage. After clicking on the appropriate hearings, all of the testimony and documents submitted by the witnesses during those dates will be listed and can be retrieved.

⁵ See testimony of Susan Gilbert (D.C. Bar) (Nov. 12, 1998); Oral testimony of Lynda Shely (State Bar of Arizona and ABA Standing Committee on Client Protection) (Feb. 5, 1999).

⁶ See testimony of James R. Silkenat (Association of the Bar of the City of New York) (Nov. 13, 1998). The following witnesses testified after the Commission issued its report: Samuel Bufford (Los Angeles County Bar Association) (Aug. 8, 1999); Steve Hoffman (President, New York County Lawyers' Association) (Aug. 8, 1999); Written remarks of Steven Krane (New York State Bar Association) (Aug. 8, 1999); James M. Seff (State Bar of California) (Aug. 8, 1999).

⁷ See testimony of Steven A. Bennett (Banc One) (Nov. 13, 1998); Testimony of M. Elizabeth Wall (Cable & Wireless) (Nov. 12, 1998).

⁸ See written remarks of Neil Cochran (Dundas & Wilson C.S.) (Feb. 4, 1999); Written remarks of Samuel DiPiazza (PricewaterhouseCoopers) (Mar. 11, 1999); Oral remarks of Richard Miller (General Counsel, AICPA) (Mar. 12, 1999); Written remarks of Kathryn Oberly (Vice Chair and General Counsel, Ernst & Young) (Feb. 4, 1999); Written Remarks of Roger Page (Deloitte & Touche) (Mar. 11, 1999); Written remarks of Richard Spivak (Managing Partner-Tax-North America, Andersen) (Mar. 12, 1999); Written remarks of Irwin Treiger & William J. Lipton (Co-Chairs, National Conference of Lawyers and Certified Public Accountants) (Mar. 11, 1999).

⁹ See written remarks of James W. Jones (APCO Associates, Inc.) (Feb. 6, 1999).

¹⁰ See written remarks of Sydney M. Cone, III (Cleary, Gottlieb, Steen & Hamilton) (Mar. 12, 1999); Written remarks of Lawrence J. Fox (Drinker Biddle & Reath) (Feb. 4, 1999); Oral remarks of Lawrence M. Hill (White & Case) (Feb. 4, 1999).

¹¹ See oral testimony of Jay G. Foonberg (Bailey & Marzano) (Feb. 6, 1999); written remarks of Charles F. Robinson (Law Offices of Charles F. Robinson) (Feb. 5, 1999).

¹² See, e.g., written remarks of Steven A. Bennett (Banc One) (Nov. 13, 1998); Testimony of Elizabeth Wall (Cable & Wireless) (Nov. 12, 1998).

¹³ See testimony of Ward Bower (Altman Weil) (Nov. 12, 1998); oral remarks of Lawrence M. Hill (White & Case) (Feb. 4, 1999); Testimony of Karen D. Powell

representatives of ABA sections, committees, or other entities;¹⁴ other lawyer organizations;¹⁵ malpractice insurance representatives;¹⁶ unauthorized practice of law (“UPL”) committee representatives;¹⁷ law school placement officials;¹⁸ organizations and individuals with dual CPA and lawyer qualifications and the organizations that represent them;¹⁹ representatives from the Securities and Exchange Commission (“SEC”);²⁰ as well as academics in tax, accounting, legal history, and ethics.²¹ Witnesses included those who were strongly opposed

(Petrillo & Powell) (Nov. 12, 1998); Testimony of Les Shapiro (Padgett Foundation) (Nov. 12, 1998); Written remarks of Samuel B. Sterrett (Vinson & Elkins) (Feb. 4, 1999).

¹⁴ See written remarks of Judge Judith M. Billings (Chair, ABA Standing Committee on Pro Bono and Public Service) (Feb. 6, 1999); Written remarks of William M. Hannay, III (Chair, ABA International Law and Practice Section) (Mar. 11, 1999); Testimony of Jan McDavid (ABA Antitrust Section) (Nov. 13, 1998); Oral remarks of Joseph P. McMonigle (Chair, ABA Standing Committee on Lawyers Professional Liability) (Mar. 12, 1999); Testimony of M. Peter Moser (ABA Standing Committee on Ethics and Professional Responsibility) (Nov. 13, 1998); Oral testimony of Larry Ramirez (Chair, ABA General Practice, Solo and Small Firm Section) (Feb. 6, 1999); Written remarks of Charles F. Robinson (Law Offices of Charles F. Robinson) (Feb. 5, 1999); Written remarks of Stefan F. Tucker (Chair, ABA Section of Taxation) (Feb. 4, 1999).

¹⁵ See testimony of Stephen McGarry (Lex Mundi) (Nov. 13, 1998). The following witnesses testified after the Commission issued its first report: Richard P. Campbell (International Association of Defense Lawyers) (Aug. 8, 1999); Patricia J. Kerrigan (President, Texas Association of Defense Counsel) (Aug. 8, 1999); Oral testimony of John Kouris (Executive Director, Defense Research Institute) (Aug. 8, 1999).

¹⁶ See testimony of William Freivogel (Attorney Liability Assurance Society) (Nov. 13, 1999); Oral remarks Joseph P. McMonigle (Chair, ABA Standing Committee on Lawyers Professional Liability) (Mar. 12, 1999).

¹⁷ See testimony of William Elliott (Kane, Russell, Coleman & Logan) (Nov. 13, 1999).

¹⁸ See oral testimony of Abbie F. Willard (Assistant Dean of Career Services, Georgetown University Law Center) (Feb. 5, 1999).

¹⁹ See oral testimony of Sidney Traum, David Ostrove, and Philip D. Brent (American Association of Attorney-CPAs) (Feb. 5, 1999).

²⁰ See, e.g., Written Comments Not Presented at Hearings, Comment of Lynn E. Turner (Chief Accountant, United States Securities and Exchange Commission); Written Replies to Commission, Reply of Harvey J. Goldschmid, General Counsel; Lynn E. Turner, Chief Accountant; Richard H. Walker, Director of Enforcement (United States Securities and Exchange Commission).

²¹ See written remarks of John Dzienkowski (Professor, University of Texas School of Law) (Feb. 5, 1999); Testimony of Professor Linda Galler (Professor, Hofstra University School of Law) (Nov. 13, 1999); Testimony of Harold Levinson (American Association of Attorney-Certified Public Accountants) (Nov. 13, 1998); Written remarks of Laurel S. Terry (Professor, The Dickinson School of Law of the Pennsylvania State University) (Mar. 12, 1999); Written remarks of Bernard Wolfman (Professor, Harvard Law School) (Mar. 12, 1999).

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to lifting the MDP ban²² and those who were strongly in favor of adopting regulations to permit MDPs.²³ In addition to these witnesses, the Commission received over thirty written comments not personally presented at the hearings. The Commission also received more than forty written comments in response to its *Report* which was issued June 8, 1999.

In sum, both proponents and opponents of the Commission's work probably would agree that the Commission engaged in a monumental effort.

²² See, e.g., oral testimony of Jay G. Foonberg (Bailey & Marzano) (Feb. 6, 1999); Written remarks of Lawrence J. Fox (Drinker Biddle & Reath) (Feb. 4, 1999); Oral remarks of Bernard Wolfman (Professor, Harvard Law School) (Mar. 12, 1999).

²³ See, e.g., testimony of Steven A. Bennett (Banc One) (Nov. 13, 1998); Written remarks of James W. Jones (APCO Associates, Inc.) (Feb. 6, 1999); Written remarks of Charles F. Robinson (Law Offices of Charles F. Robinson) (Feb. 5, 1999); Written remarks of Stefan F. Tucker (Chair, ABA Section of Taxation) (Feb. 4, 1999); Written remarks of Lora H. Weber (Consumers Alliance of the Southeast) (Mar. 11, 1999).

§ 2.03 The Commission's MDP Models

One of the issues relevant to MDPs is the manner in which an MDP may be organized, should MDPs be permitted. As mentioned earlier, on March 3, 1999, shortly before its third and last set of pre-report hearings, the Commission posted a document entitled *Hypotheticals and Models*. In this document, the Commission identified five different models by which multidisciplinary practice could be offered.

The Commission's *Model 1* was also referred to as the *Cooperative Model*; this model reflects the United States status quo in which lawyers and nonlawyers cannot be partners or share legal fees but can work jointly to provide multidisciplinary services. *Model 2* was also referred to as the *Command and Control Model*; it was analogized to D.C. Rule of Professional Conduct 5.4, which permits MDPs, provided the MDP's sole function is to provide legal services. *Model 3* was referred to as the *Ancillary Business Model* and addressed the situation covered in ABA Model Rule of Professional Conduct 5.7, in which a law firm operates an ancillary business that provides professional services to clients. *Model 4*, which was also referred to as the *Contract Model*, envisioned a situation in which the law firm was an independent entity controlled and managed by lawyers, but which had a contractual relationship with a professional services firm. In explaining this model, the Commission stated:

A typical contract might include terms such as (1) the law firm agreeing to identify its affiliation with the professional services firm on its letterhead and business cards, and in its advertising (e.g., A & B, P.C., a member of XYZ Professional Services, LLP); (2) the law firm and the professional services firm agreeing to refer clients to each other on a nonexclusive basis; and (3) the law firm agreeing to purchase goods and services from the professional services firm (e.g., staff management, communications technology, and rent for the leasing of office space and equipment). The law firm remains an independent entity controlled and managed by lawyers, and accepts clients who have no connection with the professional services firm.

Model 5 was also referred to as the *Fully Integrated Model*; under this model, lawyers and nonlawyers can serve as partners of one another and share legal fees. For each of these five models, the Commission heard testimony from at least one lawyer who had practiced in this setting.

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The Commission's *Hypotheticals and Models* document was important because it shaped much of the language of the debate before the Commission. One cannot understand the Commission's work or the testimony it heard without having a basic understanding of this terminology.

§ 2.04 Details About the Commission's June 1999 and May 2000 Recommendations

On June 8, 1999, in accordance with the mandate given to it by ABA President Phil Anderson, the Commission issued a unanimous final report to the ABA House of Delegates. In addition to its six-page *Report*, the Commission submitted a three-page *Recommendation*, which included fifteen paragraphs, a general information form required by the rules of the ABA Annual Meeting, and three appendices. *Appendix A* was a set of illustrations of possible amendments to the ABA Model Rules of Professional Conduct; *Appendix B* identified the witnesses that testified before the Commission; and *Appendix C* was the *Reporter's Notes*.

The Commission concluded in this June 1999 *Recommendation* that, subject to safeguards to prevent erosion of the legal profession's core values, a lawyer should be able to share fees with a nonlawyer or practice in an MDP. The Commission sought approval from the House of Delegates only with respect to its *Recommendation*. As the *Reporter's Notes* explained, the proposed rule changes in *Appendix A* were included only for illustration purposes and the specific language was not intended to bind the relevant drafting committees.

The Commission's materials explain how it first reached its conclusion that the current MDP ban should be lifted. First, the Commission explained that it was guided by the need to protect "clients and the public and the core values of the legal profession." The Commission identified independence, confidentiality, and loyalty as core values. The Commission concluded that there was client demand for MDPs on the part of both individual and corporate clients, as well as interest among lawyers in forming partnerships with nonlawyers. (The Commission did not define the degree of demand nor resolve the controversy between those who thought the demand was minimal and those who thought the demand was overwhelming.) The Commission further concluded "that it is possible to satisfy the interests of clients and lawyers by providing the option of an MDP without compromising the core values of the legal profession that are essential for the protection of clients and the proper maintenance of the client-lawyer relationship." The Commission recognized the concerns about independence, confidentiality, and loyalty, but determined that appropriate safeguards could be developed "to adequately address the concerns and maintain the core values while providing broader access to legal services for the public."

The Commission sought to protect clients, lawyers, and the public, but concluded that it should not permit the existing rules to "unnecessarily inhibit the development of new structures for more effective

delivery of services and better public access to the legal system.”¹ A recent law review article by the Commission’s Reporter, Professor Mary Daly, makes this three-step process even clearer:

The Commission’s analysis proceeded in three steps. First, it asked whether allowing the delivery of legal services by MDPs was in the best interest of the public and clients; second, it identified independence of professional judgment, the protection of confidential client information, and loyalty to the client through the avoidance of conflicts of interests as the core values of the legal profession; and third, it searched for measures that would protect those core values without impeding the delivery of legal services by MDPs.²

Perhaps the most significant of the Commission’s decisions in its June 1999 *Report* was its recommendation to allow Model 5—fully integrated MDPs. The Commission did not require lawyer-majority control or ownership, as was present, for example, in New South Wales’ prior rule. Instead, the Commission recommended that if non-lawyers controlled the MDP, then the MDP should be subject to a court audit procedure. None of the Commission’s submissions defined “control” nor did they provide significant detail about the content of the audit.

With respect to other “form of association” issues, the Commission’s *Recommendation* seemingly did not limit the types of individuals with whom a lawyer might join to form an MDP. The Commission recommended that all lawyers in an MDP make disclosures to a client that the lawyer practiced in an MDP. Additionally, for non-lawyer-controlled MDPs, the Commission’s certification process contemplated disclosures by the MDP to the state supreme court or its designee. The Commission recommended against allowing passive investment. It did not address the issue of what constitutes an acceptable MDP name.

The Commission did not recommend any scope of practice limitations on lawyers practicing in an MDP. Unlike the Washington, D.C. MDP rule, the Commission’s *Recommendation* did not require that lawyer-nonlawyer partnerships be limited to providing legal services.

¹ See ABA Commission on Multidisciplinary Practice Report to the House of Delegates, June 1999, at Recommendation ¶ 1 (available on the Commission’s website, *supra* § 2.01 N. 1).

² See Daly, “Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services From Lawyers in a Multidisciplinary Partnership,” 8 *Geo. J. Legal Ethics* 217, 273-274 (2000).

With respect to the issue of the regulation of ethics, the Commission concluded that lawyers practicing law in an MDP setting should comply with the legal ethics rules. The Commission seemingly took no position on whether lawyers' rules would prohibit an MDP from conducting simultaneous legal and audit work, stating that the Commission would review the Independence Standards Board's study of the incompatibility of the roles of attorneys and auditors under federal securities law. The Commission later clarified that this was an oversight and explained that "The Commission shares the SEC's position and regrets that it did not make this point sufficiently clear." In its June 1999 Report, the Commission had summarized the SEC positions as follows:

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. The Commission believes that this issue is correctly initially discussed in those fora. When the ISB completes its study, appropriate ABA entities will wish to comment on its recommendations and, possibly, to take formal positions.

In regulating the ethics of MDP lawyers, the Commission relied on the certification and audit procedure it presented. In addition, the Commission recommended that when an MDP lawyer provides legal services in conjunction with a nonlawyer providing nonlegal services, the nonlawyer must act in a manner that is compatible with the professional obligations of the lawyer. In other words, if there is a conflict between the two professions' rules, and if legal services are involved, then the legal rules trump.

The substantive ethics issues addressed in the *Recommendation* included independence, confidentiality, conflicts of interest, to whom deference may be given, the obligation to have measures in place to avoid ethics violations and, for nonlawyer-controlled MDPs, *pro bono* obligations. Although the June 1999 *Recommendation* and *Report*

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urged MDP lawyers to maintain independence, the only special measures put in place were for lawyers practicing in nonlawyer-controlled MDPs; otherwise, MDP lawyers were simply told to remain independent and that an MDP lawyer is not excused from the rules of professional conduct when the lawyer defers to a nonlawyer supervisor.

The June 1999 *Recommendation* did not specifically address confidentiality other than to identify it as a core value and require disclosure to clients of the risks of a waiver of the attorney-client privilege. Because no special screening rules were established, the *Recommendation* apparently treated confidentiality within an MDP similarly to confidentiality within a traditional law firm; i.e., absent client direction to the contrary, information may flow among all partners and employees in a firm, with the caveat that all are required to keep the information confidential.

The Commission's June 1999 *Report* confirmed this observation, stating:

The Commission recommends that no change be made to the lawyer's obligation to protect confidential client information.

Acknowledging that a nonlawyer in an MDP may be subject to an obligation of disclosure that is inconsistent with the lawyer's obligation of confidentiality. . . . the Commission specifically recommends several safeguards to assure that a nonlawyer who works with, or assists, a lawyer in the delivery of legal services will act in a manner consistent with the lawyer's professional obligations.

On the interrelated issue of imputation of conflicts of interest, the June 1999 Commission *Recommendation* decided that imputation should occur on an MDP-wide basis, rather than on a legal-services basis.

The Commission's June 1999 position on *pro bono* was that nonlawyer-controlled MDPs must certify annually that lawyers in an MDP have the same special obligation to render voluntary *pro bono* legal services as lawyers practicing solo or in law firms. The Commission's June 1999 *Recommendation* did not specifically address the various money-related issues beyond the statement that MDP lawyers must comply with the rules of professional conduct. The *Report*, however, provided additional guidance:

[A] lawyer in an MDP must take special care that payment for legal services and funds received on behalf of a legal services client are clearly designated as such and segregated from other funds of the MDP. . . . In this regard, the MDP must also comply

with any and all financial recordkeeping rules of the jurisdiction in which the legal services are being delivered.

The last substantive ethics issue addressed by the Commission was the issue of “holding out.” The Commission concluded that:

A lawyer in an MDP should not represent to the public generally or to a specific client that services the lawyer provides are not legal services if those same services would constitute the practice of law if provided by a lawyer in a law firm. Such a representation would presumptively constitute a material misrepresentation of fact.

In its illustrations of possible amendments to the ABA Model Rules of Professional Conduct, the Commission included a definition of the practice of law in the “Terminology” section. The Commission also stated that nonlawyers in an MDP should not be permitted to deliver legal services. The proposed definition of the practice of law proved to be exceedingly controversial. Over one-quarter of the written replies to the Commission’s June 1999 *Report* addressed these provisions.

All of the above substantive ethics provisions apply to lawyers who share legal fees with nonlawyers or who practice in an MDP. The Commission defined an MDP as follows:

[A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, including legal services, and there is a direct or indirect sharing of profits as part of the arrangement.

As noted previously, the ABA House of Delegates did not approve the Commission’s June 1999 *Report and Recommendation*.

Approximately one year later, in May 2000, the Commission presented its second *Report and Recommendation*. This second *Recommendation* was much “leaner” than the first. Instead of the fifteen paragraphs contained in the Commission’s first recommendation, the Commission’s second *Recommendation* contained only four paragraphs. These paragraphs were quite general. This second *Recommendation* focused on the issue of *whether* there should be MDPs under any circumstances, delegating to the states the decision about *how* to regulate MDPs. Moreover, the second *Recommendation* was

so broadly drafted that some commentators found it ambiguous and that it left much room for disagreement. For example, paragraph one stated that “Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and non-legal professional services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services.” Although the intention probably was to require MDPs to have a lawyer-majority, the paragraph arguably was ambiguous because MDP lawyers practicing with a nonlawyer majority could argue that they nevertheless have the control and authority necessary to assure their independence.

The remainder of the Commission’s second *Recommendation* directed MDP lawyers to protect five core values (independence, confidentiality, conflicts, competence and *pro bono publico* obligations), with competency and *pro bono* added as core values since the first *Recommendation*. Unlike the first *Recommendation*, the later *Recommendation* only authorized limited lawyers to practice with non-lawyers who were members of recognized professions or other disciplines that are governed by ethical standards. Like the first *Recommendation*, the second *Recommendation* continued the prohibition on passive investment. It also continued the prohibition on non-lawyers providing legal services. Finally, a new provision directed regulatory authorities to enforce existing rules and adopt whatever additional enforcement procedures would be necessary to implement the principles in the second *Recommendation* and to protect the public interest. The second *Recommendation* did not explicitly address the difficult issues of whether to have a ban on simultaneous legal-audit work, whether nonlawyers should be included when applying legal ethics conflict of interest imputation rules, or whether non-lawyers ever must comply with legal ethics rules.

In sum, the Commission’s June 1999 *Recommendation* attempted to provide guidance not only on the issue of *whether* MDPs should be permitted, but also the issue of *how* they should be permitted, resolving issues about the forms of association, scope of practice, functional ethics and substantive ethics. In contrast to this approach, the May 2000 *Recommendation* concentrated on the issue of *whether* to permit MDPs and omitted, for the most part, any recommendation about *how* they should be permitted, leaving those decisions to the “regulatory entities.” Although the Commission arguably omitted details from its *Recommendation* in an effort to make it easier for the Commission to obtain an affirmative vote from the ABA House of Delegates, the positive vote did not occur.

§ 2.05 Criticisms of the Commission's Work

Not surprisingly, the Commission's work has not gone without criticism. A number of academic articles about the MDP debate and the Commission have emerged and are still emerging since the Commission began its work.¹ It is beyond the scope of this chapter to survey the criticisms of the Commission's work. It is clear, however, that the method the Commission used, as well as its results, have been the subject of criticism. Some claim that the Commission did not sufficiently take into account the public interest, relying too much on the interests of lawyers and individual clients.² Other commentators have suggested that the Commission's membership made its conclusions inevitable.³ Some have suggested that the Commission's website promoted passivity and did not create a mechanism for developing a debate and exchanging views about MDPs.⁴ With respect to comments from outside the academic community, one criticism that has been lodged against the Commission is that it developed an approach from the "top down" and then tried to impose it on the American Bar Association, rather than listening to lawyers and developing an approach from the "bottom up."⁵ In short, although critics praise the efforts of the Commission, it has also received its share of criticism as to its methodology, as well as its results.

¹ See, e.g., "The Phyllis W. Beck Chair in Law Symposium: New Roles, No Rules? Redefining Lawyers' Work," Vol 7, No.4 Temple L. Rev. (Winter 1999) (containing several articles about MDPs); "The Future of the Profession: A Symposium on Multidisciplinary Practice," Vol 84 Minn. L. Rev. 1083 (June 2000); Business Law Symposium: Multidisciplinary Practice, 36 Wake Forest L. Rev. 1 (Spring 2001). Other law schools have also held or are planning to hold such symposia.

² See generally Luban, "Asking the Right Questions," 72 Temple L. Rev. 839 (1999).

³ The author's observation of the Commission members during the hearings led her to believe that when the Commission began its work, many Commission members were skeptical of MDPs, if not downright hostile. Indeed, one of the Board liaisons had filed an expert opinion in support of the Dutch Bar's efforts to uphold its MDP ban. As this chapter was written, this case currently is pending before the European Court of Justice. See *Wouters v. Netherlands Bar Association*, 309/99. For a discussion of the lower court's opinion and an English translation of the case, see Terry & Houtman Mahoney, "What If . . . ? The Consequences of Court Invalidation of Lawyer-Accountant Multidisciplinary Partnership Bans" in *Private Investments Abroad-Problems & Solutions in International Business in 1998* (1999).

⁴ This author made that observation in Terry, "Multidisciplinary Practice: Examining the Issues," Symposium Issue of *The Professional Lawyer* 1 (1999).

⁵ See, e.g., Remarks of Cheryl Niro, Member, ABA Commission on Multijurisdictional Practice at the February 16-17, 2001 Public Hearings held in San Diego California, at the ABA Midyear Meeting.

§ 2.06 State Action in the Wake of the ABA Commission

Despite the ABA House of Delegates' rejection of both recommendations submitted by the ABA Commission, over forty-five state and local bar associations are or have engaged in an examination of the MDP issue. Interestingly, some positive recommendations have emerged. On March 23, 2000, the Philadelphia Bar Association reportedly became the first bar to adopt a recommendation to relax the current MDP ban. The Philadelphia Bar Association Board of Governors approved its task force's recommendation that lawyer-controlled MDPs be allowed to practice without delay and that other forms be allowed only after additional study and the enactment of appropriate regulations. This recommendation was advisory only and did not change the status of MDPs in Pennsylvania.

In preparation for the vote on the its second *Recommendation*, the Commission posted on its website a survey of state MDP activity. Although the Commission was disbanded in August of 2000, the Commission's counsel, together with the assistance of the Oregon State Bar, has prepared and posted several updates to the charts and narrative that summarize state and local bar activities regarding MDPs. According to the April 10, 2001 version of this chart, nine bar associations have pending recommendations to change the state rules to permit some form of MDPs and one state has recommended a definition of the practice of law. Fifteen state bar associations rejected, at either the committee level or governing body level, proposals to change the "no-MDP" rule. Numerous states are still studying the issue. Thus, while the ABA Commission may have been unsuccessful in its own efforts, it began a dialogue that still continues. For that it must be congratulated.