

The MDP Controversy: What Legal Educators Should Know

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In August 2000 the intense debate about multidisciplinary practice that had been waging within the American Bar Association since President Philip Anderson's appointment, two years earlier, of the Commission on Multidisciplinary Practice took a dramatic turn.¹ The ABA House of Delegates voted overwhelmingly to dismiss the commission and adopt Resolution 10F, offered by a coalition of state and local bar associations. That resolution urged the states to "preserve the core values of the legal profession" by implementing principles that included recognizing a "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." Most importantly it declared that "[t]he 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."²

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1. The commission defined *multidisciplinary practice* 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 also 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. . . .

ABA Comm'n on Multidisciplinary Practice, Report to the House of Delegates (August 1999), available at <<http://www.abanet.org/cpr/mdpreport.html>> [hereinafter MDP 1999 Report].

In its final report issued in spring 2000, the commission acknowledged that an integrated practice or other alignment potentially could include professionals or other participants, but it limited its recommendation to cover members of other professions or disciplines "governed by ethical standards." ABA Comm'n on Multidisciplinary Practice, Report to the House of Delegates (May 11, 2000), available at <<http://www.abanet.org/cpr/mdpfinalrcp2000.html>> [hereinafter MDP Final Report 2000].

2. ABA Comm'n on Multidisciplinary Practice, Multidisciplinary Practice Recommendation to the House of Delegates (July 17, 2000), available at <<http://www.abanet.org/cpr/mdprecom10f.html>>.

The MDP movement that spurred this response has been called the single most important issue confronting the profession. While this characterization could be dismissed as mere hyperbole, indicative of the passionate and often rhetorical positions assumed by participants in the debate,³ the record amassed by the commission certainly offers much on which to ruminate concerning lawyers and their clients that is relevant to the profession's future and to the focus of legal education. The hearings and written testimony submitted to the commission present opportunities to consider the multiple competing identities of lawyers and lawyering. I encourage legal educators to review the record. Although many of us were not familiar with the MDP movement before it had been identified by the ABA, the issues raised are important to our work. Educators are likely to see meaningful potential connections between the practice issues raised in the record and their educational agenda. The record provides a window on what clients think of lawyers and exposes significant commentary about the lawyering work they seek. We can learn from the record about consumer concerns about access to legal services, teamwork in problem-solving, and other considerations that cast into question whether lawyers are mindful, as they work, of the public interest and needs.

Since this movement can have broad ramifications for the way law is practiced and how clients are served, it deserves legal educators' reflection on its relationship to legal education. Our critical review of the record and commentary, considering both what has been discussed and what is missing from the debate so far, can help to shape the future assessment of MDP and the profession. We should also incorporate insights from the debate into our communications with law students as they plan for their future—a future that undoubtedly will include new forms of practice and interdisciplinary arrangements.

As a step in this undertaking, in the following pages I raise some of the questions that surfaced in the debate and responses that were recorded in the testimony and other communications with the ABA commission.

Will this movement—and the controversy it engenders—continue?

Resolution 10F was championed by state and local bar associations that were stridently opposed to permitting lawyers to practice in entities with nonlawyers and share fees. The resolution's supporters began with the same objective expressed by the MDP commission—preserving the core values of the legal profession. But Resolution 10F stood in stark contrast to the recommendation that the commission presented to the House of Delegates in the summer of 1999 and later modified and proposed for consideration at the

3. See, e.g., Lawrence J. Fox, *Redefining Lawyers' Work: Multidisciplinary Practice, Old Wine in Old Bottles: Preserving Profession Independence*, 72 *Temp. L. Rev.* 971 (1999); Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 *Minn. L. Rev.* 1097 (2000). Cf. James W. Jones, *Focusing the MDP Debate: Historic and Practical Perspectives*, 72 *Temp. L. Rev.* 989 (1999); Russell G. Pearce, *A Cautionary Tale from the Multidisciplinary Practice Debate: How the Traditionalists Lost Professionalism*, 72 *Temp. L. Rev.* 985 (1999).

2000 annual meeting.¹ After conducting more than ninety-five hours of hearings and reviewing countless pages of written testimony and other evidence submitted to it, the commission had come to the conclusion (not without a great deal of soul-searching and introspection) that the public and client interests were best served by changing the Model Rules to provide increased flexibility and choice. The commission proposed that state and local governing bodies permit the sharing of fees by lawyers with nonlawyers, which it believed would open to lawyers opportunities to restructure their relationships, would foster teamwork, and would encourage continuous formal collaboration with other professionals in solving clients' often multifaceted problems. The commission was persuaded by the testimony of client witnesses who spoke overwhelmingly in favor of flexibility that would allow more accessible and effective delivery of legal services. Its conclusions were founded in the belief that the core values and "special role" of lawyers need not be corrupted by such changes, particularly in light of the fact that there were ready examples of non-law-firm professional relationships where lawyer independence in decision-making had not been compromised by lawyers' moving outside the traditional law practice model.⁵ The commission was also convinced that there were available mechanisms to cultivate loyalty and maintain confidentiality in lawyer-client dealings. Moreover, the commission concluded that states had the capacity to construct and adopt appropriate monitoring and regulatory approaches to ensure that, in a multidisciplinary practice, other

4. The commission's recommendation provided:

RESOLVED, that the American Bar Association amend the Model Rules of Professional Conduct consistent with the following principles:

1. Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services. "Nonlawyer professionals" means members of recognized professions or other disciplines that are governed by ethical standards.

2. This Recommendation must be implemented in a manner that protects the public and preserves the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and *pro bono publico* obligations.

3. Regulatory authorities should enforce existing rules and adopt such additional enforcement procedures as are needed to implement these principles and to protect the public interest.

4. The prohibition on nonlawyers delivering legal services and the obligations of all lawyers to observe the rules of professional conduct should not be altered.

5. Passive investment in a Multidisciplinary Practice should not be permitted.

MDP Final Report 2000, *supra* note 1.

5. Moreover, in its earlier report to the House of Delegates the commission had recognized that the fee-sharing prohibition had not been instituted until 1928 and therefore was not part of a venerable professional tradition. See MDP 1999 Report, *supra* note 1.

For an account of the late-developing core-values argument and how it was used by the organized bar to inhibit competition, see Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 Minn. L. Rev. 1115 (2000).

values like competency and the obligation to perform pro bono service could be maintained, enhancing rather than diminishing the lawyer's "special role."

It is unclear what will be the long-term impact of the action taken by the ABA House of Delegates. Certainly, Resolution 10F has foreclosed the opportunity immediately to test the benefits of forthright change which the commission believed could flow from a uniform regulatory-reform proposal.⁶ It is the case, however, that more flexibility than is contemplated by Resolution 10F in the way lawyers and nonlawyers can practice is likely to occur.⁷ Even as the House of Delegates refused to support the lifting of fee-sharing barriers and structural impediments to partnering of lawyers with nonlawyers, decision-making bodies of sections of the ABA such as those on taxation, real property,

6. The commission had reasoned:

In a large-size MDP, such as one including several hundred professionals in different disciplines, formal structures are certain to be needed. At a minimum, they should include: (1) structuring the MDP so that the lawyers who are delivering legal services to the MDP's clients are organized and supervised separately from the MDP's other units (*e.g.*, business, technology, or environmental consulting services); and (2) establishing a chain-of-command in which these lawyers report to a lawyer-supervisor whose responsibilities include hiring and firing, fixing the lawyers' compensation and terms of service, making decisions with respect to professional issues such as staffing of legal matters and the allocation of lawyer and paraprofessional resources, and advising on issues of professional responsibility. In a large-size MDP practice setting, the structures could be modeled on ones developed by general counsels' offices for the purpose of fostering lawyer independence. These types of structural arrangements should contribute to fostering a culture of professionalism and help to preserve lawyer independence within large MDP organizations, just as they have in large in-house legal departments and law offices in government agencies. The articulation of the precise contours of the structural arrangements is best left to the individual states for adoption in light of particular local concerns.

MDP Final Report 2000, *supra* note 1.

7. For an account of what has transpired in the U.S. since the House of Delegates' rejection of the commission's recommendation, see John Gibcalt, *Law Practice: Cash Bought*, A.B.A. J., Feb. 2001, at 50. At the time that Resolution 10F was presented the following states had taken action favorable to some sort of change: Arizona, Colorado, Minnesota, and Oregon. These states had taken action opposed to any change: Florida, Illinois, Kansas, Nebraska, New Jersey, New York, and Texas.

In addition, international organizations of the bar have continued to draw their own conclusions. Scotland and England made determinations in July 2000 to approve the establishment of MDPs, and legislation was introduced in Australia that would allow law firms to incorporate, share profits with nonlawyers, and raise capital through passive investment. Shares in these law firms would float on the Australian Stock Exchange. Australia's state of New South Wales recently approved MDPs. In August 2000 the Canadian Bar Association's Council passed a resolution permitting MDPs provided that the "delivery of legal services is controlled by lawyers." At its midyear meeting the Council amended the earlier resolution by requiring lawyer control "necessary to ensure that the MDPs comply with the ethical obligations of lawyers."

By late fall 2000, 24 states had taken positions on MDP, 14 rejecting mixed practices and the rest supporting some kind of change. By winter 2001, Michigan, Minnesota, and Colorado appeared to be moving forward on formal rules supporting MDPs for their supreme courts' approval. In addition to these state efforts Gibcalt, *supra*, describes a burgeoning movement of law firms forming ancillary businesses in "law-related services" that are not precluded by the present rules. These spin-off enterprises provide services ranging from litigation support to computer technology and avoid confronting ethical problems because of their separate organization and support staff.

probate and trust law, and solo and small-firm practice passed resolutions favoring the position of the commission or proposed other alternatives which fostered closer relationships with other professionals. Moreover, in 1999 the Litigation Section took the extraordinary and provocative step of formally aligning its lawyers with PricewaterhouseCoopers to secure professional support services; as "litigation cosponsors," PwC agreed to provide enhanced benefits and resources to the members of the section.

A handful of state and local bar groups have also drafted resolutions supporting some change, and rejecting a position as restrictive as was proposed in Resolution 10F, on the basis of their own findings and conclusions after studying the MDP movement abroad and identifying lawyer and client interest in this country. Meanwhile in other countries, bar associations, some of whom had been waiting to learn what position the ABA would take, have recommended lifting their prohibition of MDPs, and some regulatory bodies have moved forward on these recommendations.⁸ Pertinently, outside the confines of the organized bar, lawyers in the United States and abroad continue to take affirmative steps to form closer working relationships with nonlawyer professionals through creative alliances and by retooling existing structures.⁹

There are reports of a brisk business of lawyer hiring in professional consulting firms—senior lateral as well as entry positions. These indicators suggest that the MDP movement (which, after all, began in an environment of restriction) is likely to continue to grow, albeit raggedly, despite the present restrictive regulatory setting, at least as long as there is demand by clients and interest on the part of lawyers in working collaboratively.¹⁰ In short, it seems highly unlikely that the movement—or the controversy about it—will soon

8. Notably, in February 2001 the French High Court overturned the previous year's decision by the National Bar that prevented lawyers and nonlawyers from working together, reasoning that the lawyer association had exceeded its authority in setting such restrictions on lawyers. The case was brought by PricewaterhouseCoopers' French "legal arm," Landwell & Associés. It was predicted that the court victory would spur accounting firms to lobby for fully integrated MDPs.
9. The consulting firms have also continued their forays. For example, a new credential, "cognitor," has been proposed by the international accounting firms to recognize that person's ability to provide a range of professional services from accounting to business law. See Mark Hansen, *Lawbeat: A New Credential*, A.B.A. J., Feb. 2001, at 18.
10. Early in the debate opponents of change argued that the "demand" for MDPs was contrived by the professional service organizations, who were artificially creating the specter of unmet client needs to market their businesses and move into the legal services field. More recently opponents have called the demand "equivocal." They argue that it is the burden of those who promote change to prove that the demand is significant in light of the risks of compromising the core values of the profession. Experts who have studied the MDP movement abroad, like Laurel Terry, have argued that the value of choice and the interest of autonomy in client decision-making would suggest that the burden should lie with those who favor restricting the practice to prove that the restriction is justified. Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?* 72 *Temp. L. Rev.* 869, 924-30 (1999).

As has already been the case, it can be anticipated that the efforts of lawyers and other professionals to work together and share the fruits of their work (fees or other economic benefits) will be at the boundaries of existing limitations on their coming together. Notably, both the commission and proponents of Resolution 10F were concerned about the possibility that some alliances could be constructed that were "virtual MDPs," challenging the limits of restrictions, and enjoying the benefits of working together and offering services to clients.

fade. In fact, we may look upon the commission's recommendation and the House of Delegates' response as the first part of a continuing dialog about effective delivery of services by the profession. The debate raises important questions such as how to define what it means to be a lawyer and whether the practice of law is sufficiently autonomous that it ought to be isolated from other services that are required in problem-solving for clients. It has caused members of the profession to think expansively about the potential advantages as well as risks of collaborative work with other professionals. The conflicting responses about the desirability of eliminating barriers to sharing fees challenge us to justify assumptions about the profession, beyond protectionist motives, and call into question the distinctive quality of the profession's core values.

What distinguishes lawyers from other professionals?

Both the commission and the supporters of Resolution 10F focused their attention on the importance of preserving the core values associated with the profession—values identified as independence, loyalty, confidentiality, competence, and a commitment to pro bono service.¹¹ The commission's recommendation and Resolution 10F were at polar ends in terms of how these values should be protected. Staunch opponents to change believed that maintaining and even fortifying formal barriers to practice with other professions was necessary because only in this way could the lawyer values avoid dilution. Proponents of change, on the other hand, were not of one mind about which of a variety of alternatives permitting more flexibility would best protect these core values.¹² The commission ultimately concluded that structural choice should be maximized, and it focused instead on preserving the "principle of lawyer control and authority."

The commission believed it was far better to encourage lawyers to explore ways of working with nonlawyer professionals through more flexible rules which would keep them voluntarily within the regulatory umbrella than to erect new and tighten existing restrictions that would create incentives for some lawyers to argue that they were not engaged in the practice of law. See MDP Final Report 2000, *supra* note 1.

11. Initially the commission's position was challenged because, among other problems, it failed explicitly to list competence among the values it identified as in need of protection. This omission was acknowledged in the Interim Report issued in January: "The Commission never intended to denigrate the importance of competence and assumed that competence as a core value was implicit in its Recommendation. It regrets that the Recommendation was not as clear as it should have been on this point." ABA Comm'n on Multidisciplinary Practice, Updated Background and Informational Report and Request for Comments (Dec. 15, 1999), available at <<http://www.abanet.org/cpr/felbmdp.html>>.
12. Many of the alternatives proposed by those favoring change focused on protecting the value of independence and safeguarding against the possibility that a lawyer's judgment would be compromised or second-guessed. Some individuals and entities that favored change sought to include a restriction on the control and authority that nonlawyers could exercise by requiring a certain percentage of ownership retained by lawyers or structural segregation of the practice of law from other business of the multidisciplinary practice.

See John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-first Century*, 69 *Fordham L. Rev.* 83 (2000).

In defense of their view that almost no change was necessary or acceptable,¹³ some opponents of the commission's flexible position waxed eloquent about the traditional protections of lawyer independence in the law firm structure. They argued, for example, that law firm culture reinforces the importance of the lawyers' independence and prevents decision-making from being compromised by other concerns that predominate in other professional business settings. As lawyers and other participants in the proceedings observed, these arguments sometimes seemed to be based on a romanticized image drawn from a bygone era (if there ever was such an era) of law practice insulated from "the bottom line" of commerce. It is an image at odds with what we know about law firm mergers, acquisitions, and dissolutions, and reports of distrust, disconnection, and cutthroat competition offered in other testimony about large and moderate-sized law firms today.

The proponents of change, on the other hand, appeared to trivialize the concern about maintaining independence of lawyers, often characterizing it as no different from the concerns of other professionals, including accountants, outside of their auditing responsibilities.¹⁴ Their willingness to conflate the concerns of lawyers and other professionals for their clients seemed to suggest that the values discussion could be boiled down to the expectation that all professionals assume ethical obligations as fiduciaries to do no harm.

Neither side of the formal debate seemed skeptical of the core values' importance in shaping lawyer identity and a shared understanding of the ethical lawyer. But the record disclosed less agreement about whether the core values are, in fact, identifiable, as well as whether they are protected by practice structures that have emerged in the organization of disciplines in the past.

The conflicting obligations of auditors and lawyers to maintain independence was often raised by the opponents of change as reflecting the need for separation of lawyers and accountants and, by implication, the need to protect against the risk of other conflicts by maintaining prophylactic barriers to partnering with other professions. The risks created by this distinction between the lawyer's independence in judgment and the accountant's independence from her client for the public's protection when performing an auditing function proved to be not so troublesome as a practical matter. Accounting firms were willing to jettison their auditing function by reorganizing or by

13. Notably, opponents argued that there were already adequate opportunities for lawyers and nonlawyer professionals to work together to effectuate the kinds of collaboration and team decision-making sought by some lawyers and clients, including extended contractual relationships. See L. Harold Levinson, *Independent Law Firms That Practice Law Only: Society's Need, the Legal Profession's Responsibility*, 51 *Ohio St. L.J.* 229 (1990).
14. Although the commission's recommendation to the House of Delegates in August 1999 deferred to the SEC on this issue, it was obvious from the outset that the auditing responsibilities of an accountant, including the obligation to disclose information, would be at odds with the core duty of confidentiality that is an essential component of the lawyer-client relationship. Consequently, it would be problematic for the practice of law and the auditing function to be included in the same practice. Representatives of accounting firms testified, however, that the auditing function easily could be spun off. The SEC's position is that accounting firms that undertake audits for SEC-registered companies are precluded from providing both auditing and legal services.

withdrawing from the audit business entirely. This seemed to suggest not that differences were insurmountable, requiring separation, but perhaps that more narrow rules could be adopted to protect the interests of clients while encouraging professionals who want to work together to explore the differences in their duties and seek reconciliation and transparency in their communications with clients. The ultimate objective would be to permit clients to exercise informed choice about the kind of entity to which they bring their problems.

The more subtle distinguishing features of lawyering that cross existing legal practice contexts and affect the question of partnering were not always apparent, as was evident in testimony submitted to the record. For example, young lawyers who had been recruited from law firms early in their careers to work in Big Five accounting firms found no distinctive professional qualities in the lawyers of the law firms, and they were skeptical that the law firm's environment actually promoted heightened ethical sensibility or opportunities to preserve independence. Indeed, those who had practiced in both settings professed to find no discernible difference in the way decisions were made, beyond compliance with conflict imputation rules that were imposed on the lawyers practicing in law firms. Moreover, even some lawyer witnesses were skeptical that special meaning attached to the lawyer's ethical obligation of loyalty to clients, arguing that the present-day imputation rules were unrealistic and posed unreasonable burdens on the increasingly large and disconnected megafirms and other law firm alliances and their equally large clients.

Although practicing lawyers expressed concern about protecting the common law privilege of confidentiality, the reality is that nonlawyers also are obliged to protect confidences of their clients. In fact, by statute and by court decisions, the contours of the obligation of confidentiality for professionals have been changing, and their functions could benefit from further probing as the debate continues. But much of the record testimony centered on the importance of having clients understand that they risked losing the attorney-client privilege available to lawyers acting as lawyers and holding themselves out as doing so when other professionals not connected with the legal work are present. Here, as elsewhere, it appeared that clients could be protected by lawyers' being candid and clear about their functions as they collaborate with other professionals to provide services. Such conversations between the lawyer and client could make possible the exercise of informed choice about the kind of practice the client feels most comfortable working with. It is also the case that value conflicts like the competing obligations of professional confidentiality often implicate other interrelated values, requiring further exploration than the record testimony suggested.

The commission and some witnesses raised a concern about whether the commitment to pro bono service would founder without restrictions on lawyers' practicing with others. This fear was connected to the lack of assurance that lawyers working in non-law-firm settings would find a culture supportive of such service. The concern seemed weakened by the facts that many lawyers in law firm practice do not live up to this commitment and the organized bar has not made this commitment more than an aspiration in its rules. Not surprisingly, consulting firms were able to respond that they had assumed the

obligations to do good works and could point to corporate efforts that rivaled law firms' giving of time and other resources. Whereas lawyers argued that their commitment was distinguishable, focused upon supporting legal or law-related services such as representation of the indigent in court, this argument seemed to beg the question since existing restrictions on practice had left some lawyers ill equipped to do—and even barred from doing—this kind of work.

Pertinently, few witnesses explored the connection between the lawyer's pro bono obligation and the lawyer's special or public role. A consideration of the meaning of this role and the public's interest in securing it might expose the best rationale for distinguishing the service of lawyers. The special role or public role that lawyers play in the democratic order seems most credibly to situate lawyers as holding a distinctive professional place and comes closest to justifying extraordinary efforts to protect from erosion the values which are said to lie at the core of the profession.¹⁵ In contrast, to the extent that other professionals as fiduciaries might also adhere to values like confidentiality and loyalty, they are driven principally by concern for the protection of predominantly private interests, without a necessary corollary obligation to work for the good of the community at large. Commentators criticized the commission for failing to highlight this role and to press witnesses to explore its contours. There is little in the record that spells out what this special or public role of lawyers entails, other than a duty to perform pro bono service, and no exploration as to why or how it extends to all members of the profession. In fact, the commission seemed willing to treat any response on the record which addressed the *clients'* interest as satisfying concerns about the *public* interest. This shortcoming may be indicative of what appears to be a tendency by lawyers to take the lawyer's public role for granted or, worse, to reject a public role.

It seems especially important for legal educators to be more explicit about identifying the contours of this professional characteristic and to encourage students to think about the implications of having a responsibility to the public affecting whatever work context they choose. We could provide law students with a deeper appreciation of the history of the profession, including the profession's growth in stature at the expense of more equitable distribution of wealth and power, as well as instances where lawyers have exercised leadership in promoting social change. If we foster a more critical understanding of the choices that the organized bar and courts have made, we can encourage students to consider whether and how the rhetoric about the lawyer's special or public role rings true, and they can more meaningfully

15. For an explication of the meaning of lawyers' role as guardians of public norms, including a criticism of the commission for poorly addressing this issue, see David Luban, *Asking the Right Questions*, 72 *Temp. L. Rev.* 839 (1999). There are duties owed by other professionals considered to be in the public interest. For example, accountants and social workers have a public obligation of disclosure. Green, *supra* note 5, at 1146–47. But these public obligations are not thought of as supporting the very foundation of the democratic order as the lawyer's obligations have been characterized as doing. See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 *B.C. L. Rev.* 1, 68–83 (1988). See also David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 *Md. L. Rev.* 1502 (1998).

assess the responsibilities that ought to accompany any preferred status that the organized bar continues to secure for lawyers. Such a self-conscious evaluation of a public role and responsibility, however, does not lead inexorably to the conclusion that the lawyer should be isolated in her work and barred from seeking collaboration in her problem-solving.

The record reveals a continuing struggle to identify features of the legal profession which justify maintaining barriers to practice with others. As members of the commission observed, part of the problem lay in the difficulty of defining what is the practice of law. Particularly from the vantage point of the public, clients, and other businesses—but also from the perspective of many lawyers—the practice of law represents a diverse set of occupations far beyond the traditional law firm practice, while “traditional” law firm practice sometimes seems indistinguishable from other business. In fact, there are numerous ways in which lawyers practice law and work in fields only tangentially related to law, with the blessing of the Model Rules. As will be discussed more fully below, clients see their problems as multidimensional, not purely legal. This fact too offers little support for striving to construct a “unified profession” that emphasizes separation from others in the way services are made available rather than permitting opportunities for joint work.

How should we address the client's interest in new forms of practice?

Perhaps not surprisingly in light of the fact that lawyers themselves seemed unable to agree upon what essentially distinguishes the legal profession, consumers seemed ambivalent about maintaining exclusive boundaries for legal services. For example, when surveyed, consumers have often expressed interest in having the choice of obtaining legal service in MDPs; but they also have been likely to respond that they would prefer to use law firm services.¹⁶ In the debate about changes in the Model Rules, particularly modification of the fee-sharing prohibition in Rule 5.4, opponents of change argued that, in the interest of protecting clients and the public, the existing restrictions should continue unless the proponents of change could demonstrate that real client demand existed and there would be no erosion of core values.¹⁷ The support-

16. While approximately two-thirds of the surveyed respondents indicated that they still preferred to purchase legal services from a traditional law firm, a *Financial Times* survey affirms the general proposition that corporate clients want the option to purchase legal services from alternative providers. The survey offers additional evidence for the resolution adopted by the Board of Directors of the American Corporate Counsel Association “support[ing] a broader range of choice for clients to select from service providers” See Sean Eaglesham, Financial Groups Support Multi-Disciplinary Firms, *Fin. Times* (London), Sept. 6, 1999, at 8. More recently another study found, among other things, that only one in five business executives would consider using MDPs. Ill. CPA Soc’y Report, Business Executive’s Opinions on Multi-Disciplinary Practices: 193 Surveys Returned, available at <<http://www.icpas.org/icpas/business/MDP.html>>.
17. Reporting on a survey of 350 of the largest British corporations conducted in 1993, London’s *Commercial Lawyer* found that 88 percent did not want to use integrated lawyer and accounting firms. Bernard Wolfman challenged the commission to develop its own independent and objective survey of interest in the United States. Reflecting the position of many opponents of change, he argued that results like those reported by the *Commercial Lawyer* should lead to a decision to maintain the barriers to nonlawyer involvement in the field of practice. See ABA

ers of Resolution 10F either were skeptical that such demand existed or believed that, notwithstanding demand, it was in the interest of consumers of legal services to secure these services only in traditional law firm settings because of the risks to the lawyer's independence and other conflicts.

Some commentators, like Laurel Terry, argued that proponents of restrictions on the practice of law should bear the burden of demonstrating that such restrictions were in the clients' best interests. She and some other experts remained unconvinced that the clients' interests were well served by continuing the restrictions in the face of an undefined but vocalized demand for choice expressed by a range of clients, including small businesses and large corporations as well as individual clients and consumers—clients crossing class lines and substantive interests. And lawyers from a variety of practice settings expressed the desire to have the flexibility to join a practice with nonlawyers and share fees, arguing that such associations would provide opportunities for collaboration and team-based decision-making which they found to be productive and in the clients' interests.¹⁸

While not explicitly taking a position about who had the burden of proof, the commission concluded that there was significant evidence of demand, as was apparent in the record, and that it would be difficult to clarify the level of demand, given the present regulatory environment restricting the development of MDPs.¹⁹ Most important, it decided that notwithstanding doubts about the depth of consumer interest in MDPs, it was in the clients' interest to have choice. The desire for choice that was manifested in the statements of consumers reflected client interest in having available a range of alternatives for resolving legal problems, promoting decision-making autonomy.

Recognition of the value of permitting choice in the settings in which legal services are made available slowly emerged in the two years of hearings and other opportunities for lawyers and other interested people to respond. Its emergence was a likely consequence of viewing multidisciplinary practice beyond the context of the Big Five. Witnesses in the hearings convened in fall 1999 and winter 2000 spoke about the interests of small businesses and low-income clients; lawyers also testified about the advantages of teamwork. But

Comm'n on Multidisciplinary Practice, Bernard Wolfman, February 2000 Hearing, Testimony on MDP (Feb. 12, 1999), available at <<http://www.abanet.org/cpr/wolfman4.html>>.

In contrast, in a recent article in which he demonstrates that "the core values rationale is a belated explanation for restrictions that, at their inception, were transparently motivated by the financial self-interest of the bar's leadership," Bruce Green questions the premise that proponents of change should have to demonstrate that the core values will survive if the disciplinary rules are liberalized. Green, *supra* note 5, at 1145.

18. The commission recognized that the "forces of change are bearing down on society and the legal profession with an unprecedented intensity," including globalization, the growth of technology, advancement in self-help legal software, legal engineering, and financial planning leading to this desire. MDP Final Report 2000, *supra* note 1.
19. The commission drew its conclusion based on several reasons: (1) difficulty in coming up with an instrument to evaluate demand that was cost effective; (2) skepticism expressed by experts in constructing such instruments whether an accurate reading of demand was likely, given the charged nature of language that would be used in describing interest; (3) recognition that demand could not be accurately evaluated while there was an environment which prohibited this form of organization. MDP Final Report 2000, *supra* note 1.

the expressions of a preference for choice may not be determinative of the public interest concerns about multidisciplinary practice. In particular, opponents of change expressed fears that unsophisticated clients could easily be victimized by marketing efforts and practice formats that actually could leave them without effective choices as to whether to use one lawyer or another identified by the nonlawyer organization with which the client came in contact. They paternalistically chose to protect all clients from the risks of bad decisions about whom to involve in the resolution of legal problems.²⁰ Whereas autonomy is a value lawyers have grown accustomed to talking about with respect to other client/professional relationships, some lawyers in this debate seemed reluctant to explore the benefits of client decision-making autonomy in law practice, preferring to emphasize the lawyers' professional capacity to gauge what is in the client's best interest.

This aspect of the controversy provides another context for further reflection within the law school about the future of the profession, raising such questions as: How should the competing interests of autonomy and professional interest in protecting the client be resolved? What concerns are raised by restricting choice in the face of client desire to exercise autonomy? What can we learn about the value of client autonomy from other lawyer contexts as well as professional relationships that we have investigated such as that of doctor and patient? What interests of clients are served by promoting choice? The record raises questions about how disparities in economic status and power ought to affect the responses to these questions and adds a new dimension to work begun by clinicians and others.

There are some significant insights revealed in the record about the thinking of clients on the issue of choice that affected the commission's decision-making and could help shape future decisions. Most noteworthy is the evidence that, for a striking number of clients who have legal or law-related problems, seeking out a lawyer for assistance is neither a priority nor a preferred course of conduct. For example, the director of AARP, Wayne Moore, offered his organization's recent findings that lack of interest in contacting an attorney and even feelings of intimidation at the prospect of having to deal with a lawyer led some senior citizens simply to forgo having their legal problems resolved. He observed that lawyers' tendencies to cast problems in adversarial terms and to introduce complexity into what appear to consumers to be everyday disputes left senior citizens unwilling to draw lawyers into the fray.

While lawyers herald the importance of obtaining legal representation to properly identify and resolve legal issues, consumers sometimes saw the lawyers' efforts to isolate legal issues from other aspects of their problems as costly and self-defeating. Speaking on behalf of low-income consumers in Alabama,

20. In its initial report, the commission had recommended several safeguards to protect and sustain current levels of client confidentiality in an MDP environment for both lawyers and associated nonlawyers, and to promote transparency in the dealings of clients in a relationship including lawyer and nonlawyers. See MDP 1999 Report, *supra* note 1. For a discussion identifying and challenging the underlying premises of those who are opposed to change in the interest of protecting core values, see Green, *supra* note 5, at 1145-56.

one witness, Theodore Debro, explained why he thought they ought to have the option of getting legal advice in a multidisciplinary context. Many of the people he represented felt a lawyer could not help them, thought the cost of a lawyer was too high, or simply did not know a lawyer. Unlike other more affluent and educated consumers, when the people he represents do choose to see a lawyer, they may lack the financial ability, time, or opportunity easily to seek out advice from other professionals; they are not as likely to find among their friends and colleagues resource persons who are able to add "multidisciplinary" dimensions to their problem-solving enterprise. He added: "These Americans, more than any other group are intimidated by the thought of going to see a lawyer."

A small businessman, George Abbott, similarly responded to criticism lodged by lawyers that one-stop shopping was merely for convenience and should be sacrificed to protect the decision-making integrity of lawyers. In support of his position favoring MDPs, he observed that most problems he confronted were not purely legal and that the costs in time (more than money) in seeking the advice of a number of different experts, including legal and nonlegal advisers, were prohibitive for some small businesses. He observed that seeking legal advice from a lawyer in a traditional practice setting is often not as productive as seeking the advice of professionals accustomed to engaging in a team-coordinated approach.²¹

The opponents of change seemed to trivialize and even disparage clients' concerns about cost and their desire for one-stop shopping, and they emphasized that significant contractual opportunities and other possibilities for collaboration exist without permitting fee sharing. In contrast, clients who spoke in favor of MDPs (as well as lawyers who favored change) believed that, at present, the culture of law practice stifles rather than promotes a multifaceted and collaborative approach to problem-solving.²² Clients as well as lawyers who supported the option of seeking service from MDPs emphasized innovation, and the synergy and creative problem-solving that come from a culture of teamwork by equals engaged in collective work. Both junior and senior lawyers who had chosen to "practice tax" or otherwise engage in work within professional services firms said they preferred the supportive interdisciplinary environment, including the information management that was often also provided in these settings, rather than the environment offered in departmentalized law firms. They argued that better service was provided to clients.

In short, despite risks related to undifferentiated roles of lawyers and nonlawyer professionals, some clients seek autonomy and others support MDPs because of the costs of segmented problem-solving and the benefits

21. Another witness, Philip Matthew Stinson Sr., observed that some practice areas, like special education, have been defined by federal laws to require increased participation of other professionals working along with the lawyer. As a consequence, the lawyers' ability adequately to represent the client and assess her claims depends on a close working relationship with other professionals. So, according to Stinson, having the ability to form alliances and work as a team was almost mandated by the regulatory regime.

22. Perhaps nowhere was this more clearly demonstrated than in the context of talking about information management.

they have found in a team-centered approach. Their observations will not be unexpected to legal educators. In law schools we have begun more consciously to embrace the concept of collaboration and to find value in team building. It is not surprising that law schools have recently tended to emphasize the importance of diversity in student admissions and in faculty hiring to promote richer dialog about legal decision-making. Long before the MDP movement emerged, we had begun to bring into our scholarship and our teaching an interdisciplinary approach that assumes law should not be intellectually isolated from the social sciences and natural sciences to retain its integrity as a discipline.

Legal educators, moreover, are positioned to identify the client and public interests at issue in this aspect of the controversy. We can leave economic protectionism aside and reflect on the concerns that bear on the ability of all clients to get efficient, comprehensive, and multifaceted solutions to their problems inside and outside of traditional law firms. We can push our students to think more deeply about the strengths of locating their work in law firms as compared to other structures and suggest ways in which firms can better compete in the business world by creatively using their connections with other disciplines.²³ Most important, we can continue this conversation, begun in the hearings, about effective ways of delivering legal services without becoming enmeshed in the consulting-firm/law-firm competitive crossfire. As should be evident from reports about the MDP movement and this essay, much of the debate about multidisciplinary practice has concerned strategies of the Big Five and professional services firms, and their participation has overshadowed the opportunities for exploring the future of other relationships between lawyers and other professionals. The possibilities for lawyers to be more responsive to their clients' interests in alternative practice structures have yet to be fully explored.

What draws lawyers to non-law-firm work settings?

The commission's inquiry confirmed newspaper accounts of the substantial numbers of senior and junior lawyers who have been and continue to be recruited to Big Five professional service firms, regional accounting firms, and other non-law-firm settings. Whereas opponents of change argued that large salaries drew lawyers to these organizations, witnesses who testified about their decisions to join the organizations offered contrasting views, emphasizing professional challenges, a supportive work environment, and quality of life. The record supporting these competing views did not expose in any depth an account of the law firm life that these lawyers left behind and left out a substantial assessment of whether and in what ways (if any) life in the law firm is better. To be sure, opponents of change argued that supervision over young

23. This kind of reflection has already begun in the scholarship dealing with lawyer roles and emerging conceptions of legal work, challenging a patry conception of the lawyer as adversary and a narrow view of legal knowledge. See, e.g., Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 *Temp. L. Rev.* 785, 792-808 (1999); Wilkins, *supra* note 15.

lawyers—including mentoring, the inculcation and reinforcement of values associated with the profession, and understanding about legal decision-making—is missing or marginalized in organizations that are not controlled by lawyers. Yet there is also evidence that the competition of the 1990s, including firm reconfigurations, mergers, acquisitions, and closings, has deeply affected the law firm culture, causing lawyers to be less certain of the security of their expectations about practice, and challenging traditional views about loyalty and the law firm's interest in the lawyer's individual nurturing and development. In contrast, the record includes evidence that the Big Five firms have heavily invested not only in constructing effective information management systems, but also in providing employee training and support. They seem willing to support the lifelong learning, mentoring, and commitment to community service that had distinguished traditional law firm practice for lawyers.

The distrust that opponents of change have for the multidisciplinary practice is articulated in terms of the fear that values important to the profession will be eroded in these settings. This fear implies a lack of confidence in the lawyer's ability to be self-disciplined and self-conscious in her exercise of judgment. As some witnesses pointed out, similar risks of compromise are experienced by associates and partners of law firms and were the focus of opposition to earlier exceptions to the Model Rules on law firm ownership and control. It seems obvious that fears about erosion of values can be addressed not only by assuring opportunities for young lawyers to be mentored and nurtured in every practice setting, but also by introducing and reinforcing those values in law school. This too should not be lost on legal educators.

There is also opportunity to explore the ways in which diverse workplace environments—traditional firms and other contexts—can promote a professional life that is more satisfying and productive for lawyers in the twenty-first century.²⁴ Law school placement offices and NALP are important resources for further documenting the experiences of lawyers who have chosen to work outside traditional law firm settings. Students and young lawyers could benefit from a better account of the non-law-firm work setting so that their choices about practice can be better informed.

What is the future of the profession?

It is not surprising that many of the witnesses before the MDP commission focused their comments mainly on the Big Five and financial services firms, given the rapid growth of these enterprises and their ability to respond to a globalized economy and technology. Many lawyers are fearful about the future of law firm practice because of this fast-growing component of the MDP movement, in part because these businesses have been forthright in expressing their interest in attaining a competitive position in the provision of law-

24. A recent symposium held at Temple University used the MDP controversy to examine the problem of shifting conceptions of lawyering and the profession and whether the ethical rules give adequate guidance to today's roles for lawyers. The Phyllis W. Beck Chair in Law Symposium: New Roles, No Rules? Redefining Lawyers' Work, 72 *Temp. L. Rev.* 773 (1999).

related services. Because of unauthorized-practice-of-law statutes, common law and judicial rules, and general acceptance of the Model Rules' prohibition on fee sharing and nonlawyer ownership of law firms, until recently the legal profession seemed insulated from such outside competition. Lawyer connections with non-law-related entities had been fairly circumspect. This state of affairs appears to be challenged by the strategy of these aggressive businesses.

The response of proponents of Resolution 10F, seeking restrictions on who is authorized to practice law and reaffirming fee-sharing and ownership prohibitions, assumes that securing a restrictive environment is possible and can stop the invasion. This approach seems ill fated so long as clients in particular and the public in general are unconvinced that restrictions serve their interests and see them as merely protectionist tactics. The MDP record reflects that citizens are skeptical of such restrictions and raises real doubt whether there is the public will to protect lawyers from such competition. Even clients who are unconvinced that they will seek the services of an MDP for their problem-solving are interested in having such a choice available. This state of affairs requires further introspection by members of the profession, including legal educators, about the future: Are law firms and other traditional structures equipped to respond to the client and public interest (and that of lawyers) of the twenty-first century?

The professional service firms' focus on information management and keeping abreast of the rapid increase in technology has left law firms appearing slow to respond to the information explosion and, by implication, to the new century's needs. If law firms have equipped themselves for this change, the record of the commission suggests they have so far missed the opportunity to persuade clients—or students about to enter practice—to have confidence in their leadership. The professional service organizations not only present themselves as in the forefront in this area; they also appear increasingly to be more client centered and supportive. But professional service organizations also sometimes appear to be jargon laden and marketing driven in their presentation, leaving the impression that the packaging they offer lacks real substance.²⁵ Focusing on this weakness, lawyers opposing the fee-sharing change have charged that the demand for professional services is supply driven and will be short-lived.

The record discloses, however, that lawyer and client interest in MDPs is not limited to the Big Five or even regional accounting or professional service firms which by design focus on information management. The movement clearly has the potential of involving a variety of settings for lawyers and

25. I was introduced firsthand to the emerging terminology of MDPs while serving on a panel discussing multidisciplinary practice at the National Conference of Law Librarians in July 2000. One of the other panelists, Catherine A. Hewson, who works as a manager of one of the legal research support teams affiliated with Andersen, gave a fascinating account of the challenges she faced as a former traditional law firm librarian who now manages one of several teams engaged in research support for the "fee earners" or lawyers engaged in providing Andersen's professional services. The business card she carries is itself noteworthy: it reads that she is Manager, UK Tax & Legal Library of Garretts, "a member of the international network of law firms co-ordinated by Andersen Legal CV, which is associated with Andersen Worldwide SC."

nonlawyers to work together with profound effects on the delivery of services, some of which are seen as valuable to clients, according to the record. The commission heard testimony about the opportunities for collaborative work between lawyers and other professionals. While the record is not nearly as developed in this focus as in the context of consulting and financial service firms, the commission attempted to consider whether and how this multidisciplinary movement serves all clients, not just big business, and uncovered a number of areas where the movement seems to have great potential for responding to clients' unmet needs. The emphasis on technology and information management is important, but it provides an incomplete picture of client needs and surely does not respond to the question about what is in the public interest.

The notion that protection of law firms from competition necessarily serves the public interest is questionable, based on what we can learn from the record about the needs of low- and moderate-income clients. As one witness observed, the reality is that middle- and upper-income consumers already have a network of friends and advisers from whom to seek advice about their problems. Not only are there no similar networks readily available to low- and moderate-income clients, there is a documented substantial decline in the availability of lawyers in solo practice and in the kind of firms that have traditionally handled their needs.

It may not be surprising that the record has focused mainly on the Big Five firms and financial services, yet it is clear that the shape of the profession and its future are ultimately affected by the needs of clients and a conception of the public interest that is richer than the debate about the Big Five. Legal educators can build from the record evidence a more complete assessment of the needs of clients and public purposes to which the future profession should respond. They can explore the range of creative alliances among professionals that might be responsive to them and consider the social justice and political implications of restrictive and more flexible alternatives of practice.²⁶

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The record of the ABA commission presents an important setting for lawyers to think about the future of the profession and professionalism in the face of extraordinary change. Legal educators are especially positioned to mine the contents of the record and to promote a more meaningful and introspective dialog than was likely to occur in the context of the immediate and self-interested debate about the proposed rule changes to permit multidisciplinary practice. There is no doubt that clients and students can benefit from this continued exploration by legal educators.

26. This important work has already begun in clinical circles. See Louise J. Trubeck & Jennifer J. Farnham, *Social Justice Collaboration: Multidisciplinary Practice for People*, 7 *Clinical L. Rev.* 227 (2000).