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“FROM THE TRENCHES AND TOWERS”

Five Years Later: Reconsidering the Original ABA Report on MDP

Sydney M. Cone, III

Reconsidering the original report issued in 1999 by the ABA Commission on Multidisciplinary Practice, this essay suggests that that report properly attempted to deal with questions of legal ethics that might arise if the practice of law by lawyers were integrated into an enterprise in which nonlawyers had a significant degree of ultimate control, but that the commission, perhaps because of undue time pressure, neglected to pursue these questions deeply enough. This essay suggests that more was needed than a proposed mechanism for self-certification of compliance with rules of legal ethics, coupled with possible review of compliance. The “more” that was needed, this essay further suggests, was a proposal for the licensing of an enterprise in which lawyers do not have exclusive ultimate control, as a precondition to permitting lawyers in the enterprise to offer legal services to the general public. Thus, before it could offer legal services to the general public, such an enterprise would need to comply with requirements for obtaining a license, and noncompliance with rules of legal ethics could bring into play traditional disciplinary measures including, where appropriate, suspension or revocation of the license.

I. INTRODUCTION

This essay on multidisciplinary practice (MDP), written from the perspective of early 2004, takes the following questions as its theme: In mid-1999, when the House of Delegates of the American Bar Association (ABA) rejected the first proposal of the ABA commission on MDP,¹ what,

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1. Neither the 1999 Report nor the Recommendation that accompanied it was voted on as such, but procedural votes by the ABA House of Delegates on August 10, 1999 had the effect of rejecting the Recommendation “indefinitely” (Conley 1999). The “recommended procedures” in the 1999 Report, discussed herein, have not been resubmitted to the ABA House of Delegates.

from today's viewpoint, was wrong with the commission's 1999 Report (hereinafter 1999 Report)? How, redrafted today, might it be usefully recast to deal with MDP? ("MDP" as used herein, depending on the context, means either the concept of multidisciplinary practice, or an entity or group engaging in multidisciplinary practice, in each case where one of the disciplines is the practice of law.)

First, let us take a brief look back. The commission, which was created in the second half of 1998, felt itself effectively under an obligation to submit a proposal for consideration by the ABA House of Delegates at its annual meeting in the summer of 1999. The resulting deadline called for a commission report to be available in the late spring of 1999. There were those (including the present author) who were of the opinion that this timetable was unrealistic and that it involved a risk that the resulting report would, perforce, be hastily conceived.²

At the time, there was little doubt that the major accounting firms, then known as the Big Five, urged the commission to propose a form of MDP that would permit a Big Five firm to integrate the practice of law into the firm's activities in a manner permitting the firm to offer both legal and nonlegal services to its clients.³ The commission, it would seem, was not opposed to this objective. In any event, its 1999 Report would have permitted the full integration of a legal practice into an enterprise engaged in nonlegal activities managed by nonlawyers. Thus, the 1999 Report would have permitted professionals other than lawyers—and, conceivably, non-professional service providers as well—to invest in, and potentially to own and control, firms of lawyers offering legal services to the general public.⁴

In preparing a proposal that would permit this result, the commission deemed it appropriate to consider how legal rules of professional ethics, particularly the rules on conflicts of interest, might be effectively applied to a legal practice as to which nonlawyers would be in a position of partial or even

2. The commission was created in August 1998 by ABA president Philip S. Anderson and held hearings in November 1998 and February and March 1999. See Background Papers (ABA Commission on MDP 1999). Although the Report was dated August 1999, it was issued on June 8, 1999. See, e.g., memorandum thereon available at <http://www.abanet.org/cpr/adhocmemo.html> (Aug. 4, 1999). The present author is also of the view that the 1999 Report was better conceived than the report prepared by the ABA Commission and rejected by the ABA House of Delegates the following year and that improvements on, rather than abandonment of, the 1999 Report might have been more productive. See ABA Commission on MDP Transcript 2000.

3. See, e.g., Garten 1999, 26. The Big Five were Arthur Andersen (since liquidated), Deloitte Touche Tohmatsu, Ernst and Young, KPMG Peat Marwick, and PricewaterhouseCoopers. See also Oberly 1999 (Kathryn Oberly was vice chair and general counsel, Ernst and Young LLP).

4. The 1999 Report itself does not confine the service providers in an MDP to lawyers and other professionals. The "illustrations" of rules in the Report's Appendix A (tracking § 3 of the Report's Recommendation) defined an MDP in two sentences. The first sentence defined it as an 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." The second sentence says:

dominant control. The commission apparently felt it imperative to take account of the possibility that, through investment or otherwise, nonlawyers might influence decisions relating to compliance with applicable rules of legal ethics once a legal practice had been integrated into, for example, one of the Big Five or into some other enterprise in which ultimate decision-making authority did not rest exclusively with members of the legal profession.

To deal with this possibility, the commission was (in its words) "particularly mindful" that "appropriate safeguards" would be needed to protect the "core values" of the legal profession in the context of MDP. It identified three core values: professional independence of judgment, the protection of confidential client information, "and loyalty to the client through the avoidance of conflicts of interest" (1999 Report 2, 4). With "appropriate safeguards" in mind, the commission included in its 1999 Report "recommended procedures" for the regulation of an enterprise "controlled by non-lawyers" that offered legal services to the public.

Basing these "recommended procedures" on the jurisdiction exercised by the courts of the several states in regulating the legal profession, the 1999 Report made essentially five proposals: (1) an MDP not controlled by lawyers would provide the highest court(s) of the relevant state(s) with "written undertakings" that the MDP would "establish and maintain procedures protecting the independent professional judgment" of its lawyers; (2) annually, the managers of the MDP would certify to those courts that the procedures had been observed; (3) if it so chose, a court could initiate its own investigation to determine whether the MDP had acted in compliance with its undertakings; (4) the cost of administering this mechanism would be met by annual certification fees imposed on MDPs; and (5) noncompliance by an MDP "shall be subject to withdrawal of its permission to deliver legal services or other appropriate remedial measures ordered by the court."⁵

These five proposals for regulating an MDP controlled by nonlawyers are examined in more detail below.

II. THE 1999 REPORT'S "RECOMMENDED PROCEDURES"

In the 1999 Report proper, not very many words are devoted to the "recommended procedures." The "written undertakings" to be made to

"It [presumably an MDP as defined in the first sentence] includes an arrangement by which a law firm joins with one or more other professional firms to provide services, and there is a direct or indirect sharing of profits as part of the arrangement." Since the definition did not restrict the term MDP to such an arrangement, the first sentence seemingly included nonprofessionals in the scope of "nonlawyers."

5. The 1999 Report, at 3, 5. On annual certification fees, see pt. IV.A herein. On "withdrawal of permission," see pt. IV.B herein.

the courts by MDPs are briefly described on page 3 and, two pages later, the other "recommended procedures" are mentioned in fewer than 100 words. For gloss thereon, one turns to two documents that accompanied the 1999 Report: a Recommendation setting out a resolution for adoption by the ABA House of Delegates—a resolution on which, in the event, the House did not vote (see note 1, above); and Appendix A, which could have become relevant had the resolution been adopted, setting out "illustrations of possible [MDP] amendments to the [ABA] Model Rules of Professional Conduct." (These documents are herein referred to respectively as the "Recommendation" and "Appendix A.")

The Recommendation and Appendix A convey the impression that the commission seriously intended to safeguard the core values of the legal profession in an MDP controlled by nonlawyers. The "written undertakings," destined for signature by an MDP's chief executive officer and its board of directors, would have covered, in respect of each lawyer in the MDP, the lawyer's exercise of independent professional judgment, the lawyer's obligation to segregate client funds, and aspects of the lawyer's "unique role . . . in society"; and would have required all "members of the MDP delivering or assisting in the delivery of legal services" to abide by rules of professional conduct applicable to lawyers. The annual certification of compliance with the written undertakings was to be a formal document filed with the relevant court(s) and delivered to each lawyer in the MDP; the MDP was to grant formal approval to the court "to review and conduct an administrative audit of the MDP" as the court deemed appropriate; and the MDP was to bear the cost of the administrative audit "through the payment of an annual certification fee."⁶ Finally, the Recommendation repeats the language in the 1999 Report (mentioned above) that failure by the MDP "to comply with its written undertaking shall be subject to withdrawal of its permission to deliver legal services or to other appropriate remedial measures ordered by the court."⁷

Both the Recommendation and the illustrative legal professional rules in Appendix A dealt with the applicability of legal rules of professional conduct to an MDP. The Recommendation said that a lawyer in an MDP delivering services to the MDP's clients "should be bound by the rules of professional conduct" and should not be excused from this obligation when acting in accordance with instructions from a nonlawyer supervisor; and that "[a]ll rules of professional conduct that apply to a law firm should also apply to an MDP."⁸ On the question of conflicts of interest, the language is quite specific:

6. See, especially, the Recommendation § 14 (repeated in Appendix A in illustrative ABA Model Rule 5.8(c)).

7. Recommendation § 15. The same language appear in Appendix A in illustrative ABA Model Rule 5.8(d).

8. Recommendation §§ 5–7. In Appendix A, illustrative ABA Model Rule 5.8(b) would have made legal professional rules generally applicable to lawyers in MDPs. The reference to "rules of professional conduct" presumably is to the ABA Model Rules of Professional Conduct, which are reproduced in various sources, e.g., Dzienkowski 2003–2004.

In connection with the delivery of legal services, all clients of an MDP should be treated as the lawyer's clients for purposes of conflicts of interest and imputation in the same manner as if the MDP were a law firm and all employees, partners, shareholders or the like were lawyers. (Recommendation § 8)⁹

With respect to an MDP, imputed disqualification of a lawyer applies if the conflict in regard to the legal services the lawyer is providing is with any client of the MDP, not just a client of a legal services division of the MDP or of an individual lawyer member of the MDP. (Appendix A, illustrative comment 4 to ABA Model Rule 1.10)

The intent of the commission seems quite clear: to place not only an MDP's lawyers but also, for purposes of conflicts of interest, the MDP itself squarely under the legal profession's rules of professional ethics. If the MDP, outside its "legal services division" (to use the phrase found in Appendix A), were to have a client which, judged by the legal profession's rules on conflicts of interest, had interests in conflict with the interests of the client of the "legal services division," then the MDP would be required to handle the conflict in accordance with the rules of the legal profession.

Although the implications of this proposal on conflicts of interest are not spelled out in the 1999 Report or its accompanying documents, it would seem that the commission had ventured rather boldly into the sensitive territory of subjecting nonlawyers in an MDP (subjecting parts of an MDP other than its "legal services division") to legal professional rules on conflicts of interest. The commission, undoubtedly aware of the sensitivities touched upon by this proposal, seems to have decided to let the proposal speak for itself rather than to take on a further delicate task of textual exposition. On the other hand, leaving it to the House of Delegates to appreciate the implications of technical provisions in the proposal may have caused a key aspect of the commission's work to go largely unexamined.

Given the manifest concern of the commission to create safeguards for the core values of the legal profession and to extend the profession's ethical rules to MDPs, why was the House of Delegates so hostile to the 1999 Report? In all likelihood, a complete answer does not lie in the nuances of this or that provision in the documents prepared by the commission. Thus, the question will be discussed below at two levels. First, what were the special influences at work in mid-1999 in the debate over MDP? They are mentioned in part III below. Second, with the benefit of hindsight, how might the 1999 Report have been improved to provide a more satisfactory approach to MDP? This is discussed in part IV below. A common thread in

9. The reference presumably is to, *inter alia*, ABA Model Rule 1.7 (Conflict of Interest: Current Clients); 1.8 (Conflict of Interest: Current Clients: Specific Rules); 1.9 (Duties to Former Clients); 1.10 (Imputation of Conflicts of Interest: General Rule) (see Dzienkowski 2003-2004, 187-204).

answering both questions is the constraint of an ABA presidential term limited to one year, which may have influenced the commission (or perhaps, more accurately, the leadership of the ABA) to act with undue haste rather than to devote more time and thought to educating itself, the ABA membership, and the public (including the Big Five) on problems inherent in the subject matter of the 1999 Report.

III. SPECIAL INFLUENCES IN THE 1999 DEBATE

There were undoubtedly many influences on the 1999 debate over MDP, such as concern that established attorney-client relationships might be challenged or that professional standards might be modified. For purposes of discussion, two types of participants in the 1999 debate over MDP are deemed to have been "special influences": the Big Five (as supported by some commentators identified with the American law and economics school of thought); and legal practitioners and law professors, who focused on what were often referred to as the core values of the legal profession.

A. The Big Five

The 1999 Report would have permitted the Big Five, by following a procedure of self-certification, to integrate legal practices into their operations and thus to offer legal services to their clients. The Big Five did not welcome the 1999 Report, however. On the contrary, shortly after it had been released on June 8, 1999, they issued a 14-point statement denouncing it.¹⁰ This Big Five document set out a series of negative conclusions about the 1999 Report, without quoting from it or purporting to provide an objective summary of its contents. Some of this document's assertions are questionable and given without explanation; for example, in point 7, a reference to "draconian penalties" that (were the 1999 Report to be adopted) purportedly would flow from "any violation of the bar rules by any professional—lawyer or non-lawyer—in the organization [in an MDP]."

Given the nature of this statement by the Big Five, only two conclusions will be attempted here with respect to the Big Five and the 1999 Report. First, the Big Five were opposed to being required to observe the rules on conflicts of interest applicable to the legal profession. Point 6 of the Big Five document said this about making those rules applicable

10. The Big Five statement, distributed in July 1999, was titled "By Dramatically Expanding the Definition of the 'Practice of Law,' the MDP Commission Transforms Bar Associations into Super-Regulators with Vast Control over Industries and Organizations Never before Subject to Lawyers' Rules and Bar Discipline." It comprises 14 bullet points over 3¼ pages.

throughout an MDP: "The likely result is that firms [presumably MDPs or firms within MDPs] will have to 'fire' existing clients and turn away new ones."¹¹ Second, the Big Five were seeking both the right to include legal services in the services offered by them to the general public and freedom from the judicial supervision that, in the case of lawyers and law firms, accompanies that right. Although the Big Five document did not attempt to reconcile those two objectives, it would seem that their position was that only the lawyers within an MDP, but not the MDP itself nor any nonlawyers within the MDP with management responsibility for legal services, should be subject to judicial supervision (see Oberly 1999).

In mid-1999 the Big Five apparently had as their objective the integration of legal practices into their general operations without being required to forgo consulting services and other nonlegal representation of clients where conflicting interests might exist under standards applicable to the legal profession, and without being subject to judicial supervision of their practice of law beyond judicial supervision of the individual lawyers themselves. Was this objective based on a cost-benefit analysis? Had the Big Five calculated that the costs of complying with the 1999 Report would outweigh the benefits to be obtained by offering legal services to their clients? Or did the Big Five simply miscalculate? In general, did they misjudge how to advance their interests in MDP?¹² In particular, did they pass up an opportunity to achieve MDP through the relatively benign process of self-certification? Under the 1999 Report, the "written undertakings" and the annual "certifications" by MDPs would have been generated internally by the MDPs themselves, which thus would have enjoyed substantial control over when and how to initiate, shape, and submit the documents necessary for an integrated approach to MDP.

The Big Five were presumably familiar with those commentators who are found in the American law and economics school of thought and who advocate unregulated market freedom. Those commentators consider the legal profession's rules to be a form of economic protectionism, unduly encumbering free entry of willing sellers of legal services (such as an integrated provider of multiple services) into the marketplace for those services (see, e.g., Fischel 2000; see also Cone 2001, 5-10). A critique by those commentators of the 1999 Report might have condemned the proposed extension of the legal profession's rules to MDPs, not to mention the "written undertakings" and annual "certifications," as barriers burdening

11. In her February 4, 1999, oral remarks, Kathryn Oberly also opposed subjecting an MDP to the rules of the legal profession on conflicts of interest (see Oberly 1999; note 3 above).

12. The context of the 1999 debate on MDP may have been changed by enactment of the Sarbanes-Oxley Act of 2002 on July 30, 2002, Pub. L. 107-204, 116 Stat. 745 (2002), and by the issuance thereunder of a relevant Securities and Exchange Commission release (2002) concerning auditor independence.

access by the Big Five (and other entities) to consumers of legal services and making it needlessly difficult for consumers to choose among as large a variety of potential providers of legal services as possible.

In any event, with the Big Five's immediate and sharp rejection of the 1999 Report a potential argument for MDP was weakened as the ABA House of Delegates convened in early August 1999. The Big Five issued their rejection in July 1999 just as the ABA Commission was seeking to persuade the ABA House of Delegates that adoption of the 1999 Report would bring lawyers working for the Big Five into a system compatible with the commission's views on the proper application of professional rules governing the legal profession.

B. Defenders of the Legal Profession's Core Values

Attacking (from quite a different perspective) the integrated version of MDP espoused by the 1999 Report were those lawyers and law professors who saw it as insufficiently protective of the legal system, legal ethics, and the fiduciary duties that lawyers owe their clients (see, e.g., Wolfman 1999). These critics of the 1999 Report were of the view that lawyers are responsible for maintaining the professional standards of the legal profession and that, as regards legal practice, lawyers should, therefore, be in a position of control that enables them to discharge that responsibility. Some of these critics emphasized the professional "culture" needed to nourish respect for the values of the legal profession and questioned whether the "written undertakings" and annual "certifications" called for in the 1999 Report would be adequate to create and maintain the requisite level of professional "culture."¹³ Rather, they suggested, the duties of the lawyer are not merely a matter of administrative supervision, but involve substantial jurisprudence and learning that the "recommended procedures" of the 1999 Report might be inadequate to capture and to instill in an MDP controlled by non-lawyers.

To give concrete expression to these concerns, lawyers in New York State, in July 1999, formed a special committee to consider the law governing firm structure and operation. Its 400-page report was written in the context of the ABA debates¹⁴ and provided the New York courts with a basis for adopting rules on multidisciplinary practice. These rules do not permit a legal practice to be integrated into an entity in which

13. On the need to create a "culture" supportive of strict observance of the legal rules of professional conduct, see Nelson 1999. Nelson was a member of the ABA Commission and thus a signer of the 1999 Report.

14. The special committee, established by the New York State Bar Association, issued its report in Albany in April 2000. (The present author was a vice chair of the special committee.)

nonlawyers have an ownership or investment interest or otherwise manage or control the legal practice. Rather, the New York rules permit MDP only if it either (1) involves nonlegal services controlled by lawyers or (2) consists of "side-by-side" contractual arrangements between lawyers and other licensed professionals designed to assure that the legal practice maintains its independence.¹⁵

In common with the ABA Commission, the New York Special Committee worked toward a tight deadline; for the New York Special Committee, it was the perceived need to issue its report several weeks prior to the meeting of the ABA House of Delegates in early July 2000. As just noted in the preceding paragraph, the New York Special Committee did not attempt to devise rules for MDP permitting a legal practice to be integrated into an entity controlled by nonlawyers. While the ABA Commission did make the attempt, its proposal was not adopted. Thus, in a sense, the ABA Commission and the New York Special Committee shared a common result; both stopped shy of causing rules to be adopted under which a legal practice could be integrated into an entity controlled by nonlawyers. Given more time, might the New York Special Committee have successfully come to grips with the drafting of rules for the integrated MDP?¹⁶ It would not seem inappropriate to keep this question in mind as hindsight is applied in Part IV below to the 1999 Report.

IV. HOW MIGHT THE 1999 REPORT HAVE BEEN IMPROVED?

The question, how might the 1999 Report have been improved, will be answered in terms of two of its provisions. The first is the proposal in the 1999 Report that the cost of judicial supervision of an MDP controlled by nonlawyers would be funded out of "an annual certification fee" levied on the MDP (Recommendation § 14(i)). The second is the proposal that if an MDP controlled by nonlawyers failed to comply with its undertakings, the

15. The rules came into effect on November 1, 2001 as part of the N.Y. Code of Professional Responsibility. They are N.Y. Disciplinary Rules 1-106 (nonlegal services controlled by lawyers) and 1-107 ("side-by-side" contractual arrangements) (Dzienkowski 2003-2004, 516-19).

16. Even if the New York special committee had drafted rules for the integrated MDP, it is questionable whether such rules would have been adopted by the New York courts. The courts (the Appellate Division), in approving the rule on "side-by-side" contractual arrangements, added language that, while not modifying the operative text of the rule, seems inconsistent with the integrated MDP. The added language in N.Y. Disciplinary Rule 1-107, constituting its first five sentences, concludes as follows: "[A] strict division between services provided by lawyers and those provided by nonlawyers is essential to preserve those values [guaranteeing clients of lawyers independent professional judgment and undivided loyalty uncompromised by conflicts of interest]." See Dzienkowski 2003-2004, 517-18.

MDP would be "subject to withdrawal of its permission to deliver legal services" (Recommendation § 15).

A. The 1999 Report's Funding Proposal

The 1999 Report's funding proposal seems to assume that there would be a correlation between the certification fees levied by a given jurisdiction on a given MDP controlled by nonlawyers and the administrative costs of judicial supervision of that MDP in that jurisdiction. The assumption seems rather dubious. The more problematic the MDP, the greater would be the costs of supervision. Some MDPs might engender little in the way of administrative supervision, while others might raise substantial problems. Supervisory costs, moreover, might vary considerably for a given MDP from one jurisdiction to another. The possibility of aggregate fees in excess of aggregate costs in a given case might seem a tolerable result, especially from the perspective of the budget of the jurisdiction in question, but the opposite result seems open to question. Surely it was not intended that when the administrative costs of supervising a given MDP reached an amount equal to the fees theretofore paid by that MDP, efforts at judicial administration would cease. Nor could it have been intended that an MDP would be able to limit judicial surveillance simply by delaying payment of, or defaulting on, the fees it owed. The whole funding idea in the 1999 Report, on a moment's reflection, seems fraught with budgetary difficulties.

More important, it would seem that if the judicial supervision of MDPs controlled by nonlawyers were in the public interest, then the costs of that supervision should be met in the same manner that the costs of the judiciary are met generally—in part, at least, out of appropriations duly voted by the legislature to fund the judiciary. As a largely ancillary matter, if the jurisdiction in question imposed annual fees on lawyers, then lawyers in MDPs would in the ordinary course be required to pay those fees.¹⁷ Similarly, if entities practicing law in a given jurisdiction were required to pay fees, then MDPs practicing law could be slotted into the appropriate tariff.

This matter of funding the administrative costs envisaged by the 1999 Report helps to demonstrate the need for deeper inquiry into how the basic objective of the 1999 Report could be better achieved. That basic objective was twofold: to permit legal services to be integrated into MDPs controlled by nonlawyers; and to safeguard the core values of the legal profession in

17. Fees paid by lawyers may in fact be destined to help defray the costs of disciplinary administration and enforcement. See, e.g., ABA Model Rules for Lawyer Disciplinary Enforcement, rules 5 and 8 (Dzienkowski 2003–2004, 1272, 1275–77). However, the fees paid by a given lawyer are not earmarked for that lawyer alone, and in the normal course one lawyer's fees will be used in respect of administration or discipline of another lawyer.

those MDPs. An improvement on the 1999 Report would be not to trivialize the value of that basic objective by approaching it in terms of ancillary and unpredictable revenues from specific certification fees.

Instead, it seems essential to reach, or to reject, a policy decision that the social benefits of integrated MDPs justify the costs of subjecting them to judicial supervision. Indeed, unless one is willing to reach such a policy decision, there would seem to be little merit in the objective sought by the 1999 Report. Those opponents of the 1999 Report who have concluded that MDPs controlled by nonlawyers simply do not belong in the legal system are unlikely to be persuaded to change their minds because one budgetary approach might be somewhat cheaper than another. For their part, members of the law and economics school favoring unregulated enterprise, while no doubt deploring the cost of subjecting integrated MDPs to judicial administration as envisaged by the 1999 Report, have more radical reasons for promoting unfettered access to the marketplace for legal services.

Having in effect ignored those radical views and having attempted to accommodate the advocates of the core values of the legal profession, the 1999 Report would have been strengthened, as a matter of strategy and substance, had it evaluated the benefits of its proposal in societal terms rather than in terms of marginal administrative costs. A more complete analysis of societal costs would acknowledge that the proper integration of MDP into the legal system necessitates the availability of judicial resources adequate to provide for, first, the meaningful evaluation of applications by MDPs seeking licenses in order to offer legal services to the public, and, second, adequate disciplinary supervision of those MDPs once they have been licensed.

B. "Subject to Withdrawal of Its Permission to Deliver Legal Services"

Given the time pressures on its preparation, the 1999 Report might be forgiven a certain lack of acuity on budgetary matters. The same cannot be said, however, when it comes to ambiguity regarding the fundamental nature of its "recommended procedures." They essentially would authorize an MDP controlled by nonlawyers to certify itself as entitled to offer legal services to the general public. The proposed "written undertakings" and the annual "certifications" would emanate from the individual MDP. The relevant court would be relegated to the role of watching the MDP certify itself as qualified to engage in the practice of law.

These "recommended procedures" contrast strikingly with the fundamental requirement in our society that, in order to offer legal services to the general public, an applicant must first satisfy the judiciary that the applicant has the requisite qualifications and meets applicable standards, and only on this basis is entitled to be licensed to practice law. Moreover,

the license is not immutable. For cause, the judiciary has authority to suspend it or to revoke it.

These fundamentals were dealt with only obliquely by the 1999 Report. They are obscured by a convoluted form of the following key sentence—set out identically in the 1999 Report itself (p. 5), in the Recommendation (§ 15), and in Appendix A (illustrative ABA Model Rule 5.8 (d)):

An MDP that fails to comply with its written undertaking shall be subject to withdrawal of its permission to deliver legal services or to other appropriate measures ordered by the court.

Having self-certified its own “permission” to practice law, the MDP would be at liberty to offer legal services to the general public so long as a court did not undertake to try to stop the MDP from engaging in the practice of law. The MDP would be spared the customary requirement of *applying* for a license to practice law. It would not need a license, or even a permit. The phrase “its permission” is without jurisprudential underpinnings (and even, one might argue, does not make permissible use of “permission”). The conferring of “its permission” would take place somewhere in the shadows of the legal system, not in an established manner involving an application to judicial authority for a license, consideration of the application by that authority, and a decision by that authority to grant, to deny, or to seek further information in respect of the application.

This ambiguous approach to entitlement to practice law stands the legal system on its head. The burden would be on the judiciary to find out whether a self-certified MDP offering legal services to the public was not qualified to do so. If the judiciary made such a finding, it would lack the customary recourse of being able to suspend or revoke a license to practice law, because no such license would have been required in the first place. One can even imagine an MDP resisting judicial intervention on the ground that, as regards MDPs, the judiciary lacks its customary authority over the legal system. The image of a court as plaintiff pursuing an MDP in the somewhat murky haze of the key sentence quoted above is less than reassuring.

It might be argued that a legal practice integrated into an MDP should not be subject to licensing because licenses are issued to lawyers and not to firms. This formalistic approach fails to take account of the essential operative distinction between a firm that is controlled by licensed lawyers and a firm that is controlled by persons who are not licensed lawyers. To take account of that distinction, it is necessary to penetrate the entities rendering legal services in order to determine who therein controls the rendering of those services. A legal practice controlled by licensed lawyers is, perforce, effectively subject to being licensed as a legal practice.

Moreover, in rendering those services to the general public, a law firm controlled by lawyers is, as a firm, often expressly subject to certain rules governing the legal profession.¹⁸ In contrast, if a legal practice is in an integrated MDP that is controlled by persons who are not licensed lawyers, the persons controlling that legal practice escape being subject to licensing and supervision as lawyers, with the result that the MDP itself likewise escapes responsibility for observing the standards of the legal profession.

The 1999 Report seems to have gone astray by forgetting the bedrock principle that entitlement to practice law, especially to do so by selling legal services to the general public, is not a self-conferred right. It is a privilege conferred by society, acting through the judiciary, on persons who demonstrate that they meet standards established by the judiciary. Despite the protestations of commentators identifying themselves with the law and economics school that this privilege has a protectionist aspect offensive to the purity of the marketplace (see, e.g., Fischel 2000; see also Cone 2001), our society continues to view the right to practice law as a privilege restricted to applicants who satisfy the judiciary that they possess certain qualifications thought necessary to assure adequate professional standards and adequate safeguards for the general public. In addition, our society continues to look to the judiciary to intervene as necessary to suspend or revoke the privilege thus conferred.

V. CONCLUSION

Although considerable serious groundwork would be required to prepare the way for the licensing of MDPs, to authorize MDPs and then to fail to create a licensing system for them would be unsustainably anomalous if they were to be owned or managed in significant part by persons other than licensed legal practitioners and were to be entitled to offer legal services to the general public. As long as our society finds the licensing of the legal profession to be in the public interest (so long as, for example, certain commentators in the law and economics school have not persuaded our society to abandon regulation in favor of the unregulated marketplace), it would be difficult to justify an exception for MDPs which were not licensed to practice law and in which similarly unlicensed owners or managers were in positions of authority.

Such an exception would result in a legal system bifurcated as to the regulation of services provided to the general public. On one side of the

18. See, e.g., ABA Model Rules 1.10(a) (imputed firmwide disqualifications), and 5.1 (firmwide responsibilities of lawyers); New York Disciplinary Rules 1-104 (law firm general responsibilities), and 5-105 (law firm responsibilities regarding conflicts of interest) (Dzienkowski 2003-2004, 200, 252-53, 515-16, 536-37).

bifurcation would be lawyers and law firms who would be responsible for the provision of all services, whether legal services or nonlegal services, provided by them to the general public, and who in respect thereof would be subject to applicable rules governing the legal profession. On the other side of the bifurcation would be MDPs controlled by nonlawyers who would not be subject to those rules as regards the provision of legal and nonlegal services to the general public.

On both sides of the bifurcated legal system, service providers would be permitted to render both legal and nonlegal services to the general public. The line of bifurcation would separate not the potential availability of a broad range of legal and nonlegal services, but two quite different approaches to the duties and obligations of the legal profession. On one side would be law firms controlled by legal practitioners whose professional backgrounds and activities provide a basis for fulfilling the social duties and obligations of the legal profession toward the general public, and not just for exploiting the opportunities for gain available to legal practitioners. On the other side would be MDPs that were (in the words of the 1999 Report) "controlled by non-lawyers," that is, by persons who are divorced from direct judicial supervision and whose business interests present the risk that lawyers under their control will at times be less than adequately integrated into a legal system with duties and obligations to the general public. In the latter case (where neither the MDPs nor their nonlawyer managers would have been licensed to offer legal services to the general public), waiving licensing requirements for MDPs "controlled by non-lawyers" could be justified only on grounds of expediency—only in order to avoid the task of developing rules for the licensing of MDPs.

The 1999 Report completed much of that task by tying its "recommended procedures" to safeguards relating to the core values of the legal profession (see text at note 8 above). The 1999 Report stopped shy, however, of including the critical step of MDP licensing requirements (possibly because its schedule simply did not allow sufficient time for thinking through that step). To take that step, one would have to pick up on the rules adumbrated in the 1999 Report (including the Recommendation and the illustrative ABA Model Rules in Appendix A) (see pt. II above), and one would have to develop new rules with these three objectives: (1) defining an MDP controlled by nonlawyers, (2) defining the MDP eligible for licensing, and (3) setting out the form and substance of an application for the licensing of an MDP.

A. Defining the MDP "Controlled by Non-Lawyers"

The 1999 Report created its "recommended procedures" only for MDPs "controlled by non-lawyers" and did so because of the perceived need in

such MDPs to have safeguards in place to protect and preserve the core values of the legal profession, including independent professional judgment, loyalty to the client, and avoidance of conflicts of interest (1999 Report). Although the 1999 Report did not define "controlled by non-lawyers," the rationale of the 1999 Report strongly suggests that a definition should be grounded in concern for maintaining the essential values of the legal profession. Put the other way around, the concern is to avoid having those values put at risk. When, therefore, nonlawyers in an MDP are in a position to put those values at risk, the MDP, under the criteria inherent in the 1999 Report, could be said to be potentially or actually "controlled by non-lawyers."

The potential or actual capacity of nonlawyers in an MDP to put the values of the legal profession at risk in the MDP might therefore serve as the touchstone for defining "controlled by non-lawyers." This capacity might be inherent in any of a number of factors relevant to the management and operations of the MDP. If nonlawyers controlled a valuable trade name used by the MDP; if they were in a position to select and refuse clients for whom legal services were to be rendered, or to determine which of those clients was to enjoy priority over another; if they were in a position materially to influence the resolution of intra-MDP conflicts of interest affecting a client for whom legal services were to be rendered; if they were otherwise in a position materially to influence the handling of legal professional matters within the MDP—in situations such as these, the MDP, under the criteria inherent in the 1999 Report, could be said to be potentially or actually "controlled by non-lawyers." Thus using the 1999 Report, one arrives at a pragmatic and prophylactic approach to defining the type of MDP that would be required to obtain a license before it could offer legal services to the general public: the MDP in which the economic influence or managerial position of one or more nonlawyers might materially affect decisions relating to the practice of law or the observance of legal professional rules.

B. Defining the MDP Eligible for Licensing

A definition of the MDP eligible for licensing might borrow from (1) the rules adopted in New York authorizing MDP through "side-by-side" contractual arrangements, and (2) standards observed in Germany for MDP. To try to assure that the service providers within an MDP shared compatible attitudes toward clients, the relevant new rule might take the New York approach and require that all of the service providers in an MDP must be professionals meeting certain standards as to education and enforceable professional rules. In Germany, an even stricter standard is imposed, and an MDP is limited to professionals who are under a duty to maintain the

confidences of their clients.¹⁹ Referring to standards such as these, the new rules would be able to set out criteria for those MDPs eligible for receiving licenses to offer legal services to the general public, and would limit eligibility to MDPs owned and controlled by licensed professionals who were members of professions subject to enforceable disciplinary rules found to be sufficiently comparable to the rules governing the legal profession.

A licensing authority might also take into consideration rules applicable to non-lawyer professionals in an MDP, to ascertain whether the MDP is managed in accordance with, and thus is eligible for licensing under, those rules. For example, shortly after the 1999 Report was issued, the general counsel, chief accountant, and director of enforcement of the Securities and Exchange Commission (SEC) wrote to ABA president Philip S. Anderson to call attention to the fact that SEC rules on the independence of auditors "prohibit an auditor from certifying the financial statements of a client with which his firm has an attorney-client relationship" (letter of 12 July 1999; see also SEC 2002). These rules would seem to be relevant to an MDP seeking to be licensed to offer both auditing and legal services to the general public.

The licensing of an MDP with respect to legal services might not be the only licensing required of the MDP. Where professional services in addition to and other than legal services were to be offered to the general public by an MDP, additional licenses might have to be obtained with respect to those additional services. Multiple licensing of the MDP in respect of multiple regulated professions would seem altogether appropriate. Any conflicting professional rules would have to be resolved; resolution in favor of the strictest rule would often be both proper and readily applicable. Examples of multiple licensing can be found in Germany where there are MDPs comprising professionals in addition to lawyers.²⁰

C. The MDP Application for a License

In applying for a license to offer legal services to the general public, an MDP might usefully be required to set out the procedures that it will follow

19. On New York's requirement, see the New York State Bar Association Special Committee 2000, 351-52 (MDP should be restricted to lawyers and other professionals who "belong to a profession requiring a reasonable degree of higher education and having a set of enforceable standards of professional conduct sufficiently comparable with those of lawyers") (this approach was given effect in N.Y. Disciplinary Rule 1-107). On Germany, see the same report (2000, 250-51): "the German Parliament limited [integrated] MDPs to those comprising the listed professionals (essentially, lawyers, accountants and tax advisers) in order to safeguard rules (such as the rules on confidentiality) designed to protect clients of the legal profession."

20. Given the possibility of multiple licensing, the 1999 Report seems to have raised a false issue when it adverted to the possibility of "a new regulatory body" for MDP (at 5). On Germany, see the New York State Bar Association 2000, 237-44.

in order to assure the independence of its legal professionals, to assure that conflicts of interest throughout the MDP are handled in accordance with the conflicts rules applicable to the legal profession, and to assure observance of specific rules of the legal profession on, for example, professional training and competence, fiduciary obligations toward clients, the handling of client funds, and the lawyer's role in the legal system. A requirement along these lines would be compatible with, and would help to make truly enforceable, provisions in the 1999 Report aimed at safeguarding the core values of the legal profession (see pt. II above).

Not inconceivably, objections might be raised (as the Big Five objected in 1999) to a requirement that the rules of the legal profession on conflicts of interest must be observed throughout the MDP offering legal services to the general public (see pt. III.A above). Subsequent to the issuance of the 1999 Report, however, the political climate may have changed to the point that these objections would be viewed with considerable caution (see note 12 above). Conflicts of interest may now be a matter of concern to the point that the procedures and standards applicable in this area to lawyers and to law firms might be deemed appropriate for application throughout an MDP offering legal services to the general public.

An application for licensing of the type just mentioned could provide a licensing authority with an adequate basis for reviewing the application, for using its discretion as appropriate to seek supplementary information and assurances from the applicant, and for approving or disapproving the application. Moreover, in the case of a licensed MDP, traditional disciplinary measures could be made available for the purpose of empowering a licensing authority to act on any complaints that an MDP had failed to observe applicable rules. Thus, licenses could be issued in the usual context in which suspension or revocation would be available and in which civil litigation by complainants might rest on the alleged nonobservance of applicable standards.

Achieving this result might well require enabling legislation.²¹ The process might thus entail rigorous legislative groundwork, and might invite public debate over the social value of permitting MDPs controlled by nonlawyers to offer legal services to the general public. The outcome of the debate in a given jurisdiction could be adoption or rejection of the proposal. Rejection might be on grounds of undue demands on, or added costs of, judicial resources, or rejection might occur if the claimed benefits to be derived did not withstand legislative scrutiny. Whatever the outcome, the legislative debate could usefully focus on the value of the objective being

21. For an unrelated but possibly helpful example of enabling legislation, see N.Y. Judiciary Law § 53(6) (McKinney 1998) ("Nothing in this chapter prevents the court of appeals from adopting rules for the licensing as a legal consultant, without examination and without regard to citizenship, of a person [meeting certain criteria]"), introduced in March 1973 and adopted by the N.Y. State Legislature and signed into law in March-April 1974.

sought, including the value of avoiding a bifurcated legal system. Thus framed, the debate could produce results that would be accepted by the public with a considerable measure of confidence.

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