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PRACTICING LAW ACROSS GEOGRAPHIC AND PROFESSIONAL BORDERS: WHAT DOES THE FUTURE HOLD?

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In the 1960 musical comedy *Please Don't Eat the Daisies*, Doris Day sings, "When I was just a little girl, I asked my mother, What will I be? Will I be pretty? Will I be rich? Here's what she said to me: *Que sera, sera*. Whatever will be, will be."¹ Lawyers, like the protagonist of the 1960 film *Please Don't Eat the Daisies*, seem to be asking what the future will bring to the practice of law. As players in a competitive marketplace for professional services, however, the simplistic answer, *que sera, sera*, is not very helpful. Perhaps the phrase epitomizes the futility of seeking 1950s wisdom to address fundamental practice questions in the twenty-first century. In order to succeed in the new millennium, practi-

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1. Doris Day's song *Que Sera Sera* won an Academy Award in 1956, for the Alfred Hitchcock movie, *THE MAN WHO KNEW TOO MUCH* (Universal 1956), with James Stewart and Doris Day. The song by Jay Livingston and Ray Evans, available at <http://www.getmusic.com/artists/amg/Album/936/98936.html> (last visited Apr. 3, 2001), was reprised in the Doris Day comedy, *PLEASE DON'T EAT THE DAISIES* (Joe Pasternak 1960). The complete lyrics of this classic pop song are available at http://www.schiedung.de/musik/que_sera.html (last visited Apr. 3, 2001).

tioners will need to come to grips with a number of critical issues. "What will be, will be," will simply not be enough.

A new global business reality is transforming the practice of law.² Nowhere is this transformation more apparent than in the areas of multijurisdictional and multidisciplinary practice. These two trends, towards practice across jurisdictional boundaries on the one hand and across professional boundaries on the other, are engaging the attention of lawyers at the American Bar Association,³ the Canadian Bar Association,⁴ the American Corporate Counsel Association,⁵ the International Bar Association,⁶ as well as numerous other state and local, international, and specialty bar associations.⁷ This article describes that new business reality, those trends, and some of the ethical constraints presented by current rules of professional conduct.

AN EVOLVING MARKETPLACE

Four aspects of the new economy are changing how business enterprises perceive and manage legal and business risks. First, a context of constant rapid change combined with widely differing values around the world is producing an evolution in business mores. This shift, in turn, contributes to conflicting standards gov-

2. See Ann L. MacNaughton, *Multidisciplinary Trends in an Evolving Marketplace: Practicing With Other Professions*, in GARY A. MUNNEKE & ANN L. MACNAUGHTON, *MULTIDISCIPLINARY PRACTICE: STAYING COMPETITIVE AND ADAPTING TO CHANGE* 9 (2001) [hereinafter MUNNEKE & MACNAUGHTON]; see also GARY A. MUNNEKE, *SEIZE THE FUTURE: FORECASTING AND INFLUENCING THE FUTURE OF THE LEGAL PROFESSION* (2000) [hereinafter SEIZE THE FUTURE] (summarizing the 1999 ABA conference of the same name, which attempted to identify the forces that are bringing significant change to the legal profession).

3. See information posted at these web sites: American Bar Association Center for Professional Responsibility, at <http://www.abanet.org/cpr/home.html> (last visited Apr. 3, 2001); ABA Ethics 2000 Commission, at <http://www.abanet.org/cpr/ethics2k.html> (last visited Apr. 3, 2001); ABA Commission on Multijurisdictional Practice, at <http://www.abanet.org/cpr/mjp-home.html> (last visited Apr. 3, 2001); and ABA Commission on Multidisciplinary Practice, at <http://www.abanet.org/cpr/multicom.html> (last visited Apr. 3, 2001). See generally http://www.abanet.org/lpm/Mdp_front.shtml (last visited Apr. 8, 2001); <http://www.futurelaw.net> (last visited Apr. 8, 2001).

4. See <http://www.cba.org/Home.asp> (last visited Apr. 8, 2001).

5. See <http://www.acca.com/advocacy/mjp/index.html> (last visited Apr. 8, 2001); <http://www.acca.com/advocacy/mdp/index.html> (last visited Apr. 8, 2001).

6. See <http://www.ibanet.org> (last visited Apr. 8, 2001).

7. See generally <http://www.mdpcentral.org> (last visited Apr. 8, 2001).

erning business conduct worldwide.⁸ What this means to lawyers is that they face an increased risk of inadvertently violating jurisdictional laws, professional standards, administrative rules, or client expectations.⁹ Business transactions increasingly do not fall neatly within the geographic boundaries of a single jurisdiction; business in today's world typically crosses state lines and, increasingly, international boundaries. The advent of e-commerce promises, or threatens, depending on one's point of view, to produce a marketplace without geographic boundaries.¹⁰

Second, globalization of business and a parallel consolidation of marketplaces create a business environment in which today's competitor may be tomorrow's joint venturer, partner, or merged entity. When such events combine with revolutionary changes in technology, old models for solving problems, like yesterday's computers, can become obsolete. Business venturers in the interconnected global marketplace of the twenty-first century will increasingly emphasize dispute avoidance strategies, cooperative business solutions, sophisticated models for cost-shared dispute resolution, and systems for creating competitive advantage through collaborative conflict management.¹¹

The Chinese symbol for "crisis" may be useful in understanding the transformational changes occurring in today's networked business world and how they impact the role of lawyers. That symbol is made up of two pictographs that, taken individually, mean "danger" and "opportunity." Both danger and opportunity are present to lawyers serving business enterprises that are re-

8. See, e.g., Work Product of the International Standards Organization, at <http://www.iso.ch/welcome.html> (last visited Apr. 8, 2001).

9. See, e.g., *Birbrower v. Superior Court*, 949 P.2d 1, 5-10 (Cal. 1998).

10. See generally ABA E-Commerce & ADR Task Force, at <http://www.law.washington.edu/ABA-eADR/home.html> (last visited Apr. 8, 2001); REINVENTING WORK: THE PROFESSIONAL SERVICE FIRM 50 (1999); ALLIANCE ADVANTAGE (1999); TOM PETERS, CIRCLE OF INNOVATION: YOU CAN'T SHRINK YOURSELF TO GREATNESS (1997); GARY HAMEL & C.K. PRAHALAD, COMPETING FOR THE FUTURE (1994).

11. See *infra* notes 36-37 and accompanying text. Such approaches to dispute resolution will in many cases replace adversarial processes such as civil litigation as a problem-solving tool. This does not mean that litigation as a dispute resolution system will disappear, only that businesses will increasingly turn to other methods of settling problems and that litigation increasingly will be perceived merely as one of a number of options available to parties. With a variety of choices to make, the adversarial process will not drive business behavior as it sometimes does today.

designing themselves with new strategies, structures, and systems to compete by "working beyond their boundaries."¹² Organizational charts are continuing to flatten, non-core businesses are being divested or out-sourced, and entrepreneurial activity is being stimulated inside and outside corporate corridors.¹³ The resulting network of merged entities, joint ventures, strategic alliances, and global trading sectors brings together a community of people with sharply differing values, experiences, and expectations. Managed well, this diversity can generate new solutions and tremendous productivity.¹⁴ Managed poorly, the conflict creates fertile soil for misunderstandings, disagreements over how best to accomplish even agreed objectives, polarized disputes that consume massive quantities of time and money; and ultimately failed ventures and lost opportunities.¹⁵

Third, commercial and regulatory complexities often require interdisciplinary solutions from teams of professionals with an appropriate blend of business, legal, and relevant technical training and experience.¹⁶ In search of improved client service models, multidisciplinary solutions providers are creating new strategic

12. See, e.g., SHELL OIL COMPANY, *Networked Community Fieldbook* 7-8 (Version 0.2 Apr. 1998).

13. *Id.*; see also GARY HAMEL & C.K. PRAHALAD, *COMPETING FOR THE FUTURE* 322 (1994).

14. See Ann L. MacNaughton, *Creating Value and Avoiding Disputes through Conflict Management Strategies*, in ABA GUIDE TO INTERNATIONAL BUSINESS NEGOTIATIONS 113-37 (James R. Silkenat & Jeffrey M. Aresty eds., 2000); Ann L. MacNaughton & David Victor, *Conflict Management and Cross-Cultural Awareness*, in THE INTERNATIONAL BUSINESS OF EXPLORATION (2000).

15. Indeed, in the business context, parties are likely to view problem resolution in terms of transaction costs. A system of dispute resolution may be technically efficient as a problem-solving tool, but if it is inefficient economically, it may not be a viable approach. Lawyers tend to view their services as necessary to business transactions, whereas their clients may view legal services as techniques that either increase or decrease overall transaction costs. Thus, if the lawyer's services are perceived to make a transaction more expensive, business people will seek out approaches that accomplish their objectives at a lower cost in the final analysis.

16. See MUNNEKE & MACNAUGHTON, *supra* note 2, at 4 (noting "in reality, lawyers practice with a variety of different professionals every day. These interdisciplinary relationships are different depending on the substantive area of practice, but the common theme is that legal problems in our complex modern society often require more than one service provider.").

alliances, and bright lines among professional services firms are beginning to blur.¹⁷

Finally, the technology revolution continues to expand dramatically the interpersonal one-on-one, one-to-many, and many-to-one connectedness around the world. We can move our bodies, our voices, our images, and our information around the globe at will. E-mail has replaced telephone and fax as the preferred method of communication in many instances; now, videoconferencing is becoming as common today as e-mail was then.¹⁸ Attention is shifting to development of advanced web-based knowledge management and information sharing applications that enable more effective global compliance with regulatory requirements, transmission of advice and work product, paperless discovery, on-line dispute resolution, web-based marketing and sales, and myriad other purposes. Lawyers and others in firms of every size—the biggest of the big and the smallest of the small—are finding new ways every day to connect to clients, the public, and each other through the Internet.

Law practice today exists in an evolving global milieu in which practitioners encounter increased impact from multinational business enterprises and their needs for cooperative business solutions. For example, environmental practice has always been multidisciplinary in nature.¹⁹ Now, however, new competitors are offering integrated professional services to address problems that may have legal aspects through firms that are not necessarily owned by lawyers.²⁰ Innovative solutions providers blend

17. See Andersen Legal website, at <http://www.andersenlegal.com/WebSiteLegal.nsf/Content/MarketOfferingsLegalServices> (last visited Apr. 8, 2001).

18. As in-house counsel to a major multinational energy company in the middle 1980's, co-author MacNaughton required all outside counsel to shift routine communications from typed or faxed correspondence to e-mail. E-mail communication, a relatively new tool then, has presently become a common business communications tool. MUNNEKE & MACNAUGHTON, *supra* note 2.

19. See Ira Feldman & Ann L. MacNaughton, *A Model MDP—Environmental Practice*, in MUNNEKE & MACNAUGHTON, *supra* note 2, at 99.

20. See, e.g., SUSAN HACKETT, *A PRIMER ON MULTIDISCIPLINARY PRACTICE* 9 (2000), available at the American Corporate Counsel Website, <http://www.acca.com/advocacy/mdp/hackett.html> (last visited Apr. 8, 2001) [hereinafter HACKETT]; RANDY MYERS, *LAWYERS AND CPAS: HOW THE LANDSCAPE IS CHANGING* (2000); see also Andersen Legal website, *supra* note 17 (defining the Andersen Legal plan for future operation—goals, dealing with global legal trends, our focus on clients, brand identity and more).

business, legal, and various types of technical expertise with common sense to help clients avoid disputes, resolve unavoidable ones efficiently, and create new value.²¹ Many other practice areas are experiencing the same kind of interdisciplinary evolution.²²

CURRENT EVENTS AND FUTURE TRENDS

Current events and future trends do not provide a basis for predicting the future, but they do provide a basis for helping to shape it.²³ Although even careful study will not permit precognition, knowing and understanding economic, cultural, demographic, and technological trends can help observers identify and evaluate possible future developments, which in turn makes it possible to develop strategic plans that start with the *preferred* end in mind.²⁴

In a 1996 address to the American Bar Association, futurist Stephen P. Johnson noted these trends:

Declining sovereignty of nations;

Increasing multilateral coordination of international trade;

Business *networks* replacing traditional corporate *hierarchies*;

21. Ann L. MacNaughton & George E. Danner, *Creating Value Through Dispute Resolution Strategies*, 1 BUS. CONSULTING J. 61 (June 1999) (modeling and quantifying net value created or consumed through organizational conflict management and dispute resolution practices).

22. See, e.g., MUNNEKE & MACNAUGHTON, *supra* note 2, at 4; see also Christopher L. Noble, *Multidisciplinary Practice: A Construction Law Perspective*, 33 J. MARSHALL L. REV. 413 (2000).

23. See generally SEIZE THE FUTURE, *supra* note 2, available at <http://www.futurelaw.net> (last visited Apr. 3, 2001).

Because we live in an incredibly complex system, we can neither know or control all the variables, and we cannot eliminate the element of uncertainty from our decisions. We can, however, make rational decisions about what we do based on what we know and observe. The uncertainty principle tells us that there is not one predestined future but many alternative futures If we recognize more plausible courses, we can act in a way that maximizes our interests in the future. And we may even be able to influence which alternative future comes to pass.

See SEIZE THE FUTURE, *supra* note 2, at 4-5.

24. See STEPHEN R. COVEY, *THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE* 95-144 (1989).

Greater business competition, with increased efforts to capture global markets;

Newly industrializing countries spreading world economic activity more widely;

Special interests growing in number and influence, creating increased tension and dissent among major factions of the economy and society;

Mass society giving way to mosaic society—a collection of individuals pursuing their own interests;

Continued deregulation except for some fast-growth industries (e.g., telecommunications);

Continued rise in corporate legal department costs;

Blurring and diminishing of lines dividing public and private sectors;

Governmental downsizing, including reduced resources for the courts;

Continued “law-curtailing” trends, including more sanctions for litigation abuses (cost and delay), and more legislative controls; and

Private sector performing many duties previously performed by government.²⁵

Three years later, the Futures Committee of the State Bar of Texas recommended that Texas lawyers should anticipate and prepare to respond to the following trends and their implications:

Global practice will internationalize capital, clients, and cultures;

25. Rona R. Mears, *The Future of Legal Disputes: Becoming a Conflict Resolution Counselor 2*, Mid-Year Section Meeting, State Bar of Texas Dispute Resolution Section (Feb. 20, 1999) [hereinafter Mears] (citing Stephen P. Johnson, *Why and What to Think About the Future* (June 15, 1996) (a presentation to the ABA Board of Governors)). See also American Bar Association Law Practice Management website, at <http://www.abanet.org/lpm> (last visited Apr. 8, 2001).

Clients will control the law firm's marketplace;
The role of the lawyer will be redefined;
The entity of the law firm will be redefined;
Paperless borderless communications will dominate;
Law firms will become "virtual locales";
New leverage will replace pyramidal firm structures;
The Internet will continue its growth explosion;
Intellectual capital will be the key to managing information;
The legal population will explode;
With competition for productivity, the influence of greed will become prevalent unless lawyers take preemptive action;
Accounting firms will compete with law firms;
Quick-thinking smaller firms will compete with larger firms;
and
Dispute resolution will yield changing models of resolving differences.²⁶
The reports suggest that these developments will bring about fundamental changes in the way law is practiced.²⁷ The practice

26. STATE BAR OF TEXAS, FINAL REPORT OF FUTURES COMMITTEE TO THE BOARD OF DIRECTORS OF THE STATE BAR OF TEXAS (September 9, 1999). Full text available at <http://www.mdpcentral.org> (last visited Apr. 8, 2001).

27. The topic of change in the legal profession has been the focus of several important conferences. The American Bar Association Law Practice Management Section sponsored two *Seize the Future* conferences, the first in 1997 and the second in 1999, to bring together bar leaders and to expose them to speakers addressing questions about the future in the larger business community and society. See *SEIZE THE FUTURE*, *supra* note 2. Participants in these two national conferences have organized state futures conferences in Maryland, Oklahoma, Wisconsin, Texas, and other jurisdictions. The American Bar Association in 2000 appointed a Committee on Research on the Future of the Profession to study and report on future trends on an ongoing basis. In February 2001, the ABA Law Practice Management Section conducted a *Future Search* conference to identify major trends impacting the nature and delivery of legal services in the early twenty-first century. This raises the question: If changes are occurring at the rate suggested by some pundits, do lawyers have the leisure time to sit back

of law is not immune to changes occurring throughout society. Although it is possible to argue the extent to which some of these changes will occur, or the timing of changes, it is difficult to deny that every aspect of society is dramatically different than it was fifty or one hundred years ago. Few among us are willing to stake our fortunes on an assumption that the bulk of the change is behind us. Instead, the more plausible assumption is that change will continue to occur in the short-term future and that the pace of change will accelerate.²⁸ Major issues identified by these conferences and publications on the subject of changes affecting the legal profession are:

Globalization of commerce will continue to transcend national boundaries and economies will become increasingly interdependent;

Technology will continue to drive changes in how people communicate and do business; availability of information will make access to products, services and knowledge easier, while at the same time undermining traditional notions of privacy;

Clients and consumers of products and services will control the marketplace, not only because they can, but also because they want to do so and the need for autonomy or control will create a consumer-centric business ethos. Clients of lawyers will focus on effective and efficient solutions, regardless of source;

Law practice inevitably will become more multijurisdictional and multidisciplinary; thus lawyers inevitably will deliver services to clients in the context of professional teams;

New forms of market competition from a variety of providers will offer alternative systems for the delivery of services, eventu-

and assess the changes as they are reported? See summary of comments by Tom Peters and Gary Hamel, *SEIZE THE FUTURE*, *supra* note 2.

28. Author Tom Peters at the ABA *Seize the Future* conference posed the question, "What would you do if you knew that you were in the midst of a 10,000 year sea change in human culture—not one hundred years, or five hundred years, but the biggest change our species has experienced since we came off the plains of Africa, became hunter gatherers, and built houses 10,000 years ago?" See also *SEIZE THE FUTURE*, *supra* note 2, at 21 (quoting notes of co-author Gary A. Munneke from the November 1999 *Seize the Future* conference).

ally forcing some practice areas into commodity pricing, and driving inefficient practices out of business;

Demographic shifts will continue to change not only where people live and work, but also which people live where; the world as a mosaic society will grow continually more inter-connected; and

The justice system itself will transform as technology morphs traditional procedural rules to accommodate electronic communication, and non-judicial dispute resolution shifts problem solving out of the courts in many substantive practice areas.²⁹

Market dynamics creating our networked commercial world have profound implications for lawyers, for the delivery of legal services, and for the management of law practices. Most business lawyers, whether in-house or in private practice, are accustomed to providing a mix of legal and practical advice in conjunction with diverse other professionals whose expertise also is important in fashioning a solution for a particular problem. The question for professional service providers, including law firms, is not whether they will provide multidisciplinary services in this world, but whether they will be able to deliver such services efficiently, economically, and competently, while at the same time protecting ethical standards of confidentiality, loyalty to clients, and avoidance of interest conflicts.

New systems to create competitive value through conflict management and dispute resolution strategies are emerging from "quality management" initiatives,³⁰ "learning organization" strategies;³¹ a focus on saving not just costs but also relationships through cooperative business solutions;³² and new strategies to

29. SEIZE THE FUTURE, *supra* note 2, at 21 (quoting notes of co-author Gary A. Munneke from the November 1999 *Seize the Future* conference).

30. See RICHARD H. WEISE, REPRESENTING THE CORPORATE CLIENT: DESIGNS FOR QUALITY ch. 1 (1991).

31. See PETER SENGE, THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF THE LEARNING ORGANIZATION (1990); MARGARET J. WHEATLEY, LEADERSHIP AND THE NEW SCIENCE (1992).

32. See Rona R. Mears et al., *The Future of ADR in Texas and Beyond: New Processes, Technologies and Opportunities*, 18 CORP. COUNS. REV. 1 (1999).

derive net value (instead of net costs) from conflicts inherent in diversity.³³

The question of whether and how to deliver services in the context of this new global reality does not apply just to law firms in the business and commercial arena. Lawyers who practice in other substantive areas also will experience this transition from representing every aspect of a client's case to participating with a team of professionals to solve problems that may include legal aspects.³⁴

TREND TOWARD COOPERATIVE BUSINESS SOLUTIONS

Global transformation of business reality, coupled with the high transaction and opportunity costs of adversarial litigation and arbitration processes, has led to an increased focus on cooperative business solutions where costs may be lower, processes may be faster, and parties expect strengthened relationships, enhanced efficiencies, and other value from the dispute resolution process itself.³⁵

33. See generally MacNaughton & Danner, *supra* note 21 and accompanying text.

34. The primary focus of this article is on the business and commercial aspects of multidisciplinary and multijurisdictional practice. In this environment such issues are endemic to the delivery of professional service. This does not mean that small firm practitioners in traditionally local practice areas will be immune from this phenomenon. See, e.g., Ann L. MacNaughton, *MDP: Dangers And Opportunities for Solo Practitioners*, in *FLYING SOLO* (American Bar Association, 4th ed. 2001); Norman K. Clark, *Multidisciplinary Practice: What It Will Mean to Smaller Firms*, cited in MUNNEKE & MACNAUGHTON, *supra* note 2, at 93. The ABA Model Rules of Professional Conduct state that, in exercising professional judgment, "a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." MODEL RULES OF PROF'L CONDUCT R. 2.1 (2000). Thus, the lawyer's responsibility goes beyond the legal issues; yet if the lawyer lacks knowledge of non-legal considerations in a case, competent representation would seem to require that the lawyer consult with other professionals who possessed such knowledge. *Id.* R. 1.1.

35. See generally EDWARD A. DAUER, *MANUAL OF DISPUTE RESOLUTION: ADR LAW AND PRACTICE* 56-91 (1995); WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 170-71 (1988). In pursuit of dispute resolution strategies that preserve important relationships and other corporate resources, CPR Institute for Dispute Resolutions was established in 1979 as a coalition of general counsels and law firms who agree to use "ADR" processes prior to instigating civil litigation with each other. See <http://www.cpr.org> (last visited Apr. 4, 2001) (containing the CPR Pledge and related information).

Different ethnic, geographic, and corporate cultures have different mental models for appropriate conflict management and dispute resolution,³⁶ and diverse work groups need conflict management strategies that draw synergistically from these diverse models. In some cultures, the use of adversarial dispute resolution may be the preferred method for parties to solve their differences, but in others, a model based on who is right and who is wrong may actually impede resolution and productivity.

The prevailing United States model has been to escalate a dispute to a higher authority (judge, jury, senior management) for a decision about who is right and who is wrong. This model not only treats *disputes* as negative events, but *conflict* as well, and not surprisingly encourages the avoidance of such events if at all possible. When the objective of the parties is to maximize long-term value, rather than to minimize transaction costs, a conflict avoidance win-lose model may not be the best approach. Taking the opportunity to pause, sit back, and reconsider how to go forward in light of a perceived conflict offers opportunity for creativity and development of new solutions. In a dispute, by contrast, the focus is on how to prevail over the other side, not how resolve differences. Winning a rights or power contest rarely creates new value, but can create high costs.³⁷

Many cultures operate with different mental models that are less confrontational and more relationship-focused (*i.e.*, less like litigation or arbitration, and more like mediation).³⁸ As a dispute

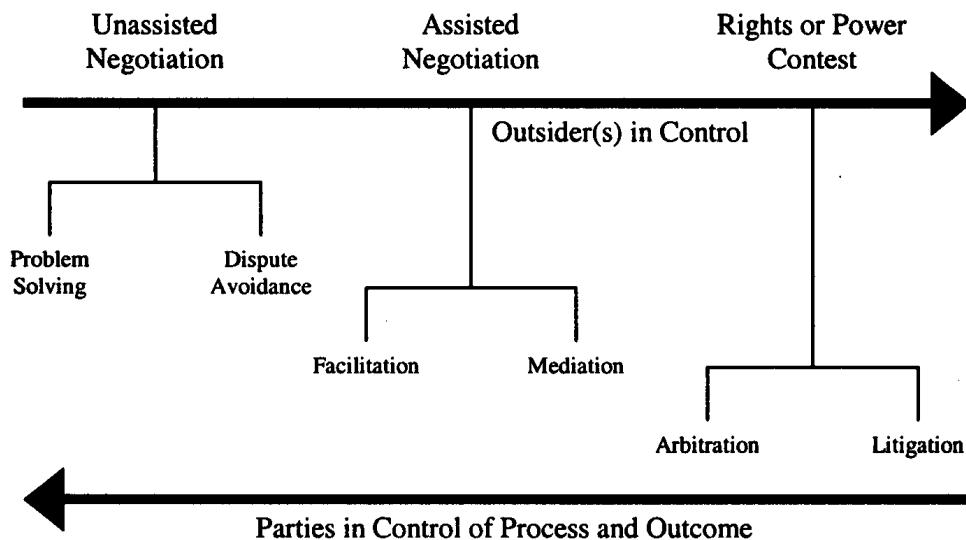
36. See generally MacNaughton & Victor, *supra* note 14. "Mental models" are deeply ingrained assumptions, generalizations, or even pictures or images that influence how we understand the world and how we take action. Very often, we are not consciously aware of our mental models or the effects they have on our behavior." See SENGE, *supra* note 31, at 8; see also *id.* at 174-204 (discussing how mental models can cause even the best ideas to fail).

37. See Ann L. MacNaughton, *MDP and ADR: Multidisciplinary Trends in an Evolving Marketplace*, State Bar of Texas Corporate Counsel Section Annual Meeting CLE Program. See also URY ET AL., *supra* note 35, at 3-19 (noting the dynamic differences between rights and power contests). Like "suicide," "fratricide," and "matricide," our English word "decide" derives from a Latin root word *caedere* meaning "to cut or kill," and the Latin *de plus caedere* yielding *decidere*, translated as "to cut off," and *decedo*, "to die." See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 240, 272, 330 (1988). When we make a "decision," we select one alternative and "kill off" or "cut off" the other(s). By contrast, the Latin root "*resolvere*" means to reduce or loosen and contains the word "solve." When we "resolve" a dispute, we analyze its component parts, reduce them to their simplest form, and find a solution that satisfies (and ideally optimizes value to) each party.

38. DAVID A. VICTOR, *INTERNATIONAL BUSINESS COMMUNICATION* (1992).

escalates, communication between disputants begins to shut down, emotions become more intense, and positions become less flexible. As time and attention are diverted from fundamental business objectives to the dispute instead, individual egos become more attached to winning (and, perhaps especially, to not losing). Costs in terms of dollars, lost opportunities, and damage to important relationships all spiral upward.

The nature of business problem solving is shifting the focus for corporate dispute resolution to the left on this dispute resolution continuum. By utilizing advances in technology disputants can develop new approaches to dispute avoidance, early case analysis, and effective dispute resolution.



Even where litigation and assisted settlement costs may be roughly equivalent, joint problem-solving results may be of much greater value than a trial verdict. If saving costs is good, adding bottom-line value is better. At their most effective, assisted negotiation strategies produce results that create new value, such as new or improved products, brand, or customer relationships.

TREND TOWARD MULTIJURISDICTIONAL PRACTICE

Global transformation of business reality includes substantial and significant delivery of legal and other professional services across state and national borders. Business organizations often operate offices and conduct business in numerous states and foreign countries. Individuals may have employment, residences, children, and assets in multiple jurisdictions. At the same time, different jurisdictions impose individual licensing processes and rules against the unauthorized practice of law ("UPL").³⁹ Each jurisdiction tends to have its own individual licensing authorities and UPL rules. Some practitioners have created niche practices by becoming knowledgeable about these variations; others have created strategic alliances to deliver cost-effective solutions to their clients. Still others find this regulatory quilt to be both confusing and inhibiting to practitioners whose clients' work crosses state lines or national boundaries. On the global stage, restrictions on the right to practice may limit the effectiveness of American lawyers or the ability of American companies to compete both domestically⁴⁰ and also abroad.⁴¹

Texas Efforts to Enforce UPL Rules. Recent efforts at enforcement by the Texas UPL Committee illustrate some of the challenges to prosecuting new competitors in the marketplace, whether they are multidisciplinary firms owned by accountants or self-help publishers offering "wills in a box" for sale at grocery

39. See Bruce A. Green, *Assisting Clients with Multi-State and Interstate Legal Problems: The Need to Bring the Professional Regulation of Lawyers into the 21st Century*, SYMPOSIUM ON THE MULTIJURISDICTIONAL PRACTICE OF LAW, at http://www.abanet.org/cpr/mjp-bruce_green_report.html#Application (last visited Apr. 5, 2001) (noting that even a cursory review of the fifty-state compilation makes plain that these laws vary considerably from state to state: some are criminal and some are civil; some are statutory and some are court rules; some simply proscribe "the practice of law" by those who are not licensed in the state, while others make some attempt, at least in general terms, to define "the practice of law"). See also <http://www.elawyering.org>.

40. See Anthony E. Davis, *Multijurisdictional Practice by Transactional Lawyers: Why the Sky Really Is Falling*, in MUNNEKE & MACNAUGHTON, *supra* note 2, at 33, 38-40 (discussing that in a limited fashion, the North American Free Trade Agreement already gives the right of lawyers from one signatory state to open offices and to practice their own national law within the other member states; the multinational equivalent is the General Agreement on Tariffs and Trade).

41. See Chris Arnheim, *Multidisciplinary Firms: Why Global Firms Need to Provide Much More than Legal Advice*, in MUNNEKE & MACNAUGHTON, *supra* note 2, at 89; see also *supra* note 20 and accompanying text (discussing the same).

store check-out counters. Although the Texas results were prompted by aggressive enforcement efforts of the Texas UPL Committee, there is no reason to think that similar efforts in other jurisdictions would not meet a similar fate.⁴²

Texas apparently has abandoned recent efforts to prosecute two accounting firms facing UPL complaints.⁴³ Its UPL Committee filed a complaint against Arthur Andersen in 1997, alleging that the accounting firm engaged in the unauthorized practice of law by preparing documents, assisting in corporate mergers and acquisitions activity, engaging in estate planning, giving compensation advice, and litigating in Tax Court. The matter was dismissed without comment eleven months later.⁴⁴ Around the same time, inquiry commenced into the possibility of similar unauthorized practice by Deloitte & Touche,⁴⁵ but no formal proceeding was ever initiated. Cases in other jurisdictions have fared no better.⁴⁶

42. See generally Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981) (making a powerful case against the exercise of lawyers' professional monopoly to enforce state prohibitions against unauthorized practice). Although the article is now twenty years old, the author's observations remain applicable to the current discussion about multijurisdictional practice:

Legal historians may ultimately treat the bar's unauthorized practice campaign as both a product and a casualty of the Depression. The same forces that gave rise to the bar's economic concerns generated a set of governmental structures and societal adjustments that made the profession's aspirations to monopoly increasingly anachronistic Almost from conception, the unauthorized practice movement has been dominated by the wrong people asking the wrong questions. Enforcement of sweeping prohibitions has rested with those least capable of disinterested action Particularly at a time when lawyers are justifiably concerned about their public image, the bar itself has much to gain from abdicating its role as the self-appointed guardian of the professional monopoly. Given mounting popular skepticism about unauthorized practice enforcement, prudential as well as policy considerations argue for greater consumer choice.

Id. at 97-99.

43. See Arthur S. Hayes, *Bean Counters Win: Accountants vs. Lawyers*, NAT'L L.J., Aug. 10, 1998, at A4. See also Daniel R. Fischel, *Multidisciplinary Practice*, 55 BUS. L. 951 (2000).

44. Texas Supreme Court Justice Craig T. Enoch, Remarks at the 23d Annual Corporate Counsel Institute (Mar. 22, 2001).

45. See Elizabeth MacDonald, *Texas Probes Andersen, Deloitte on Charges of Practicing of Law*, WALL ST. J., May 28, 1998, at B15.

46. See generally Ward Bower, *The Case For MDPs: Should Multidisciplinary Practices Be Banned or Embraced?*, in MUNNEKE & MACNAUGHTON, *supra* note 2, at 81.

When Parsons Communications and Nolo Press, publishers of Quicken Family Lawyer and various other self-help publications, respectively, were notified by the Texas UPL Committee that questions had been raised about whether their publications might violate Texas UPL laws, Parsons responded formally and was found to have violated those laws.⁴⁷ Nolo Press responded through its web site.⁴⁸ The Texas Legislature acted within months to nullify a Texas Supreme Court decision⁴⁹ by enacting new law characterizing the product as "not the practice of law."⁵⁰ The Texas statute expressly exempts publications and products such as those published by Quicken and Nolo Press from the unauthorized practice of law.⁵¹

The logic underlying the legislative action is perhaps revealed in this quote from Nolo's web site:

What justification is there to allow a herd of Texas lawyers—many of whom have an obvious economic interest to suppress self-help law publications—to investigate whether to ban Nolo's books and software? Texas lawyers themselves claim they have the power to investigate Nolo "to protect the Texas public."⁵²

47. *Unauthorized Practice of Law Comm. v. Parsons Communications Tech., Inc.*, No. Civ. A. 3:97CV-2859H, 1999 WL 47235, at *6-*7 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999) (finding that Quicken Family Lawyer was engaged in the practice of law and enjoining its sale in Texas).

48. *Legal Vigilantes: How the Supreme Court of Texas Allows Lawyers to Attack Self-Help Law Publication*, at <http://www.nolo.com/texas/Vigilante.html> (last visited Apr. 15, 2001); see also *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768 (Tex. 1999) (vacating an order concerning the confidentiality of the UPL records of Nolo Press).

49. See *In re Nolo Press/Folk Law*, 991 S.W.2d at 779.

50. H.R. 1507, 1999 Leg., 76th Sess. (Tex. 1999) (approved by the Governor June 19, 1999); see also TEX. GOV'T CODE ANN. § 18.101 (Vernon 2000).

51. *Id.* (explaining that the "practice of law" does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney).

52. See *Legal Vigilantes*, *supra* note 48 (citing the comments of Mark Ticer, Chair of the Dallas Unauthorized Practice of Law Committee, as reported in *The Wall Street Journal*, March 26, 1998).

Lawyers protecting the public from Nolo Press? Once you finish chuckling at that one, it is fair to ask a few questions:

Does the Supreme Court of Texas' Unauthorized Practice of Law Committee (and its subcommittees) have a majority of public members? Or is the Texas UPL Committee controlled by lawyers?

Who initiated the investigation of Nolo? Has the Supreme Court of Texas received any significant number of complaints against Nolo from Texas consumers? Or have complaints primarily been made by lawyers?

Has the Supreme Court of Texas held public hearings or invited public comments on the broad issue of access to justice in Texas or the narrower one of the alleged harm caused by Nolo's self-help law publications?

As far as we can tell, the answers are that the Texas UPL Committee is controlled by lawyers, its investigation of Nolo was initiated by lawyers and the public has not been consulted through hearings or otherwise.⁵³

Is Nolo Press correct when it suggests that the lawyer-controlled Texas UPL Committee is more interested in protecting the interests of lawyers than it is the interests of the public? Is the provision of on-line legal information in a user-friendly format something that the lawyers of Texas want to keep from the public? Do on-line publishers have the same First Amendment right to provide information to consumers that publishers of self-help books have?⁵⁴ The action of the Texas Legislature to overturn the *Nolo* decision suggests that the right to publish legal information extends to the Internet and that access to such information is sound public policy. The debate as to whether the Texas UPL Committee looks after the interests of the public or the interests of lawyers undoubtedly will continue, but in one sense it is irrelevant to the question of on-line information, because Parsons and

53. See generally *Legal Vigilantes*, *supra* note 48.

54. See, e.g., *New York County Lawyers Ass'n v. Dacey*, 28 A.D.2d 161, *rev'd*, 21 N.Y.2d 694 (1967).

other service providers are free to operate in Texas.⁵⁵ Because Internet websites can be located anywhere, and because creation of the sites themselves often involves collaboration of both legal and technology professionals, this emerging type of service delivery system is inherently multiprofessional and multijurisdictional.

UPL Enforcement Actions Against Lawyers. The problem of UPL prosecutions by a state against lawyers licensed in another jurisdiction has attracted less attention.⁵⁶ Multijurisdictional practice ("MJP") issues arise in connection with the delivery of legal services by lawyers to a client who resides in a state where the lawyer is not licensed to practice, as well as by providing legal counsel or advice involving the law of a state where the lawyer is not licensed.

In today's mobile society, individuals and business organizations frequently have people and property spread across the country (and sometimes about the globe). Gone are the agrarian days where all of a person's interests are tied up in the family farm lo-

55. As technology continues to advance, the sophistication of legal websites undoubtedly will increase. Using powerful search engines and analytical tools operating in an interactive environment, the information provider will be able to do more than tell the reader about wills; it will be able to create a custom will for the customer instantly. These websites are not some futuristic vision; in fact, a number of e-lawyering websites were operating in the spring of 2001. See, e.g., <http://www.legalquestion.com/ask-a-question.html> (last visited Apr. 5, 2001); <http://ask-a-lawyer.com> (last visited Apr. 5, 2001); http://www.nolo.com/product/forms_home.html (last visited Apr. 5, 2001); <http://www.willworks.com> (last visited Apr. 5, 2001); <http://whatisthelaw.com> (last visited Apr. 5, 2001); <http://www.cybersettle.com/introduction.html> (last visited Apr. 5, 2001); <http://www.lawyers.com> (last visited Apr. 5, 2001); <http://www.netatty.com> (last visited Apr. 5, 2001); as reported in William Hornsby, *Improving the Delivery of Legal Services Through the Internet: A Blueprint for the Shift to a Digital Paradigm* (2000), available at <http://www.abanet.org/elawyering/papers/improving.htm>. (last visited Apr. 5, 2001)

56. Because every jurisdiction has its own licensing rules, any person who is not licensed in a given state is not accorded the right to act as lawyer in that state. A person may be a resident of the state or conduct business in the state, but she may not represent clients in the state unless she is licensed to do so. Under state UPL laws, lawyers and nonlawyers alike, who are not duly admitted to practice in the jurisdiction are subject to prosecution for the unauthorized practice of law. Although lawyers may appear in court *pro hac vice*, and nonlawyers may appear *pro se*, most transactional legal work is subject to sanction. In the case of lawyers, not only is there a possibility that they will be subjected to UPL prosecution whenever they undertake work outside the jurisdiction(s) where they are licensed, but also they risk disciplinary action. Model Rule 5.5 states, "A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction." MODEL RULES OF PROF'L CONDUCT R. 5.5(a) (2000).

cated not just in a single state, but also in a single county in that state. Despite the far-flung nature of modern economic and property interests, individuals and business entities often desire to be represented by a single lawyer or law firm. One of the fundamental precepts of the American legal system is that people should be able to be represented by the lawyer of their choice.⁵⁷ Although it was not so in earlier times, in the present and foreseeable future, jurisdictional barriers to practice undermine clients' access to counsel of their choice. Arguably anyone with interests in more than one state must retain separate counsel to advise them with respect to every jurisdiction where advice must be rendered. Not only will the necessity of hiring multiple lawyers complicate the typical representation, but it will also drive up the legal costs.⁵⁸

California, New York, and the Birbrower Decision. In the early 1990s, a New York law firm entered into a written fee agreement to represent a California company in an arbitration to be held in California and governed by that state's law.⁵⁹ The California company was a subsidiary of a New York client of the firm, and most of the work on the case was performed in New York.⁶⁰ However, some of the law firm's lawyers, none of them admitted in California, made three brief trips to the state for purposes of advising their client, negotiating with its opponent, and interviewing possible arbitrators.⁶¹

The dispute was eventually settled, but the California company and the law firm had a falling out. The client claimed malpractice, and the law firm counter-claimed for its fee.⁶² In January 1998, the California Supreme Court held that the firm could not get paid for work its lawyers performed while physically "in" California because it constituted the unauthorized practice of law.⁶³ Even work the lawyers did in New York could constitute UPL in California, the court ruled, if the lawyers were "virtually"

57. Cf. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 318 (1986).

58. If that is the case, no wonder many turn to nonlegal service providers that can deliver competent solutions more efficiently.

59. *Birbrower v. Superior Court*, 949 P.2d 1, 2 (Cal. 1998).

60. *Id.* at 3.

61. *Id.* at 18.

62. *Id.* at 3-4; see also CAL. CIV. PROC. CODE § 1282.4 (West 2001); CALIFORNIA RULES OF COURT 983.4.

63. *Id.* at 10.

in California via "modern technological means," such as "telephone, fax, [or] computer."⁶⁴ The court also ruled that the result would have been no different even if the lawyers had associated California counsel.⁶⁵ Soon after the court's decision, California enacted a law providing for *pro hac vice* admission in arbitration and the California Supreme Court adopted an implementing rule.⁶⁶

The *Birbrower* decision and other similar cases in other jurisdictions⁶⁷ raise troubling questions about cross-border practice. Multijurisdictional practice issues include questions as to whether existing restraints of trade violate the Sherman Act;⁶⁸ whether licensing limitations place lawyers at a competitive disadvantage *vis-à-vis* professional services firms that lack such restraints; and whether the treaties enacted under the treaty power of the Constitution of the United States giving access to United States markets to foreign service providers,⁶⁹ should trump state laws limiting the practice of law to professionals licensed by the state.⁷⁰

The ABA Commission on Multijurisdictional Practice. In March 2000, ABA President William Paul convened a conference at Fordham Law School in New York City to discuss the problem of multijurisdictional practice.⁷¹ Subsequently, the ABA created a

64. *Birbrower*, 949 P.2d at 5-7.

65. *Id.* at 7.

66. CAL. CIV. PROC. CODE § 1282.4 (West 2001); CALIFORNIA RULE OF COURT 983.4.

67. See, e.g., *Ranta v. McCarney*, 391 N.W.2d 161 (N.D. 1986) (denying a fee to a Minnesota lawyer who had been giving federal tax advice to a small business in North Dakota and holding that the lawyer could get paid for work he did in his home state, but not for work done while physically in North Dakota).

68. Sherman Antitrust Act, 15 U.S.C. § 1 (1994) (declaring illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations") (emphasis added).

69. See, e.g., North America Free Trade Agreement ("NAFTA"); World Trade Agreement 1994 (establishing the World Trade Organization and including the General Agreement on Tariffs & Trade (GATT Uruguay 1994); General Agreement on Trade in Services ("GATS") (aiming to remove any restrictions and internal government regulations in the area of service delivery that are considered to be "barriers to trade").

70. An excellent summary of these issues and their common law underpinnings is provided in Anthony Davis's article, *Multijurisdictional Practice By Transactional Lawyers: Why the Sky Really Is Falling*, in MUNNEKE & MACNAUGHTON, *supra* note 2, at 33.

71. The invitational conference was attended by over one hundred bar leaders, professors, judges, bar examination professionals, corporate counsel and other practitioners. Among the recommendations to come out of the conference was a call for the ABA to create a Multijurisdictional Practice Commission to study MJP issues and propose policy changes to the

new Commission on Multijurisdictional Practice to undertake an objective and comprehensive national study on the application of current ethics and bar admission rules to the multijurisdictional practice of law. The MJP Commission is analyzing the impact of those rules on the practices of in-house counsel, transactional lawyers, litigators, and arbitrators; on lawyers and law firms maintaining offices and practicing in multiple state and federal jurisdictions; and on international issues related to multijurisdictional practice in the United States. It is scheduled to make its report and recommendations by the time of the 2002 ABA Annual Meeting.

To clarify its focus, the MJP Commission created several illustrative hypotheticals, "pared down versions of recurrent situations":

Hypothetical #1: Lawyer Smith, admitted only in State A, is working on a business deal for a client. The work requires her to travel to the client's satellite site in State B to speak with and counsel officers there. Also in State B, she spends two days negotiating portions of the transaction with lawyers for the other party. Due diligence requires Smith to investigate the laws of several jurisdictions, including federal law and the laws of State A and State B.

Hypothetical #2: Same as before except Smith's communications with her client's officers and the opposing lawyer are all done via e-mail, fax, and telephone into State B.

ABA's House of Delegates as appropriate. A summary of the proceedings of the conference is contained in Bruce Green, *Assisting Clients with Interstate Problems: The Need to Bring the Professional Regulation of Lawyers into the 21st Century*, A Report Summarizing the Proceedings of the Symposium on the Multijurisdictional Practice of Law March 10-11, 2000, American Bar Association (2000). In response, the next ABA President, Martha Barnett, appointed an ABA Commission on Multijurisdictional Practice, which at the time of this writing is conducting public hearings to gather information on the subject. Given the failure of the ABA's Multidisciplinary Practice Commission, which was disbanded by the House of Delegates after the House rejected its recommendations, the authors question whether the MJP Commission will experience any greater success changing longstanding and entrenched ABA policy. See ACTIONS OF THE HOUSE OF DELEGATES, AMERICAN BAR ASSOCIATION, JULY 2000.

Hypothetical #3: Brown is a nationally recognized expert on federal copyright law admitted only in State A. A company in State B invites her to come to State B and work with its staff in developing some protocols that will afford maximum protection for the company's intellectual property. She plans to spend a week in State B.

Hypothetical #4: Same as #3, except Brown's expertise is in commercial law. The states laws in this area are nearly uniform and all are easily available nationwide through computer research. She plans to spend a week in State B advising her State B client on procedures to protect their interests under that State's commercial laws.

Hypothetical #5: Lawyer Jones, admitted only in State A, is an expert in trade regulation. A company in State B asks him to come to its headquarters, speak to its officers and employees, and review its files in order to advise it on whether (or not) to bring an action against a competitor under federal law or the laws of State B (or both). Any such action would be brought in federal or state court in State B. Jones would be lead counsel and would seek *pro hac vice* admission once an action is brought, if it is.⁷²

Now, here are some ways in which some have suggested that the UPL questions these lawyers face might be clarified, if at all. We offer these to help your own analysis. As stated above, the Commission has taken no positions on any of these suggestions.

First, the organized bar may decide to remain with the status quo. We might conclude that vagueness is inevitable in the state-based admission system we have and that any solutions we might propose are only likely to create new problems. Lawyers will have to recognize that if they practice law in any jurisdiction, physically

72. Memorandum from Harriet E. Miers, Chair ABA Commission on Multijurisdictional Practice to Bar Leaders (Nov. 1, 2000) (regarding "Multijurisdictional Practice of Law Issues"), available at http://www.abanet.org/cpr/mjp-gillers_final_article.html (last visited Apr. 4, 2001).

or virtually, more than some *de minimis* amount or allow or aid someone else in doing so, they may be technically guilty of UPL and face challenges to their fees, prosecution, or discipline.

Second, the organized bar could encourage states to adopt rules that authorize employed lawyers in good standing in their home state, who move into another state to serve their corporate, governmental, or other organizational employer, to practice law for that employer so long as they remain employed by it ("safe harbor" provision). Where laws already exist, they have generally excluded permission to make court appearances, where *pro hac vice* admission is possible. Note that this deals only with the employed lawyer's practice in the state of his or her domicile, and does not address the employed lawyer's practice in multiple other jurisdictions on behalf of the employer.

Third, the organized bar could encourage states to adopt laws or court rules that explicitly authorize out-of-state lawyers in good standing (and perhaps admitted for some minimum number of years), while temporarily in the state, to engage in activities for which a law license is required. This proposal (and the next one) require us to define "temporary." For example, it might exclude a permanent physical presence and also systematic solicitation of clients in the other state.

Fourth, a more limited version of the same policy would allow lawyers admitted in any state to practice temporarily in a state if that lawyer's home state affords reciprocity to lawyers elsewhere.

Fifth, the organized bar could encourage states to adopt rules that bring within *pro hac vice* authorization work done in contemplation of filing an action in which the lawyer plans to seek *pro hac vice* admission and reasonably believes it will be granted. Obviously, the pre-filing work would then have to be protected even if the action is not filed.

Sixth, the organized bar could encourage states to adopt rules that make some sort of *pro hac vice* admission process applicable to activities in anticipation of or in connection with state or local administrative proceedings, arbitration, mediation, or other non-court-administered alternative dispute resolution process or with respect to discovery processes outside a lawyer's licensing state or the state where the lawsuit pends.

Seventh, the organized bar might encourage states to adopt rules that permit an out-of-state lawyer in good standing to do work in the state for which a law license is required, so long as he or she collaborates with an in-state lawyer (who may but need not be in the same firm).

Eighth, the organized bar could encourage the states to adopt rules that would entitle a lawyer admitted in any state to advise on federal or non-United States law (and perhaps incidental state law) anywhere.

Ninth, the organized bar could encourage the states to adopt rules that would entitle a lawyer admitted in any state to advise on highly specific or specialized areas of the law requiring a high degree of specialization or expertise (and perhaps incidental state law) anywhere.

Tenth, the organized bar could encourage the states to adopt rules that would entitle a lawyer admitted in any state to conduct any activities in a jurisdiction (short of permanent establishment or wrongfully holding himself or herself out as admitted in that jurisdiction) that a non-lawyer in that jurisdiction could undertake without violating the UPL laws of that state. This would level the playing field as between out-of-state lawyers and in-state non-lawyer professionals, such as accountants or environmental consultants.

Eleventh, and far reaching, the organized bar could urge a rule that would entitle a lawyer admitted and in good standing anywhere (perhaps after some specified number of years) to open an office anywhere, perhaps follow-

ing a character investigation. Essentially, this would be a form of national motion admission.

Twelfth, and even more far reaching, the organized bar could urge a national licensing process to solve all multijurisdictional practice issues and as well, to serve as a prelude to seeking reciprocity in the global community.

It should be noted that many suggest that the "solution" of national motion admission to license permanent presence in a state or a general federalization of the licensing of lawyers goes further than the dilemma addressed by most lawyers at present requires. Others suggest that any attempt at nationalization would have constitutional infirmities.⁷³

This short overview and these possible solutions illustrate how complex these issues are, how diverse are the stakeholders in various positions, and how complicated it will be to attain a political solution. Yet if the legal profession is unable or unwilling to take action to make changes that can help lawyers to become and remain competitive in the evolving marketplace for professional services, changes will occur without their input or involvement. Lawyers may find themselves marginalized in the marketplace, or worse yet displaced completely from the workplace.⁷⁴

TREND TOWARD MULTIDISCIPLINARY PRACTICE

Debates are raging in state and local bar associations over whether to permit lawyers in the United States to share fees with other professionals through multidisciplinary professional ("MDP") firms such as exist in Europe, Canada, and elsewhere.⁷⁵

73. Memorandum from Harriet E. Miers, *supra* note 72.

74. See Charles F. Robinson, *Stampede to Extinction*, in *SEIZE THE FUTURE*, *supra* note 2, at 133.

75. See ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, *available at* http://www.abanet.org/cpr/center_entities.html (summarizes MDP and MJP initiatives). See also, e.g., THE FLORIDA BAR RESOLUTION REGARDING MULTIDISCIPLINARY PRACTICE AND ANCILLARY BUSINESS, *at* <http://www.flabar.org/newflabar/images/downloads/rsoltfb.pdf> (last visited Apr. 5, 2001). But see FACING THE INEVITABILITY, RAPIDITY AND DYNAMICS OF CHANGE (A REPORT FAVORING ADOPTION OF MDP MODEL AND OTHER ACTIONS), REPORT TO THE BOARD OF GOVERNORS OF THE FLORIDA BAR (January 7, 2000), *at* <http://www.flabar.org/newflabar/organization/committees/promdp.pdf> (last visited Apr. 5, 2001). See also

While MDP clearly means different things to different people,⁷⁶ much of the debate has focused on whether accounting firms, financial institutions, real estate companies, department stores, and publishing houses should be allowed to own law firms and/or employ lawyers to offer legal and/or consulting services.

Perhaps the most important question is whether client and public interests are best served by ethics rules that preclude innovation in joint service delivery enterprises among lawyers and other professionals.⁷⁷ Most business problems that benefit from the skills and experience of lawyers also require application of other professional skills and experience. Depending on the nature of any particular situation, strategic preparation for negotiation or mediation, for example, may benefit from multidisciplinary teaming among attorneys and mediators, engineers and accountants, information management and systems experts, communications specialists and psychologists, and others working together to identify and evaluate dispute dynamics, barriers to settlement, litigation risks, and effective strategies for achieving agreement. In fact, regardless of the substantive practice area, modern law-

2001). *See also* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK STATEMENT OF POSITION ON MULTIDISCIPLINARY PRACTICE (July 20, 1999), at <http://www.abanet.org/cpr/abcny.html> (last visited Apr. 5, 2001) (concluding that the economic and technological forces that are leading to more applications of MDP will only increase, not abate; thus, the legal profession should find constructive ways to adapt to these forces while preserving our highest traditions rather than trying vainly to deny these forces or to hold them back), *but see* PRESERVING THE CORE VALUES OF THE LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, REPORT OF THE NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION (Apr. 2000) [hereinafter PRESERVING THE CORE VALUES OF THE LEGAL PROFESSION], available at <http://www.nysba.org/whatsnew/maccrate.pdf> (last visited Apr. 5, 2001). *See generally* State Action links, at <http://www.mdpcentral.org> (last visited Apr. 5, 2001).

76. For example, "multi-disciplinary practice," "multi-disciplinary profession," and "multi-disciplinary problem-solving."

77. ABA Model Rule 5.4 has been adopted virtually verbatim in almost every American jurisdiction. *See* <http://www.law.cornell.edu/ethics> (last visited Apr. 5, 2000) (digital library contains codes and rules setting standards for the professional conduct of lawyers and commentary on the law governing lawyers, organized on a state by state basis). Rule 5.4 prohibits lawyers from sharing fees with a nonlawyer, forming a partnership with a nonlawyer if any of the activities involves the practice of law, permitting a nonlawyer manager or owner from directing the lawyer's independent professional judgment, or practicing in a professional corporation or association authorized to practice law for profit if a nonlawyer owns an interest therein. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4 (2000).

yers often provide services that involve more than one professional advisor.⁷⁸

A number of commentators have argued that change is inevitable or already underway.⁷⁹ Numerous bar associations have discussed how change can best be structured and implemented.⁸⁰ The debate continues unabated between those who view MDP as an attack on the core values of the legal profession itself and those who believe that MDP represents a fundamental changes in the way lawyers will serve their clients in the new millennium.

78. See *supra* note 16 and accompanying text.

79. See, e.g., Charles L. Brieant, *Is It the End of the Legal World as We Know It?*, 20 PACE L. REV. 21 (1999), reprinted in MUNNEKE & MACNAUGHTON, *supra* note 2, at 63; Mary C. Daly, *Legal Initiatives of Accounting Firms in Europe and the United States*, in MUNNEKE & MACNAUGHTON, *supra* note 2, at 47; Ira Feldman, *The Inevitability of Multidisciplinary Practice*, J. ENVTL. L. & PRAC. 47 (Fall 1999); Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217 (2000); Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117 (1999); John S. Dzienkowski et al., *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); 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); Ann L. MacNaughton, *Multidisciplinary Trends in an Evolving Marketplace*, in MUNNEKE & MACNAUGHTON, *supra* note 2, at 9; Gary A. Munneke, *A Nightmare on Main Street (Part MXL): Freddie Joins an Accounting Firm*, 20 PACE L. REV. 1 (1999); Gary A. Munneke, *Lawyers, Accountants, and the Battle to Own Professional Services*, 20 PACE L. REV. 73 (1999), reprinted in 1 CORPORATE COUNSEL REVIEW, SPECIAL EDITION (Feb. 2000) at 39; Burnele V. Powell, *Looking Ahead to the Alpha Jurisdiction: Some Considerations that the First MDP Jurisdiction Will Want to Think About*, 36 WAKE FOREST L. REV. 101 (2001); Laurel Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869 (1999); Laurel Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV. 1547 (2000); Katherine L. Harrison, Comment, *Multidisciplinary Practices: Changing the Global View of the Legal Profession*, 21 U. PA. J. INT'L ECON. L. 879 (2000).

80. See *supra* notes 27, 75, and accompanying text. See also, e.g., April 28, 2000 ADVISORY REPORT ON MULTIDISCIPLINARY PRACTICE FROM THE COUNCIL AND COMMITTEE CHAIRS, BUSINESS LAW SECTION, STATE BAR OF TEXAS [hereinafter TEXAS BUSINESS LAW SECTION ADVISORY REPORT] (copy on file with co-author MacNaughton).

[M]any of us, or our firms, already have significant, established working relationships with other professionals, including not just accountants but engineers, property appraisers, financial consultants, and business and management consultants . . . these are informal relationships that do not involve sharing of legal fees or joint ownership of professional entities . . . but all of us see the potential benefit to our clients and our own practices of being able to formalize these relationships, thus attracting and retaining the best members of other professions.

Id.

American Bar Association. For many years, ABA rules of professional conduct in the United States have forbidden United States lawyers from joining a partnership with or sharing legal fees with non-lawyers.⁸¹ Reflecting global trends toward interdisciplinary business models and consulting firm ownership of law firms, many in the ABA believe that the Association should amend the rules to permit United States lawyers to deliver legal services through multidisciplinary practice ("MDP") firms.⁸² Proponents of the MDP concept have been challenged by other lawyers who view relaxation of traditional rules to be an abdication of the core values of the profession.⁸³ After two years, the ABA's Commission on Multidisciplinary Practice was dismissed by the ABA's governing body, the House of Delegates.⁸⁴ The Commission had offered a Report to the House recommending a relaxation of the rules to allow lawyers to participate in MDPs, provided that certain safeguards were in place.⁸⁵ By a two to one margin the House voted to oppose any effort to permit fee sharing and lay

81. See MODEL RULES OF PROF'L CONDUCT R. 5.4 (2000). See also *Guidelines on Mediation and the Unauthorized Practice of Law*, DEP'T OF DISPUTE RESOLUTION SERVICES OF THE SUPREME COURT OF VIRGINIA, at 1-4 (2000) [hereinafter VIRGINIA GUIDELINES].

82. The ABA MDP Commission's 1999 Recommendation and Report to the ABA House of Delegates, and its Draft Recommendation posted March 22, 2000, at <http://www.abanet.org/cpr/multicom.html> (last visited Apr. 5, 2001).

83. See, e.g., Lawrence A. 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); see generally PRESERVING THE CORE VALUES OF THE LEGAL PROFESSION, *supra* note 75.

84. See ABA HOUSE OF DELEGATES REVISED RESOLUTION 10F, available at <http://www.abanet.org/cpr/multicom.html>.

85. See HOUSE OF DELEGATES AGENDA, REPORTS WITH RECOMMENDATIONS, AMERICAN BAR ASSOCIATION, JULY 2000. The Commission had offered a more draconian plan to the House in 1999, which would have permitted MDPs but would have required registration with the state supreme court in the jurisdiction(s) where they provided multidisciplinary services. This approach satisfied neither proponents nor opponents, and the Commission was sent back to try again. The 2000 Report was more favorably received by the proponents, but touched off a lightning bolt of opposition among the opponents. Those who fought against MDP included a number of powerful state bar associations including New York, Illinois, New Jersey, Ohio and others. Under the leadership of former ABA President Robert MacCrate of New York, a coalition of opponents offered an alternative resolution that abolished the Commission, urged states and the ABA to reinforce prohibitions against the sharing of legal fees with non-lawyers and the ownership and control of the practice of law by nonlawyers, because such practices are inconsistent with the core values of the legal profession.

control over legal businesses;⁸⁶ the Commission resolution was not even discussed.⁸⁷

American Corporate Counsel Association. Most in-house lawyers have always worked as members of integrated interdisciplinary teams. Because solutions to complex commercial challenges tend to result from combined efforts of diverse professionals, most business lawyers in private practice also are accustomed to practicing as part of multidisciplinary teams. Some work principally with executive or operating management; others with financial analysts and accountants; still others with human resource managers, engineers and scientists, industrial psychologists, information technology specialists, and/or business and management consultants. In trial and litigation management, too, lawyers work with experts drawn from many diverse disciplines.

In February 1999, the American Corporate Counsel Association adopted a resolution supporting a "broader range of choice for clients":

The American Corporate Counsel Association supports a broader range of choice for clients to select from service providers capable of formulating comprehensive solutions which address not only the legal aspect of their problems, but various other facets as well. Subject to resolving important issues of ethics and professionalism in the best interest of the client and the public, such a broader range of choice could include multidisciplinary practices, wherein lawyers are affiliated with non-lawyers.⁸⁸

86. See <http://www.abanet.org/leadership/delegates.html> (last visited March 15, 2001). For a thorough discussion of the House debate, action and aftermath, see Mona Hymel, *Multidisciplinary Practice: The States Weigh In*, TAX NOTES, Vol. 88, No. 2 (Monday, July 10, 2000), at 261, and Sheryl Stratton & Lee A. Sheppard, *American Bar Association Says No To Multidisciplinary Practice*, TAX NOTES, Vol. 88, No. 3 (Monday, July 17, 2000), at 311.

87. See Robert R. Keatinge, *Colorado and Denver in the House: MDP Declared Heresy by the ABA House of Delegates*, 29 COLO. LAW. 48, 51 (2000).

88. Remarks of Diane Yu, Associate General Counsel for Monsanto Company, at page 7 of the MDP House Debate, Annual Meeting 1999. Full informal transcript available at <http://www.abanet.org/cpr/mdphouse.html> (last visited Apr. 5, 2001). See HACKETT, *supra* note 20, for a fuller explication of ACCA's perspective.

State and Local Bar Associations. State bar associations have been divided on the issue of MDP.⁸⁹ Much of the opposition to the concept in the ABA debate emerged from state delegations in the House of Delegates.⁹⁰ A number of states studying MDP produced reports that opposed allowing such practices.⁹¹

On the other hand, many state and local bar association task forces and committees produced reports much more favorable to MDP.⁹² For example, the Utah 2001 MDP Task Force Report states:

Multidisciplinary Practice ("MDP") is neither new nor revolutionary. MDPs have operated for many years in Europe and other countries. MDPs openly operate in several locations within the United States. Arizona, Colorado, and Minnesota have each recently adopted recommendations for rule changes favorable to MDPs operating in their jurisdictions. MDPs conducted under an ancillary business model or in the form of a contract between independent professional service providers can operate at the present time in full compliance with all ethical standards applicable to Utah licensed attorneys.

Strong market forces, including the availability of legal information, advice, and documents over the Internet; the desire of some clients for one stop shopping; concen-

89. See *supra* note 75 and accompanying text.

90. See *supra* notes 86–87 and accompanying text.

91. See, e.g., the reports from Illinois, New York and Florida (Florida even commissioned a pro-MDP and an anti-MDP report, but followed the advice of the anti-MDP contingent).

92. See links to various state and local bar reports and recommendations, at <http://www.mdpcentral.org> (last visited Apr. 5, 2001). For example, Utah State Bar-MDP Task Force Report (March 13, 2001), at http://www.utahbar.org/sites/mdp/html/mdp_task_force_report.html (last visited Apr. 5, 2001); State Bar of Wisconsin Report of the Multidisciplinary Practice Committee to the Board of Governors (June 14, 2000), at <http://www.wisbar.org/bar/reports/mdp.pdf>; Minnesota State Bar Association Multidisciplinary Practice Task Force Report and Recommendations as Adopted by the MSBA General Assembly June 23, 2000, at http://www2.mnbar.org/mdp/convention_mdp/mdp.htmreport_5-3-00.pdf (last visited Apr. 5, 2001); Report to the Board of Governors of the Colorado Bar Association and the Board of Trustees of the Denver Bar Association (May 2000), at <http://www.cobar.org/mdp/reporttoc.htm> (last visited Apr. 5, 2001); State Bar of Arizona Multidisciplinary Practice Recommendations (May 19, 2000), at http://www.azbar.org/attorneyresources/mdp_recommends.cfm (last visited Apr. 5, 2001).

tration of financial and accounting services; and international trade treaties, are encouraging the expansion of MDPs. MDPs exist in Utah and will continue to grow in number and size.

Members of the legal profession have a choice to make. They may stand on the sideline and observe the development of MDPs without their input, or they may become actively involved in shaping the development of MDPs. The MDP Task Force of the Utah State Bar believes that the best interest of the public as well as the best interest of members of the legal profession require an active role.⁹³

An April 2000 Advisory Report on Multidisciplinary Practice from the Council and Committee Chairs of the State Bar of Texas Business Law Section describes the multidisciplinary nature of today's commercial law practice:

The advice we give is almost always a mixture of practical or technical business advice, common sense, and experience, together with advice on the legality or legal consequences of the possible solution to the problem or the contemplated transaction or its structure. In functioning as such givers of advice many of us, or our firms, already have significant, established working relationships with other professionals, including not just accountants but engineers, property appraisers, financial consultants, and business and management consultants, to name just a few. At present these are informal relationships that do not involve sharing of legal fees or joint ownership of professional entities, a part of whose business is the practice of law; but all of us see the potential benefit to our clients and our own practices of being able to formalize these relationships, thus attracting and retaining the best members of other professions to work with us, or permitting us to join with them, and facilitating ever closer coordination of our joint efforts in advising our clients on the wide range of considerations,

93. See Utah MDP Task Force Report, Executive Summary, *supra* note 92.

both legal and non-legal, involved in avoiding or resolving legal, business, and personal problems or engaging in particular transactions.

At the same time we recognize the challenge of distinguishing precisely between what is legal advice and what is practical or common sense business, personal, or other professional advice; but we already function with that lack of precision as we join informally with other professionals in advising our current clients. We think that our profession is able to arrive at such distinctions and apply them effectively and practically in the MDP setting while preserving the core values discussed above, and that the potential benefit to the clients justifies the effort.⁹⁴

Some states had not completed their MDP studies when the ABA House seemingly cut off debate.⁹⁵ Other states continued to move in the direction of allowing lawyers to engage in some form of MDP after the ABA's action in July 2000.⁹⁶ Conversely, some states took steps to reinforce their prohibitions against lawyers practicing with nonlawyers.⁹⁷ The result has been a slow balkanization of the legal profession. Such divergent approaches to MDP have implications for MJP, because the less similar the rules and standards are from one jurisdiction to the next, the less likely different jurisdictions will be willing to accommodate cross-border practice.

WHAT EXACTLY IS "THE PRACTICE OF LAW"?

Implicit in discussions about multidisciplinary and multi-jurisdictional practice is a more basic question: What is the practice of law? To focus on the licensing of lawyers, who are author-

94. TEXAS BUSINESS LAW SECTION ADVISORY REPORT, *supra* note 80, at 5 (citing Munneke, *Lawyers, Accountants, and the Battle to Own Professional Services*, *supra* note 79). According to the State Bar of Texas Department of Research and Analysis there were 3,898 members of the Business Law Section as of December 1999.

95. See Hymel, *supra* note 87, at 272-74.

96. See *supra* note 92 and accompanying text (discussing the actions of the Arizona, Colorado, Minnesota, Wisconsin, and Utah bar associations).

97. See *supra* note 75 and accompanying text (discussing the actions of the New York and Florida bar associations).

ized to practice law, and the corollary unauthorized practice of law, begs a fundamental question. If those authorized to engage in the practice of law provide legal services, then what services are legal and what services are not? Any services provided by a lawyer? Any services provided by a lawyer, where the lawyer was engaged because legal training and experience added perceived value? Something more narrow? Advice regarding legal rights, risks, and obligations? Litigation risk analysis? Trial advocacy? Document drafting? Mediation?

Almost any list of tasks that are typically performed by lawyers find an analog in the tasks performed by nonlawyers. Beyond a professional monopoly to represent others in court, there is little consensus about what work, if any, should fall exclusively within the purview of lawyers.⁹⁸ This lack of clarity concerning what constitutes authorized practice makes it virtually impossible to define what constitutes unauthorized practice. Absence of a definition of the practice of law in turn impacts enforceability and colors the MDP and MJP debates.⁹⁹

LAWYERS WORKING WITH OTHER PROFESSIONALS IN INTERDISCIPLINARY TEAMS

Global transformation of business reality has triggered innovation in matter management, dispute resolution, and dispute avoidance strategies. The following examples illustrate how some lawyers work with other diverse professionals to help clients develop and implement systems, strategies, and methodologies that

98. Even this monopoly to represent others in court is eroding. For example, non-lawyers are authorized to represent others in bankruptcy court, *Ferguson v. Skrupa*, 372 U.S. 726 (1963), and in tax court, see Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206 § 3411, 122 Stat. 685, 750 (1998) (codified as 26 U.S.C. § 7525 (1994)).

99. See Anthony E. Davis, *Multijurisdictional Practice By Transactional Lawyers: Why the Sky Really Is Falling*, in MUNNEKE & MACNAUGHTON, *supra* note 2, at 33; see also VIRGINIA GUIDELINES, *supra* note 81 (providing that at a minimum, a mediator provides legal advice whenever, in the mediation context, he or she applies legal principles to facts in a manner that (1) in effect predicts a specific resolution of a legal issue or (2) directs, counsels, urges, or recommends a course of action by a disputant or disputants as a means of resolving a legal issues); at <http://www.texasbar.com/attyinfo/aba/mdp.htm> (last visited Apr. 2, 2001) (State Bar of Texas UPL Task Force proposing resolution of numerous MDP issues through statutory amendments to laws governing the "practice of law").

avoid disputes, resolve unavoidable ones efficiently, and create competitive value.

Matter Management Strategies

Technology advances have transformed how systems support litigation and transactional matters management.¹⁰⁰ For example, inside and outside counsel, working together with clients and consultants, may share linked databases, and for early case analysis, diagnostics, and other strategic support across all business units. Web-based Internet and intranet systems, together with appropriate security technology, make it easy to share relevant information, enabling users with varying levels of authorized access to learn quickly about:

Internal and external resources identified for use in other matters (e.g. information management, technical experts, outside counsel, mediators);

Strategies used in other matters (e.g. data and document management, cost-sharing, assisted negotiation strategies);

Opponents (parties, counsel, positions, strategies in other matters);

Positions taken by the company in other matters that could present a risk of "position conflicts" if strategy is not coordinated; and

Lessons learned.

Interdisciplinary Dispute Resolution Strategies

Twenty-five years ago, many corporate lawyers believed the best way to control litigation costs was through aggressive pursuit of legal rights and remedies with the objective of crushing the other side(s) to any controversy. Massive litigation—and massive

100. See generally <http://www.techshow.com> (last visited Apr. 5, 2001); see also Robert B. Wallis & Ann L. MacNaughton (Turner), *Use of Technology in Managing a Corporate Law Department*, 17th Annual Corporate Counsel Institute, Univ. of Texas School of Law: Houston and Dallas (1995).

litigation budgets—resulted. In 1976, the national Pound Conference was convened to consider problems of increased expense and delay in a crowded judicial system.¹⁰¹ It recommended public funding of pilot programs using mediation and arbitration, to direct disputants to various *appropriate* dispute resolution (“ADR”) processes including for example litigation, arbitration, mediation, summary jury trial, and mini-trial.¹⁰²

Now, twenty-five years later, that Standing Committee has become the ABA Dispute Resolution Section and is working with various substantive ABA entities and other professional organizations to create consensus-based protocols, workable guidelines and standards that can be implemented by parties to on-line transactions and by on-line dispute resolution providers. The Task Force will focus on the challenges raised by multi-jurisdictional business to business (“B2B”) and business to consumer (“B2C”) transactions.

Contract Negotiations. In 1981, Roger Fisher and William Ury popularized the language and conceptual framework of interest-based negotiation in the small paperback book, *Getting to Yes*, which is itself the product of interdisciplinary teaming between lawyers and at least one anthropologist at the Harvard Negotiation Project.¹⁰³

Interdisciplinary teaming is common in business negotiations. International energy deals, for example, typically require a team of lawyers, managers, negotiators, geoscientists, economists, accountants, financial analysts, information management specialists, and other professionals.¹⁰⁴ In-house teams may work with

101. STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 7 (1992). This judicial matter management system was a conceptual precursor to commercial matter management systems such as described above. See *supra* note 34 and accompanying text. *Getting to Yes*, an interdisciplinary product of the Harvard Negotiation Workshop originally authored by attorney Roger Fisher and cultural anthropologist William Ury, established the modern vocabulary for *principled* or interest-based negotiation. ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1991) [hereinafter GETTING TO YES].

102. GOLDBERG, *supra* note 101, at 7.

103. See GETTING TO YES, *supra* note 101 and accompanying text.

104. See generally ANN L. MACNAUGHTON & MICHAEL S. REAVEY, NEGOTIATOR PRO FOR INTERNATIONAL OIL AND GAS DEALS (forthcoming 2001).

outside counsel, outside negotiators, outside litigation consultants, and/or other outside experts.

How enterprises apply interest-based negotiation principles varies. For example, co-author Ann MacNaughton, leading a team of attorneys, worked as part of an integrated team of in-house lawyers, negotiators, and engineers and outside lawyers and information management specialists to create a PC-portable contract-database for a multinational energy company, giving its lawyers and negotiators access to its full library of prior solutions, and plain-English summaries of all negotiated deal points and legal issues, on an issue-by-issue basis. This contract administration and negotiation support tool also supported improved negotiation results, document development, and dispute avoidance objectives by making it easier to construct enforceable agreements, find solutions to negotiation impasse situations, and avoid inadvertent breach of time-sensitive obligations.

Only diverse professionals working together as a team could have created this innovative solution. Such interdisciplinary teaming is common for in-house lawyers working in nonlawyer owned business enterprises. Lawyers, however, are limited¹⁰⁵ in the way that they can utilize interdisciplinary teams to reach innovative solutions. Current rules must change in order for outside professional services firms to provide similar value.

Complex Commercial Litigation. Complex commercial litigation always has engaged the training and experience of diverse professionals. In construction litigation, for example, lawyers work alongside civil engineers, accountants, contract specialists, schedulers, quality control specialists, and other technical experts to add substance to the form developed by the attorney and manager responsible for case development. None of these specialists alone knows enough to adequately analyze all the issues that

105. See *supra* note 75 and accompanying text. The Model Rules do not prohibit lawyers from employing other professionals. See MODEL RULES OF PROF'L CONDUCT R. 5.3 (2000). Nor do they prohibit lawyers from establishing a lawyer-controlled ancillary business. See *id.* R. 5.7. Rule 5.4, on the other hand, prevents lawyers from teaming as equals with other professionals as part of a multidisciplinary team, or employees of an organization of various professionals that provides multidisciplinary services. See *id.* R. 5.4. Ironically, participatory equality may be a necessary element for effective team-based resolution services, and an important incentive for professionals to join the team.

combine to create an adversarial relationship. Each matter requires in-depth analysis by appropriate experts to understand the situation sufficiently to define and pursue appropriate business solutions and/or to present a coherent picture of reality to a judge, jury, or arbitral panel.

Assisted Negotiation. The trend toward upstream conflict management and dispute resolution has led to expanded use of mediation to assist settlement negotiations. Both attorneys and non-attorneys work as mediators in and outside the litigation context.¹⁰⁶ Over the past decade, new models have been developed for assisted settlement of business litigation, including, for example, workplace dispute resolution programs; alliance and partnering programs; and cost sharing strategies in business litigation. Assisted negotiation methodologies often are multidisciplinary in nature, requiring a mix of legal, technical, financial, and other skills and experience.

Cost-Sharing Strategies. Demand for multidisciplinary solutions is expanding in business litigation contexts.¹⁰⁷ In environmental cases, for example, interdisciplinary solutions have been developed for tort, contract, regulatory enforcement, and community disputes.¹⁰⁸ Trial counsel competencies are essential but not sufficient in many environmental disputes. Engineering and other technical expertise, mediation and facilitation skills, communication and information management capabilities, and accounting expertise also may be required. For example, resolution of disputes over who will bear how much of Superfund cleanup

106. See VIRGINIA GUIDELINES, *supra* note 81.

107. See, e.g., Ann L. MacNaughton & Ray G. Schaefer, *Expanded Use of Cost-Shared Services in Superfund Litigation, Phase II Report* (Arthur Andersen LLP 1999) (copy on file with co-author MacNaughton).

108. See Feldman, *supra* note 79. See also American Bar Association Section of Environment, Energy & Resources, Statement on MDP, at <http://www.abanet.org/enviro/hottopics/practice.html> (last visited Apr. 5, 2001); Environmental MDP Forum, at <http://www.discussion.abanet.org:8080/~MDP/guests> (last visited Apr. 5, 2001). See generally GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* (1986); LAWRENCE S. BACOW, *ENVIRONMENTAL DISPUTE RESOLUTION* (1984); Ann L. MacNaughton & Geoffrey J. Brune, *Mediating Sustainable Development Disputes in Warm and Humid Petrochemical Zones*, CONFERENCE ON DEVELOPMENT, THE ENVIRONMENT & DISPUTE RESOLUTION IN THE AMERICAS: NEW DIRECTIONS FOR THE PRIVATE SECTOR (1997); Ann L. MacNaughton, *Environmental Dispute Resolution: Models for Multidisciplinary Mediation*, in *THE BEST LAID PLANS: ADAPTING DISPUTE RESOLUTION* (1998).

costs typically requires application of legal, engineering, economic, facilitative, and accounting skills and competencies.¹⁰⁹

Lessons learned in twentieth century disputes under United States environmental protection statutes are helping to sharpen the paradigm for managing sustainable development conflicts involving public policy, economic development, and environmental protection issues in critical regions of the world such as the Amazon rainforest.¹¹⁰ These models have broad application in other complex commercial litigation, and are beginning to be applied outside the specific contexts for which they were designed.¹¹¹

Recommendations of the ABA Section on Environment, Energy and Resources also have important application to the MDP in the broader context of complex litigation management.¹¹² Activities that absolutely require the services of a particular profession, such as appearing in court or approving engineering plans, should be identified along with areas where clients will realize a tangible benefit by using the services of a particular profession (for example, maintaining confidentiality). Codes of professional conduct governing the various disciplines should be harmonized to the extent practicable. Interdisciplinary educational conferences and training programs should be encouraged, and access to interdisciplinary research banks should be enhanced. Any economic limitations on how services are bundled and or delivered should be made more rational.

109. See Jay G. Martin et al., *Global Risk Management for Sustainable Development*, ABA Standing Committee of Environmental Law Conference, Infrastructure, the Environment, and Dispute Resolution in the Americas, Costa Rica (June 2001); ABA ENVIRONMENTAL DISPUTE RESOLUTION MANUAL (forthcoming 2001)).

110. "Sustainable development disputes" arise from commercial development that impacts the environment, when parties believe that environmental and/or local community constraints will frustrate economic development objectives or that economic constraints will frustrate environmental protection and/or community objectives. See STEPHEN SCHMIDHEINY, *CHANGING COURSE: A GLOBAL BUSINESS PERSPECTIVE ON DEVELOPMENT AND THE ENVIRONMENT* (1992); AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* (1992).

111. MacNaughton & Schaefer, *supra* note 107. See also Ann L. MacNaughton, *Collaborative Problem-Solving in Environmental Dispute Resolution*, in NAT. RESOURCES & ENV'T 3-6, 70 (American Bar Association Section on Natural Resources, Energy and Environmental Law, Summer 1996).

112. See Feldman & MacNaughton, *supra* note 19, at 101-02 (providing the full text of the 1999 Statement); see also http://www.abanet.org/lpm/mdparticle12212_front.shtml (containing the same) (last visited Apr. 5, 2001).

On-Line and Web-Based Dispute Resolution. As University of Massachusetts Professor of Legal Studies Ethan Katsh recently wrote, “[t]he logic is quite simple. As electronic commerce grows, disputes grow. As disputes grow, the need for dispute resolution grows.”¹¹³ Some conflict management and dispute resolution methodologies being developed for e-commerce trading communities look more, and some look less like familiar dispute avoidance and conflict resolution models. At least a dozen “on-line dispute resolution” projects are underway.¹¹⁴ Lawyers and mediators are working with diverse groups of other professionals to create systems and methodologies for electronic data management, information-sharing, and problem-solving.

Dispute Avoidance Strategies

Some forward-thinking business enterprises implement “comprehensive dispute system design (“DSD”) projects.” DSD projects may focus on an entire enterprise, or on specific components of an organizational system, or on the interface between allied enterprises. Competent DSD involves each of these four strategic organizational design steps, a better *IDEA*TM than *ad hoc* approaches:

Investigation of the existing (or “as-is”) condition

Design of recommended improvement, a change implementation plan, and methods for monitoring and measuring results on an ongoing basis;

Execution of the planned change, often through an initial pilot project; and

*Assessment over time, and continual improvement.*¹¹⁵

These projects are best accomplished as multidisciplinary efforts. Depending on specific objectives, they may involve lawyers, psychologists, human resource managers, and other professionals

113. Ethan Katsh, *The New Frontier: Online ADR Becoming a Global Priority*, ABA DISPUTE RESOLUTION MAGAZINE, Winter 2000, at 6.

114. See, e.g., http://www.drs_training.squartrade.com (last visited Apr. 20, 2001) (regarding the Square Trade Network pilot project).

115. See generally MacNaughton & Danner, *supra* note 21; URY ET AL., *supra* note 35.

with relevant experience. Enterprises that want a quantitative baseline analysis also involve accountants, economists, system dynamic modelers, and computer science professionals.¹¹⁶ Where interdisciplinary teaming is lacking, lawyers, judges, or psychologists offering DSD services without the benefit of other appropriate professionals under-serve their clients and the public.

Workplace Dispute Resolution. Global competition, razor-thin margins, and high costs of employee turnover have created new systems, strategies, and tools for resolving disputes between and among employees, supervisors, and company policy. Depending on the results of a baseline DSD investigation, or even without one, enterprises may determine they can better control costs and/or boost profits by changing how they manage internal conflicts and how they resolve internal disputes. New systems and strategies may (or may not) involve changes in recruiting, training, compensation, performance evaluation, and/or implementation of internal ombuds and mediation programs leveraged by on-line problem-solving tools and distance learning strategies.¹¹⁷

Examples include workplace conflict management systems such as those in place at Halliburton and Shell Oil Company¹¹⁸ and commercial partnering or "alliance" projects for construction, joint venture, and other long-term projects.¹¹⁹ The Dispute Resolution Program at Halliburton Brown & Root, for example, is designed to give employees an improved process and flexible options for airing and settling almost every kind of workplace dispute, from minor, every-day misunderstandings to violations of legally protected rights.¹²⁰ It allows settlement of differences construc-

116. Investigating the cost-and-time-efficiencies and long-term effectiveness of existing systems that manage conflict and resolve disputes within the enterprise and/or external stakeholders such as customers, vendors, and alliance partners can be accomplished through qualitative and/or quantitative modeling. See generally MacNaughton & Danner, *supra* note 21.

117. See generally Ann L. MacNaughton, STRATEGIC USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) (1997) (information on file with co-author MacNaughton regarding Halliburton Dispute Resolution Program and Shell Oil Company's RESOLVE program).

118. Information on file with co-author MacNaughton.

119. Thomas J. Stipanowich, *What's Hot and What's Not: Emerging Results from the First Comprehensive Survey on Dispute Avoidance and Resolution in the Construction Industry* (CPR Institute 1994). See also <http://www.jmw-consultants.com/> (last visited Apr. 4, 2001).

120. The Halliburton Dispute Resolution Program at 1 (on file with co-author Ann MacNaughton).

tively, swiftly, confidentially, simply, inexpensively, and fairly, with the help of trained mediators and independent neutral third parties, if needed.¹²¹ This program was created by an interdisciplinary team made up of lawyers and human resource professionals; interdisciplinary outside resources include psychologists, communications professionals, mediators, and arbitrators.

Partnering Projects and Dispute Review Boards. Similar in some ways to workplace dispute resolution programs, partnering projects and dispute review boards create dispute avoidance and dispute resolution mechanisms for long-term projects of multiple enterprises. Examples include joint ventures, construction projects, and merged entities—all situations in which shareholder value will be enhanced by systems and strategies that support effective partnering among entities that may be or have been competitors with very different cultures. Civil engineers, accountants, contract specialists, schedulers, quality control specialists, and other technical disciplines can add substance to the form developed anticipating and avoiding disputes, and for resolving swiftly and productively those that do arise.

Dispute Avoidance Systems

The trend toward “upstream conflict management” and dispute resolution has led to experiments with strategies designed to avoid disputes and capitalize on potential cost-saving and value-creating opportunities.¹²² Typically lawyers work with other professionals to produce results through appropriate training, compliance, and dispute system design programs.

Computer-Based Educational and Training Systems. Counterproductive disputes are best avoided by people with effective negotiation and problem-solving skills. Electronic technology is transforming the economics and consequences of helping the right

121. The Halliburton Dispute Resolution Program at 1.

122. The prevailing United States dispute resolution paradigm—that an unavoidable dispute must either be won or lost (and then, perhaps, settled after trial or on appeal)—is giving way to a new conflict management paradigm in which early resolution is the norm and downstream adversarial process is the “alternative.” Early resolution strategies aim to resolve conflicting needs and interests *before* they spiral upward into emotionally intense conflicts with hardened positions, stifled communication, and high transaction costs. *See generally* MacNaughton & Danner, *supra* note 21.

people acquire and improve upon those competencies. Distance learning through web-based internet and intranet systems and CD ROM libraries makes it possible to deliver skills training directly to an employee's portable workstations. Interdisciplinary teams, combining legal, business, industrial psychology, and information management training and experience, are creating remarkable solutions.

Web-Based Compliance Systems. United States Sentencing Guidelines provide for serious penalties if a company violates criminal laws, and civil penalties also can be severe.¹²³ Corporate lawyers have labored long and hard to help their corporate clients develop effective systems for ensuring regulatory compliance with employment, environmental, financial, trading, and other "public welfare legislation."¹²⁴

Effective compliance programs not only help avoid potentially disastrous disputes with regulatory authorities, but also can create significant competitive advantages, for example, through certification of compliance with International Standards Organization and, in the case of environmental compliance programs, with the Eco-Management and Audit Scheme requirements in the European Community.

123. Regulatory statutes like the U.S. Clean Air and Clean Water Acts, which include provisions that create personal liability for the highest-ranking company official even in the absence of any direct participation in a violation, present risks of penalties and civil claims capable of bankrupting a company. See *In re Caremark Int'l Inc. Derivative Litig.*, Consol., 698 A.2d 959, 962-64 (Del. Ch. 1996) (finding that a sufficient compliance program protects against officer and director liability, and minimizes risks under United States Sentencing Guidelines). Where a law is aimed at carrying out public policy priorities, United States courts are likely to interpret it as "public welfare legislation" and require no showing of direct personal involvement to convict a manager for company violations. ValueJet Vice President, Daniel Gonzales, was indicted for criminal misconduct in connection with the 1996 Florida Everglades crash of Flight 592. Although he was ultimately found to be not guilty, the airline maintenance company was found guilty and later went out of business under the cumulative weight of criminal penalties and civil claims. See Margaret G. Tebo, *Guilty By Reason of Title* 86 A.B.A. J. 44, 44-48 (2000).

124. See generally Jay G. Martin, *Implementing Effective Corporate Legal Compliance Programs*, 11 A.B.A. NAT. RESOURCES & ENV'T J. 14 (1997); Ann L. MacNaughton, *Environmental Dispute Resolution in the United States of America, Doing Business in the New Texas-Mexico Market* (Monterrey, Mexico: State Bar of Texas, April 1995); Charles A. DeMonaco, *Corporations Are Striving to Do the Right Thing*, CORP. LEGAL TIMES, Nov. 1999, at 70.

For example, environmental compliance managers are drawn from diverse disciplines, and include lawyers, experienced environmental managers, engineers, and other scientists.¹²⁵ "Strategic environmental management" describes a multidisciplinary environmental practice model that reflects an overall shift to a more proactive, less adversarial concept of environmental management that relies for effectiveness on the experience, training, and practical experience of lawyers, engineers, and other professionals to meet the expectations of a broad range of stakeholders.¹²⁶

As multinational enterprises migrate their compliance programs into web-based environments for more efficient information sharing and knowledge management, services increasingly are also required from sophisticated business consultants and information management professionals.¹²⁷

CONCLUSION

Our networked global community places high value on dispute avoidance strategies, and dispute resolution methodologies that preserve or enhance important relationships. Commercial and regulatory complexities often require interdisciplinary solutions. It is no accident or mere coincidence that ADR, MJP and MDP trends are emerging in this context. These trends support the development of cooperative solutions through coordinated interdisciplinary teamwork among team members and stakeholders who may be geographically remote but work together closely through electronic communication and information-sharing tools and systems.

The legal profession is re-inventing itself in the face of increasing demands for integrated professional services and cooperative business solutions such as early case analysis, assisted negotiation strategies, and enterprise-wide solutions. International competition in global markets for client service is creating pressure for change. Delivery of legal services in the United

125. See Feldman & MacNaughton, *A Model MDP—Environmental Practice*, *supra* note 19, at 99.

126. See Feldman, *supra* note 79. Mr. Feldman is president of Greentrack Strategies, an interdisciplinary strategic environmental management firm.

127.. Interview with Bernie Herbert at BP Amoco in Houston, Texas (Jan. 6, 2000).

States is restricted, at least as to United States lawyers, by economic constraints that have no counterpart in many other jurisdictions. Multijurisdictional interstate, international, and e-commerce transactions add to the complexity of the situation.

Important questions such as how to further the public interest without sacrificing or compromising lawyer independence, and how to protect the legal profession's tradition of loyalty to clients, are being addressed and will be answered as this process of change unfolds. As the State Bar of Texas Business Law Section Advisory Report pointed out, this will permit "attracting and retaining the best members of other professions to work with us, or permitting us to join with them, and facilitating ever closer coordination of our joint efforts in advising our clients on the wide range of considerations, both legal and non-legal, involved in avoiding or resolving legal, business, and personal problems or engaging in particular transactions."¹²⁸

In the final analysis, lawyers must remember that they bring something of value to transactions. The knowledge and skills of those trained in the law will always have a place in resolution of complex problems, because human problems by their nature have legal implications. Whether the legal profession finds ways to assure that lawyers can participate in and contribute to evolving problem solving models remains to be seen. Lawyers collectively can stick their heads in the sand, or sit back and sing, "*Que sera, sera*. What will be, will be,"¹²⁹ or they can choose to make choices about what the future looks like. The opportunity is ours, and the time is at hand.¹³⁰

128. TEXAS BUSINESS LAW SECTION ADVISORY REPORT, *supra* note 80.

129. See *supra* note 1. (The last line of the refrain is "what will be will be" in contrast to "whatever" in the verses.)

130. See *supra* note 15 and accompanying text.