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Lawyers and Accountants: Is the Delivery of Legal Services Through the Multidisciplinary Practice in the Best Interests of Clients and the Public?*

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Judge Brieant, members of the panel, members of the law review, students, and, most importantly, my fellow colleagues at the bar. I was delighted when Pace Law Review Executive Editor, Leonard Klingbaum, asked if I would speak on this panel. I was doubly delighted when I learned that the subject would be the concept of the multidisciplinary practice. I have been engaged in the practice of law, if you give me credit for time in the service, for about thirty-five years. During that time, in addition to looking after the needs of my clients, I have also tried to stay abreast of the major issues that have faced our profession. With the possible exception of the various proposals to change the tort laws through the years, which goes straight to the heart of every practicing lawyer, I can say with a high level of confidence that no issue has so caught the imagination of the profession, or raised greater concern, than the concept of the multidisciplinary practice, known by the acronym MDP.

At the February meeting of the American Bar Association's House of Delegates, the chair of the Association's task force said that the concept of the MDP "is not the greatest threat to the legal profession in a generation, but in this century."[1] Other commentators have characterized the concept of the MDP in

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1. Sherwin Simmons, Remarks at the American Bar Ass'n House of Delegates Meeting in Los Angeles, California (February 8, 1999).

equally apocalyptic terms. It has been observed that this is not only a Wall Street problem, it is also a Main Street problem.[2] Still another remarked, "It hurts my head just to think about it. If the profession doesn't get its act together, we're just going to be bulldozed."[3] In addition to the American Bar Association, there are several state bar associations and a handful of the larger city bar associations studying this issue.[4] The New York State Bar Association has had a blue ribbon task force looking at this issue. We have completed our report, but it has pleased very few people. Because the committee seriously and studiously avoided trying to adopt any conclusion that would embrace or reject the MDP concept, it has been roundly criticized for failing to speak out in favor of or against the concept. The report is in the process of being reviewed by various groups in our association, and I hope to make it public by May.

In addition to symposiums, there have been literally dozens, if not hundreds of law review, professional periodical, and newspaper articles written about the MDP. If you were to do a "word search" on this subject, just the list of titles would most likely run about twenty single-spaced pages. This issue has come before the court recently in a couple of cases. For example, an action was brought against Arthur Andersen in Texas.[5] Lawyers employed by Andersen were trying to file petitions in the Texas tax courts. The Texas Bar Association brought an action to enjoin Andersen's attorneys from filing petitions. The action was dismissed. Interestingly, the Texas Bar Association was represented in the lawsuit by a solo practitioner. Arthur Andersen was represented by three major law firms. For the successful defense of that action, the bill is reputed to have been very substantial. In another case, a federal district court in

2. *See* New York State Bar Ass'n, *Report of Special Committee on Multi-disciplinary Practice and the Legal Profession, Part II* (Jan. 8, 1999) <http://www.nysba.org/whatsnew/multidiscrpt.html>.

3. John Gibeaut, *Squeeze Play: As Accountants Edge into the Legal Market Lawyers May Find Themselves Blindsided by the Assault but Also Limited by Professional Rules,* A.B.A. J., Feb. 1998, at 42 (quoting ABA Section Officers Conference Chair Lawrence J. Fox).

4. *See, e.g.,* State Bar Associations for Florida, Kentucky, Maryland, Pennsylvania, and City Bar Associations including New York City and Philadelphia, PA.

5. *See* Debora Baker, *Is This Woman a Threat to Lawyers?*, A.B.A. J., June 1999, at 54.

Texas recently enjoined the sale of Quicken's Family Law Software because it amounted to an unauthorized practice of law.[6]

The most thoughtful commentaries on the MDP are those that focus on whether the legal services delivered through the MDP respond to the needs of the clients and the public, as well as or better than the delivery of those same services through the traditional independent lawyer or the independent law firm models. Certainly, the interests of our profession are important, and we should pay attention to them. However, lawyers exist to serve not ourselves, but to address the needs of our clients, and, indirectly, the needs of the society in which we exist.[7] Any study failing to recognize the needs of the clients and the public as paramount will inevitably be doomed to irrelevance.

Let me explain what I mean when I refer to MDPs. I think you can imagine three general models. In the first model, lawyers and other professionals — such as accountants, engineers, and financial planners, would work as equals and share equally in the profits of the enterprise.[8] In the second model, lawyers would work as employees of the other professionals.[9] The typical big five accounting firm is an example of the second model. The third model would be the reverse of the second — other professionals working as employees of the law firm.[10] Under the *Rules of Professional Ethics*, or the Model Rules, which exist in virtually all states, the delivery of legal services through the first and second models is prohibited.[11] The third model, where the non-lawyer employees do not share in the profits of the firm, is permitted by implication.

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6. *See* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (5th Cir. 1999). The injunction was vacated on June 29, 1999, after Governor George W. Bush signed a law exempting self-help legal publishers from Texas' unauthorized practice of law statutes. *Not So Fast*, TEX. LAW., July 12, 1999, at 3.

7. *See* New York State Bar Ass'n, *supra* note 2, at Part II.

8. *See id.* at Parts VI and XII.

9. *See id.*

10. *See id.*

11. *See, e.g.* N.Y. JUD. LAW, DR 3-102 (1999) [N.Y. COMP. CODES R. & REGS. tit. 22 § 1200.17 (1999)]; N.Y. JUD. LAW, DR 3-103 (1999) [N.Y. COMP. CODES R. & REGS. tit. 22 § 1200.18]; N.Y. JUD. LAW, DR 5-107 (1999) [N.Y. COMP. CODES R. & REGS. tit. 22 § 1200.26]; *see also* New York State Bar Ass'n, *supra* note 2, at Parts XII and XIII.

From the client's point of view, consider the delivery of the legal services through either of the two prohibited models. We begin by reviewing the arguments in favor of the MDP model of delivering legal services. Without question, the most frequently articulated argument in favor of the MDP delivery of legal services is that they deliver a level of efficiency and a reduction of client expense, which cannot be achieved when those services are delivered through separate professional entities.[12] Thus, it is argued that, in MDPs, some duplication of effort is eliminated, delivery time for service is accelerated, and costs are reduced.[13]

Client appeal is another related argument in favor of this model.[14] Clients can obtain all of their professional services relating to a particular problem at a single point of delivery.[15] Although I do not have any empirical evidence, I suspect that there is some substance to the argument, at least in theory, that the delivery of professional services through a single entity can achieve some cost savings and greater speed.[16] However, only time will tell whether those goals will be achieved. Large organizations tend to breed large support structures and significant levels of overhead. During my years of practice I have represented many large international firms, as well as many small firms. I have found, on more than a few occasions, that it is more time consuming to obtain the advice or the delivery of a service from a large firm than from a smaller, or locally focused organization.

Higher quality client service is another argument in favor of allowing lawyers to participate in MDPs.[17] The reasoning is that when a client selects a single professional services firm with an in-depth understanding of its many needs and goals, it will receive more comprehensive and higher quality advice from that firm than it would if the client had retained two or more separate firms to provide those various services.[18] The possibility that there may be some substance to the argument that a

12. *See* New York State Bar Ass'n, *supra* note 2, at Part VII.
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See* New York State Bar Ass'n, *supra* note 2, at Part VII.
18. *See id.*

sustained relationship with a client, covering many facets of its professional needs, will result in the delivery of higher level legal services, has great appeal. Whether or not those services will be of consistently higher quality will, however, depend upon the quality of the talent in the MDP organization and the length of the relationship with the client. Clients who come and go from such organizations will receive no higher, and possibly even a lower quality of legal counsel from those MDPs than if they simply went to a stand-alone transactional law firm. A stand-alone transactional law firm with superior legal talent will, at any given moment, provide greater value to the client than will the MDP firm with mediocre and slightly above average legal talent.

In short, I find that those traditional arguments in favor of the MDP model for delivering legal services (i.e., speed, cost, and efficiency) to be superficially appealing. I remain skeptical of how these benefits will actually be achieved over the long term. More importantly, clients, and indirectly the public, need to be mindful of what they give up when they cease dealing with a stand-alone law firm. In trying to focus on what is in the best interests of the client, I asked myself what should the client be thinking about when it chooses not to work with a stand-alone law firm and to obtain legal services from an MDP. Clients and society should pay some attention to the differing obligations which accountants and other professionals have on the one hand, and those that the lawyers have on the other hand.[19] They must also consider the significance of the confidentiality privilege, the potential for harm that may arise from conflicts of interest, and the diminution of the lawyer's independence in the MDP setting.[20]

There can be no question that lawyers and accountants, at least under today's laws, have different obligations or duties to their clients and to the public.[21] For example, under several standards and statutes, as well as under the American Institute of Certified Public Accountants ("AICPA") Code of Ethics, accountants who act as auditors have an obligation to report their

19. *See id.* at Parts VIII and XIII.

20. *See id.* at Parts VIII, IX, XI, and XIII.

21. *See id.* at Parts VIII and XI.

conclusions, not only to the client, but also to the public.[22] Accountants who have failed to fully disclose information in their possession to the public have occasionally been made the subject of malpractice litigation.[23] But lawyers, however, are ethically bound to represent only the interests of their client within the limits of the law. Lawyers have a duty not to reveal client confidences to the public.[24] One could easily imagine circumstances which might confront a lawyer in an MDP who might acquire knowledge about a client which he or she would regard as confidential, but which his or her accountant partner might feel obliged to disclose publicly. Further, how should the lawyer employed by an accountant/lawyer MDP react when the CEO of the firm's largest client discloses that he has been overstating sales to sustain the high price of the clients stock? Should that lawyer disclose that information to the MDPs management group? Should he or she disclose it to the public? Is he or she guilty of malpractice if they fail to disclose that information to anyone? Whose interest is the lawyer serving: the CEO's; the company's; or the MDPs? Is there any attention being paid to the interests of the public?

A similar problem arises with respect to the confidentiality privilege afforded to the lawyer/client relationship, but not to the accountant/client relationship.[25] Clients who find themselves in difficult situations requiring the advice of counsel, may be somewhat hesitant about seeking counsel in an MDP setting knowing that the lawyer's accountant partner may feel compelled to reveal the information given to the firm through the lawyer. In the process, the notion that clients could go to a lawyer and bare their souls about whatever problem they have would be severely and adversely impacted. Creating firewalls or screening lawyers from the rest of the firm, are the only devices proposed to respond to these concerns.[26] I believe that both devices would be ineffective over the long term.

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22. *See* New York State Bar Ass'n, *supra* note 2, at Parts VIII and IX.

23. *See id.*

24. *See id.* at Part IX A (stating that DR 4-101(B) provides that a lawyer shall not knowingly reveal a confidence or secret of a client except when permitted under DR 4-101(C)).

25. *See id.* at Part IX.

26. *See id.* at Parts III C and IX E.

From the client's perspective, still another problem facing the MDP is avoiding conflicts of interest.[27] Even when one considers that in situations where the audit/attest function is spun off from the MDP into a separate entity, the possibility that a large professional services firm could still have conflicts of interest, with respect to a given client, are enormous.[28] For example, a client seeking legal counsel from a lawyer in an MDP in New York City may not realize that the same MDPs San Francisco office is representing a party whose interests are adverse to the New York City client. The most commonly articulated response to this dilemma is that full disclosure of possible conflicts of interest will eliminate any need for concern. I find that response utterly naive and unrealistic. I suspect that conflicts of interest in the MDP setting will cause clients great distress and will generate significant amounts of malpractice litigation. This issue, in my opinion, will be the greatest hurdle for MDPs to jump if MDPs are to be successful in the next generation.

The final concern about delivering legal services through the MDP model is that they will diminish the independence of the legal profession to some extent.[29] After all, in such a setting, lawyers will be minor employees or equals with other professionals and will have to share their values and make decisions in coordination with those professionals.[30] It has been argued, with some substance, that over extended periods of time an independent and vigorous legal profession has benefited not only its clients, but also society as a whole.[31] This argument arises from the notion that lawyers have always played a critical role in preserving the fundamental aspects of our society.[32] It has recently been written that "[t]he vindication of individual rights, especially against the state, requires that lawyers be able to assert and pursue client interests free of external controls."[33] Those of us concerned about MDPs believe that, in such a setting, lawyers will be unable to exercise a high level of independence because they will always be concerned

27. *See* New York State Bar Ass'n, *supra* note 2, at Part XI.
28. *See id.* at Parts VIII and X.
29. *See id.* at Part VIII.
30. *See id.*
31. *See id.*
32. *See* New York State Bar Ass'n, *supra* note 2, at Part VIII.
33. *See id.* at Part VIII A.

about how that independence will affect other professionals with whom they work.

If our society were to suddenly abandon the independent lawyer or the independent law firm model, and deliver legal services wholly through MDPs, something which I do not think will happen in my lifetime, our society would first have to be satisfied that nothing of consequence would be lost in the bargain. I believe in the long run, clients and the public would rue the demise of the independent lawyer, an individual beholden to no one but his or her client and the rule of law. Imagine what would have happened in 1952 if Thurgood Marshall had been working for a New York City MDP, when the Reverend Oliver Brown came to him and said, "Thurgood, let's tell that school district in Topeka and the United States Supreme Court that they are wrong and let's change the law in this country."

There are other concerns about MDPs with respect to clients. Because of the MDPs interlocking interest with the client, the lawyers in the MDPs may become even more dependent upon their clients and less objective. There will be confusing problems arising with respect to the solicitation of work, because, at least as of today, the rules for solicitation are different for accountants and for lawyers.[34] There will be no administrative body to oversee or regulate the delivery of the services provided by the lawyers and accountants who work in MDPs. There may be some significant antitrust or trade regulation issues created by full blown MDPs.[35]

I believe when one looks at the delivery of legal services through the MDP vehicle in a rational, methodical, and objective fashion, the balance, although by no means overwhelmingly, militates in favor of the current form of delivery - the independent lawyer or the independent law firm. However, I also believe that the forces of the market place may not be interested in an independent and rational analysis of this issue. I suspect that in the short term there is going to be increasing pressure to relax the disciplinary and ethical rules which prohibit lawyers from practicing with other professionals and from sharing fees with them. I foresee that accounting firms and fi-

34. *See id.* at Parts XIII B4 and XIV.

35. *See id.* at Part III D.

nancial service firms will continue to look for ways in which they can participate in the more lucrative areas of law practice. Believe me, they are not interested in going to police court or in doing low end divorces. Instead they are interested in finding ways to get part of the action in transactional business work, mergers and acquisitions, financial restructurings, divestitures, and the big loan workouts. They want very much to play a part in litigation support. They want very much to be involved in high end estate planning. Even in some areas of matrimonial law, the financial service providers and the accounting firms may wish to play some role.

On the other hand, there will always be a place for the practicing trial attorney. I think it is entirely possible that over the course of this generation, American trial lawyers may evolve into something akin to the British barrister, with referrals coming not only from lawyers, but from other sources as well. I foresee consistent failure for most of the efforts to restrict the growth of the MDP model through unlawful practice of law litigation. Also, I foresee a growth in malpractice litigation arising out of unsuccessful law work provided through the MDP model.

In short, I believe clients may force more of the practice of law into the MDP model and, in the process, surrender some significant benefits for the sake of expediency. But in the long run, I believe that the independent law firm will not wither and die, but its inhabitants will have to work even harder and be more skillful if they are going to succeed and prosper in the narrower, smaller, and more competitive legal marketplace.