

Facing The Tide Of Change

*An Analysis of the Effect of MDP's on the Public in Florida
by the "Con" Subcommittee of the
Florida Bar Special Committee on Multi-Disciplinary Practice*

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Introduction

Consistent with the mandate of the President of the Florida Bar, the Con Subcommittee of the Florida Bar Special Committee on Multidisciplinary Practice prepared this report. This position paper sets forth the primary issues, as we see them, which are presented by the MDP debate. Clearly, the implications are far reaching. The existing Rules of Professional Conduct are implicated in many more ways than those suggested here. However, it was our goal to address the threshold or primary implications for the Bar and the public. We believe we have done so here. In doing so, we have concluded that the proponents of change have not met their heavy burden of showing that the substantial impact on the core values of the legal profession which are designed to and do protect the public justifies any change to long standing Supreme Court precedent.

Accordingly, the Con Subcommittee of the Florida Bar Special Committee on Multidisciplinary Practice respectfully recommends that the Florida Bar take the following position on Multidisciplinary Practice in Florida.

- I. IT IS IN THE PUBLIC INTEREST TO PRESERVE THE LAWYER'S DUTY OF UNDIVIDED LOYALTY TO THE CLIENT.
- II. THE FLORIDA BAR FINDS NO CREDIBLE EVIDENCE OR PERSUASIVE ARGUMENT THAT IT WOULD BE IN THE PUBLIC INTEREST TO AMEND THE RULES REGULATING THE FLORIDA BAR OR THE CODE OF PROFESSIONAL RESPONSIBILITY TO ALLOW THE SHARING OR SPLITTING OF FEES FOR LEGAL SERVICES WITH NON-LAWYERS.
- III. IT IS IN THE PUBLIC INTEREST FOR THE SUPREME COURT OF FLORIDA TO REGULATE THE PRACTICE OF LAW BY REGULATING THE ADMISSION OF PERSONS TO THE PRACTICE OF LAW AND THE DISCIPLINE OF PERSONS ADMITTED.
- IV. THE FLORIDA BAR SHALL VIGOROUSLY ENFORCE THE RULES REGULATING THE FLORIDA BAR AND WILL DEVOTE SUCH ASSETS AS MAY BE NECESSARY TO DILIGENTLY PROSECUTE ALL VIOLATIONS THEREOF.

Respectfully submitted this ____ day of December 1999.

Michael Nachwalter, John Hume, Carol McLean Brewer

Let me [start] with the moving words of John W. Davis, one of America's greatest advocates before the Supreme Court: "Every would be despot has found it necessary to silence the tongues of his countries lawyers. For this, brethren of the Bar, is our supreme function – to be sleepless sentinels on the ramparts of human liberty and there to sound the alarm whenever an enemy appears. What duty could be more transcendent and sublime? What cause more holy?"

Comments by the Honorable William M. Hoeveler, Senior District Judge, United States District Court, Southern District of Florida

We are facing an issue which may forever transform the practice of law. The legal profession as we know it may never be the same. Our duty as sleepless sentinels cannot drown in the tide of change. Our duty requires us to *face* the tide of change. Dramatic? Perhaps. Too? You decide.

Consider this: A personal injury lawyer is permanently disbarred for conduct involving dishonesty and moral turpitude. The law was his life. He misses it. He can't stand not being a part of it. While he knows he cannot practice law, he decides that he has other skills that may indirectly facilitate a licensed lawyer but wouldn't cross the line of actually practicing law. So he decides to form a corporation and offer "document management services." He also hires licensed lawyers to work for the corporation and the corporation advertizes "document management services" and "legal services." He manages the operation, makes the hiring and firing decisions, decides the compensation of the lawyers in the group, meets regularly with clients on "non-law related matters," and gets a percentage of all legal fees generated by his document management business. Possible? If MDP's are allowed in the State of Florida, combinations such at this are not only possible but far from the extreme of absurd combinations which may soon grace our noble profession.²

² In point of fact, The Florida Bar has already received actual inquiries from attorneys who wish to either own or have partnerships with the following: "used car lots, coffee shops, MRI centers, physicians, accountants, financial planners, guardians, elder care helpers, title insurance companies, stock brokers, patent research companies, investigators, dentists, mental health counselors, mediators, arbitrators, lease audit firms, paralegals, and sports agents, to name but a few." *As stated in The Florida Bar's Report and Recommendation 10B to the American Bar Association House of Delegates on August 9, 1999.*

What Are MDP's and Why Is The Term Novel to Most Lawyers and Lay Persons in Florida?

Until the summer of 1999, very few Florida attorneys and even fewer members of the public at large had even heard the term “MDP.”³ As we write this article, virtually every bar association in the country is busy learning everything they can about this animal. Before we explain *why*, first let us tell you *what* they are. Multidisciplinary practices, or MDP's as they have become known, are professional associations, partnerships or other business organizations owned jointly by lawyers and non-lawyers. At least one of its functions is the provision of legal services. Fees are shared amongst the members, including fees earned for the provision of legal services.⁴

These entities, as defined above, have had little presence in the vocabulary of most lawyers across the country because canons and rules regulating the practice of law in every jurisdiction of this country, save one⁵, have heretofore prohibited lawyers from sharing fees or forming partnerships with non-lawyers. For the current iteration of these rules, see *ABA Model Rule of Professional Conduct 5.4 and Rule 4-5.4 of the Rules Regulating the Florida Bar*.

This restriction and others intertwined with it, are centered on the notion that lawyers, unlike any other

³“All lawyers should have some concern... Most of them don't even know what is happening.” *Squeeze Play* by John Gibeaut, *ABA Journal February 1998*, quoting Iriwn L. Treiger, *ABA co-chair of the National Conference of Lawyers and CPA's*.

⁴The American Bar Association Commission on Multidisciplinary Practice defines MDP as: “... a partnership, professional corporation, or other association or entity that includes lawyers and non-lawyers and has as one, but not all, of its purposes the delivery of legal services to a client other than the organization itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, and there is a direct or indirect sharing of profits as part of the arrangement.” *See Appendix C to Report of ABA Commission on Multidisciplinary Practice*.

⁵ Washington D.C. is the only jurisdiction which allows some restricted form of fee splitting.

business person, are an arm of the judicial branch of government and integral to the development and maintenance of the law. *Comment to Rule 4-1.6 of the Rules Regulating the Florida Bar; Florida Bar v. Murrell*, 74 So.2d 221 (Fla. 1954). Entry into the profession is restricted to those who take an oath to uphold the constitutions which create the judicial branch of which we are a crucial part. *Rule 2-2.1 of the Rules Regulating the Florida Bar; Oath of Admission to the Florida Bar*. Public confidence in our justice system is considered so crucial to the function of the law, that entry into the profession can be denied to or taken away from those who damage the public's faith in our system and its ability to function free of influences counter to its purpose. *The Florida Bar, Petition of Rubin for Reinstatement*, 323 So.2d 257 (Fla. 1975).

In Florida, as in most jurisdictions in this country, the State's highest court regulates the practice of law. *Florida Constitution, Article V, §15*. Acting in a quasi legislative capacity, these courts have a legitimate state interest in implementing regulations which "are designed to safeguard the public, maintain the integrity of the legal profession, and protect the administration of justice from reproach." The fee splitting prohibitions are rationally related to this important state interest because they promote the independence of lawyers by attempting to "minimize the number of situations in which lawyers will be motivated by economic incentives rather than by their client's best interests" and "prevent...non-lawyers from controlling how lawyers practice law." *Lawline v. American Bar Association*, 956 F.2d 1378 (7th Cir. 1992) cert. denied, 510 U.S. 992, 114 S.Ct. 551 (1993) (declining to declare ABA Model Rule 5.4 unconstitutional).

The Origin of the Fee Splitting/Partnership Prohibitions:

In 1854, concerned that the Bar had no formal written code of ethics, Judge George Sharswood published a series of articles titled *Professional Ethics*. See *Annotated Model Rules of Professional Conduct, Preface [Third Edition]*. It was not until 1908 that the ABA transformed the principles contained in these articles into the first formal Canons of Professional Ethics. *Id.* The Canons were aspirational and intended to guide States in the adoption of their own codes. In 1922, the ABA expanded its role in the ethics movement when it began issuing opinions "concerning professional conduct, and particularly concerning the application of the

tenets of ethics thereto.” *Id.* While the original Canons did not have a fee splitting prohibition, the ABA issued at least one formal opinion in 1925 which found it unethical for an attorney to accept employment with an automobile club to serve the club members. That opinion stated in relevant part:

Society has seen fit, for its own benefit and protection, to limit the practice of law to those individuals whom it found duly qualified in education and character. The permissive right conferred on the lawyer is an *individual* and limited *privilege* subject to withdrawal if he fails to maintain proper standards of moral and professional conduct. Neither this privilege, nor any responsibility or duty connected therewith, can be delegated to or be shared with a layman. As the lawyer cannot share his professional responsibility with a layman or lay agency, he cannot properly share his professional emoluments with them. This of itself is sufficient to render it improper for a lawyer to allow his services to be sold or dealt in by any layman or lay agency.

See ABA Formal Opinion 8 (emphasis added). The ABA concluded that exploitation of professional legal services “is derogatory to the dignity and self-standards of professional character and conduct *and thus lessens the usefulness of the profession to the public...*” *Id.*

A few years later, the ABA formally adopted Canons 33, 34 and 35 prohibiting fee splitting with non-lawyers. The Canons evolved over the years and took on various forms and jurisdictions across the country generally followed the models created by the ABA, with amendments as they saw appropriate. The Rules substantially took on their current form in 1983 when the ABA transformed the Canon/Code format into a restatement format containing formal Rules of Professional Conduct.

In its current form, Florida’s version of Model Rule 5.4 is titled to reflect the essential purpose of its existence: to promote the *Professional Independence of a Lawyer*. The body of the rule provides, in pertinent part:

(a) Sharing Fees with Nonlawyers: A lawyer or law firm shall not share legal fees with a

nonlawyer...⁶

(c) Partnership with Nonlawyer: A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

(d) Exercise of Independent Professional Judgment: A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(e) Nonlawyer Ownership of Authorized Business Entity: A lawyer shall not practice with or in the form of a business entity authorized to practice law for profit if: (1) a nonlawyer owns any interest therein...; or (2) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

The Comment recognizes the historical acceptance of the rule: "The provisions of this rule express *traditional* limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment." (emphasis added).

The Florida Supreme Court has vigilantly enforced both the letter and the spirit of this rule. *See eg: The Florida Bar v. Beach*, 675 So.2d 106 (Fla. 1996); *The Florida Bar v. Beach*, 699 So.2d 657 (Fla. 1997) (using prior violation of 4-5.4 as aggravating factor in later disciplinary action); *The Florida Bar v. Bratzel*, 444 So.2d 954 (Fla. 1984) (accepting permanent resignation for admitted violation of 4-5.4 and other rules); *The Florida Bar v. Budish*, 421 So.2d 501 (Fla. 1982) (public reprimand); *The Florida Bar v. Hunt*, 429 So.2d 1201 (Fla. 1983) (PA listed non lawyers as officers and disbarred attorney provided services to P.A. The facts of this case are not unlike the hypothetical at the start of this paper); *The Florida Bar v. Hunt*, 441 So.2d 618 (Fla. 1983) (violation of 4-5.4 used as enhancement factor in subsequent disbarment); *The Florida Bar v. James*, 478 So.2d 27 (Fla. 1985); *The Florida Bar v. Rue*, 643 So.2d 1080 (Fla. 1994); *The Florida Bar v. Sagrans*, 388 So.2d 1040 (Fla. 1980); *The Florida Bar v. Shapiro* 413 So.2d 842 (Fla. 1982); *The Florida Bar v. Stafford*, 542 So.2d 1321 (Fla. 1989). Even judges are not above the restriction. *In re JQC No. 84-200 Inquiry Concerning*

⁶The exceptions include: various payments due to the death of a lawyer or due to the conclusion of business due to the absence of a lawyer; bonuses to non-lawyer employees not tied to client generation or a percentage of fees; qualified pension plans.

a Judge, 496 So.2d 133 (Fla. 1986). (Supreme Court affirms JQC recommendation of public reprimand of judge who, prior to taking the bench, engaged in fee splitting with a non lawyer).

The force with which the Supreme Court has expressed the sound policies behind the prohibition have been, at times, intense. Of note, is the Supreme Court's condemnation of the commercial "business arrangement" between a lawyer and a non-lawyer in *The Florida Bar v. James*, 478 So.2d 27 (Fla. 1985). In *James*, a lawyer agreed to act as the sole attorney for a corporation engaged in the collection of bad debts. The lawyer and the corporation set up operations in the same building with a shared receptionist-secretary. The non lawyer had separate offices and phones but ready access to the lawyer's files and dealt with clients who attempted to contact the lawyer. The standard contract offered by the corporation authorized the corporation to provide legal services on behalf of the client. And the non-lawyer manager filtered the cases and decided when and if legal action was needed. The fee arrangement was based on extracting judgments in excess of debts owed and the lawyer was paid out of certain portions of the recovery with the corporation receiving the rest. At the disciplinary phase, the lawyer and non-lawyer could not agree on who was responsible for different aspects of the business. Indeed, communication was so poor between the lawyer and non-lawyer, that the lawyer filed actions against debts already satisfied and at least one debtor obtained a judgment against the lawyer and his client in excess of \$1,000 for doing so. It was this client that hired independent counsel who exposed the activities to the court.

In affirming the referee's recommendation of suspension, the Supreme Court stated:

The record in these cases documents the disastrous results that occur when a practicing member of the Bar enters into a profit-making enterprise with a commercial business which ***subordinates the practice of law to the activities of the commercial business.***

Id (emphasis added).

Even some of the Court's oldest pronouncements on the importance of independence have been revived by the Supreme Court in recent years. In *The Florida Bar v. Stafford*, 542 So.2d 1321 (Fla. 1989),

the Supreme Court exacted a greater penalty than that recommended by a referee against a lawyer who engaged in fee splitting with a police officer. The lawyer agreed to pay the officer 15% of fees collected from personal injury referrals from the officer's car accident victims. Citing *State ex rel. The Florida Bar v. Murrell*, 74 So.2d 221 (Fla. 1954), the Court stated:

Thirty-five years ago in... *Murrell*, ...this Court ***differentiated the practice of law from other business pursuits*** and explained why the solicitation of clients could not be tolerated.

Id. (emphasis added). Indeed, the Court's decision in *Murrell* is perhaps the most eloquent discussion ever written on the difference between lawyers and all other business professionals and the concomitant need for independence.

The law is not a business,--it is a profession, a noble one, with standards in certain respects different from those applicable to business, which standards it is the duty of the bar to uphold.

The Court supports its distinction between the law and other businesses in three ways:

The lawyer is ***an officer and right arm of the court*** in the administration of justice, he has the major responsibility for making and administering the law of the nation, the State, the county and lesser governmental entities.

He is the trustee of his client and is expected to execute that trust in obedience to the Canons of the profession, the constitution of his State and the United States. His relation to his client is ***fiduciary*** and his integrity should be of that discriminating quality that he readily distinguishes where his duty to client and his duty to country clash; and if it does, he will be led by the higher duty to country.

There is in fact, no vocation in life where moral character counts for so much or where it is subjected to more crucial tests by ***citizen and the public*** than is that of members of the bar. His client's life, liberty, property, reputation, the future of his family, in fact all that is closest to him are often in his lawyer's keeping. The fidelity and candor with which he performs his trust, point up reasons that distinguish the legal profession from other business. Every lawyer who fails to withstand the test will subject the profession to merited criticism.

The Court concludes by acknowledging but rejecting "the contention that the practice of law is a competitive business controlled by standards not materially different from those which control other competitive businesses."

If that were true, then all we have said about the law being a great profession, that the primary function of the lawyer is that of officer of the court for the administration of justice, that his relation to client is highly fiduciary and that his relation to the court and his brethren at the bar

must be characterized by such candor and rectitude of conduct as to preclude him from advertising or appropriating other methods common to commercial ventures to attract clients,-- all this would amount to nothing more than empty trade talk. However, this is not true and while *there are differences that distinguish those who administer justice from those who sell goods, the canons clearly point out these differences.*⁷

Id (emphasis added). Nowhere are those differences better reflected than in Rule 4-5.4.

So What Is Driving the Consideration to Alter Rules Aimed at Protecting the Professional Independence of Lawyers?

Debunking the Myth of Public Demand...

Some proponents of MDP's proclaim that the movement grew out of a groundswell of public demand. While the Con Subcommittee does not agree, we agree that protection of the public is an important consideration as are the Bar's independent duties as officers of the Court. Regardless, this report would be incomplete without addressing the origins of the MDP issue. The MDP issue is highly contextual and, if taken out of context, can become distorted and confused. The history of the movement will shed some light on its path and destination. It also sheds light on the sudden awakening in the legal profession towards this issue.

A true flavor of the driving force behind the issue facing the Florida Bar is probably best conveyed by an August 1999 article which appeared in *CPA Today*. Only a duplication of the title page could convey the spirit of the issue. It is reprinted below so that nothing is lost in the translation:

⁷The central issue in the case was solicitation and other advertising by lawyers. To this day, lawyers may not advertize in the same way any other business can, may not puff its wares as any other commodity sold to the public, and may not engage in outright solicitation for pecuniary gain. *See Rule Regulating the Florida Bar 4-7*. These restrictions “prevent abuses, including potential interferences with the fair and proper administration of justice and the creation of incorrect **public perceptions** or assumptions about the manner in which our legal system works, and to **promote the public's confidence in the legal profession** and this country's system of justice...” *See Comment to Rule Regulating the Florida Bar 4-7.2* (emphasis added).

The Future of the CPA Profession in the United States:

**“Fee, Fi, Foe, Fum!
Look Out Lawyers Here We
Come!”**

This and other recent articles outline the accounting firm’s movement away from traditional accounting services into globalized bundled services. Approximately 10 years ago, the accounting profession was feeling a dip in their business. This was due largely to simplification of the Internal Revenue Code by Congress. The meat and potatoes of the accounting profession, income tax preparation, flattened. Accountants responded by offering other services to their clients and businesses responded favorably. *See Squeeze Play by John Gibeaut, ABA Journal February 1998, quoting Iriwn L. Treiger, ABA co-chair of the National Conference of Lawyers and CPA’s.* The large national accounting firms added the provision of legal services to their buffet by hiring lawyers in their foreign offices in countries which did not prohibit fee splitting and legal practice by accountants. The result, according to the accounting profession, has been a financial bonanza for the multi billion dollar accounting industry.

MDP’s have spread throughout Western Europe, and from those modest beginnings, have grown to the point that ***the Big Five firms are now the largest law firms in the world.*** For example, in Europe, Ernst & Young have more lawyers than any other law firm. KPMG owns the biggest law firm in France. And Arthur Anderson reportedly has publicly said it wants to have the world’s largest law firm by 2000.

According to the most recent survey available through Bowman Reports, worldwide in 1998,

the Big Five employed a staggering 414,498 professionals and partners and generated worldwide revenues of roughly \$56.6 billion.

Fee, Fi, Foe, Fum! at page 4 (emphasis added).

Domestically, however, accountants expressed deep frustration at their inability to expand their multi billion dollar buffet to include legal services in the United States where lawyers are actually an arm of a separate judicial branch of government.

The Big Five are the giants of the accounting world. They are buying law firms in other countries left and right. ***The legal profession has no giants*** like the Big Five to become the consolidators of the legal profession.... In the U.S. alone, the Big Five employ 174,939 staff. Of those... 125,383 are ‘other’ professionals such as engineers, actuaries, nurses, and even lawyers. ...[I]n 1998, the Big Five... generated worldwide revenues of roughly \$56.6 billion. ‘Even the largest independent law firms pale in comparison to the scale of the Big Five Firms.’⁸ Which leads me to the creation of [the] subtitle.... ***Fee, Fi, Foe, Fum! Look Out Lawyers Here We Come!***

The ***giants*** launched an all out offensive designed to exert whatever pressure they could bring to bear on the legal profession to force change. To execute their plan, they needed to bring lawyers into the fold, convert them to their cause, and make these their advocates of change. They started by amending their own rules which, ironically, prohibited ownership of a CPA firm by non-accountants.

[Accountants] revised the laws to enable CPA’s to accept commissions and contingent fees, and more, importantly, to allow up to 33 percent non-CPA ownership of a Licensed Audit Firm. Our counterparts in the legal profession watched intently as CPA’s changed their regulatory structure in order to level the competitive playing field and strategically align with other professions to provide a ***nearly*** full array of services and the convenience of one-stop shopping to their clients.

Fee, Fi, Foe, Fum at 5 (emphasis added). Next, they had to carefully navigate the Rules Regulating the Bar and convince lawyers that they could come on board without ethical repercussions.

In the US today, lawyers work for accounting firms providing advice and consultation to clients in tax and business matters. But only in ways that the ABA has deemed “do not constitute the practice of law by a layman.” In other words, if a layperson could provide that same service and not inadvertently step into the area of the unauthorized practice of law... then so can a lawyer. The remaining restriction on domestic lawyers working in these non-traditional entities include a prohibition against preparing legal documents, providing legal advice, and ‘holding out’

⁸Quoting Ward Bower, an ‘international expert on multidisciplinary practices.’

as a lawyer. Even with this limited scope of services, Pricewaterhouse Coopers and Deloitte & Touche already employ approximately 2,000 lawyers domestically.

Fee, Fi, Foe, Fum at 4. Finally, they had to make these lawyers proponents of change.

Pressure is coming from within the profession itself... [I]t will be people like the 1,000 lawyers at Ernst and Young that will demand the ability to deliver a full range of legal services and be eligible for ownership opportunities in a MDP. And of course, history shows us that the Big Five will find ways to accommodate them, just like they currently do for engineers, investment advisors, and consultants.

Fee, Fi, Foe, Fum at 33. So confident is this giant, that it declares that the ultimate driving force of change for lawyers will not be service of the best interests of the public, but service of the best interests of the lawyers financially:

When lawyers working in MDP's are allowed to advertize and trade on the fact that they are lawyers, the competitive pressure within the legal profession will drive the opponents and proponents alike to seek and demand a level *economic playing field*.

Id. (emphasis added). As predicted, at the hearings before the Commission on Multidisciplinary Practice, lawyers working for accounting firms testified overwhelmingly in support of MDP's.⁹

In addition, the accountants have openly challenged lawyers to think about their own interests over that of the public. Think about yourself. Think about the bottom line. ***Think about the money:***

Will the end result be the creation of a... regulatory system [similar to accountants]? I believe it will. Why? Because the same forces that have driven many professions and businesses to 'adapt or die' are pressing the legal profession to modify and accommodate MDP's.... [T]he incentives are huge and the resources exist. First and foremost, the incentive is a piece of the roughly \$100 billion-a-year market for legal advice which the law firms have monopolized for centuries.

Id. The reasons given by the accounting profession at the MDP hearings, however, were somewhat modified. The approach at the hearings was directed more toward the public. At the hearings, the accountants urged that it was not them that was really the driving force, it was the public. It's not so much our interest in expanding

⁹"Four out of five of the ***Big Five*** testified before the Commission that the most efficient way to provide a seamless web of services to clients was through an integrated services entity." *See Reporters Notes, ABA Report on MDP (emphasis added).*

out multi billion dollar buffet. It's really the public that is demanding change. The public is demanding "one stop shopping," "bundled services," "a complete buffet" because the consolidation of legal services will create efficiency and that means savings -- dollars -- additions to the bottom line.

Another theme in the accountant offensive carried the tag line -- lawyers, all dressed up with no place to go. If you don't capitulate voluntarily, *when we win this battle* either by change or market forces, you will not be prepared to compete. We will have the market and you will be all dressed up with no place to go.

Professional service firms with their roots in the accounting profession are well positioned to offer MDP services. Lawyers, by virtue of their self-imposed restrictions, are not.... 'Efforts by corporate purchasers of services to obtain optimal comprehensive solutions carry with them the real possibility that, in the absence of change, lawyers practicing in traditional *law firms in the coming century might find themselves all dressed up with no place to go.*' (quoting Steven Bennett).

Written Remarks of Treiger and Lipton, Co-Chairs, National Conference of Lawyers and CPA's, (emphasis added).

Finally, they urged, the tide of change is so far advanced, that you cannot stop the momentum even if you try. Essentially, you will be crushed by the wave. Your choices are really quite limited:

To address these changes and to prepare for the twenty first century, the bar has essentially three choices:

- , To do nothing, in which event external forces will become the sole determinants;
- , To wage a defensive and seemingly selfish battle;
- , To recognize the *tides of change* and attempt to help shape things to come by *working with, not against, the agents of change.*

See Written Remarks of Treiger and Lipton, Co-Chairs of National Conference of Lawyers and CPA's, emphasis and spacing added. See also, Squeeze Play, supra picturing a bench of accountants from the Big Five with a lone lawyer struggling to stay on the edge.

Let there be no doubt about it. The MDP issue did not arise out of a groundswell of public

demand. Even the ABA Commission Report on MDP's admits this.¹⁰ The MDP issue was a skillfully maneuvered operation.

And It Almost Worked – Almost

In August 1998, the ABA appointed a Commission to study the MDP issue. In the course of one year, the Commission was appointed, studied the issue, heard sixty hours of testimony from fifty-six witnesses from around the world and received written and oral comments from others. *See Report at page 1.* As the accountants predicted, the ABA study was driven by “urgency” due to the already existing “tide” of change:

“What urgency exists which requires action at this meeting of the House? The ABA president has called this the most important issue facing the legal profession today . Today lawyers are practicing in increasing numbers in professional services firms in the US, while claiming that they are not delivering legal services, and abroad such firms are holding themselves out as delivering legal services. The legal profession must address these issues now to ensure that the public interest is served.

See General Information Form from ABA at ABA Website. The Commission rushed to complete a report within one year – and it did.

The Report and accompanying documents are anything but an overwhelming endorsement of MDP's. To the contrary, the report carries with it a definite undertone of “*we have no choice.*” The theme is almost exactly as the accountants predicted – it's already happening, we can't stop it, we might as well allow

¹⁰The ABA Report states: “While ***detailed empirical data is not available***, representatives of both individual and corporate clients expressed support for relaxing the rules of professional conduct that currently either foreclose or make it extremely difficult to choose such an option.” Indeed, consumer witnesses admitted: “The fact is that the average consumer isn't aware that there is the possibility of getting legal services any way other than the current way [law firm]... Most consumers, in other words, aren't aware of what they are missing. But ***if you lift the restrictions*** barring multidisciplinary practices, ***I think you'll find*** just how great that ***hidden demand*** is.” testimony of Lora H. Weber, President and Executive Director of Consumers Alliance of the Southeast (emphasis added). Later the Report reveals: “Four out of five of the ***Big Five*** testified before the Commission that the most efficient way to provide a seamless web of services to clients was through an integrated services entity.” *See Reporters Notes, ABA Report on MDP* (emphasis added).

it so we can control it.

“Lawyers already practice in various forms of such relationships outside the US. An increasing number of U.S. lawyers with significant practice experience are leaving law firms to join organizations such as the Big 5 accounting firms that provide a variety of professional services, and those organizations have also substantially stepped up their hiring of recent law school graduates. As those organizations expand the use of lawyers to design and help sell products for use by clients of the organization, additional care must be taken to assure that the lawyer members or employees of the organization are not aiding the unauthorized practice of law.”

Report at 1. One lawyer member of the MDP Commission commented in an article in *The National Law Journal* in January 1999:

In my estimate, it will be fruitless to attempt to curtail or suppress these accounting firm activities... So what should the bar do? The only sensible answer is to compete more effectively. This would require many changes in the way that most lawyers “package and sell” themselves. It would also require us to reconsider provisions in our rules of ethics that hamper lawyers’ competitive capability. **Money is the Key.**¹¹ The relevant rules for reconsideration are those governing financial relationships between lawyers and other service providers, and the rules governing imputation of conflicts of interest.

See, Lawyers and Accountants Must Make it Work, G. Hazard, National Law Journal January 11, 1999. (Emphasis original).

The Report raised more questions than answers for the Bar. The Report begins with an acknowledgment of the “need to protect at all times the interests of clients and the public and the core values of the legal profession.” And it concludes that this is important. But it does not recommend a model which is capable of this. Indeed, the Commission does not recommend a model at all. It gives an illustration of “possible” amendments but limits its recommendations as follows: that the ABA amend the Model Rules “consistent with the following principles.” The principles describe the core principles which are implicated by such a sweeping change. It opines that “it is possible” to protect these values primarily through requiring members of MDP’s to report to the highest court of the land certifying their promise to hold and keep these values just as a lawyer would. This promise is based on a “trust me” system and the penalty for violation is “decertication” of the MDP. The lawyer is responsible for the conduct of the non lawyer members of the MDP who violate the rules and, as

¹¹This bolded phrase appears as a sub-heading in the article.

a matter of jurisdictional reality, is the only member within the power of the Court for disciplinary purposes. The proposal simply ignores jurisdictional realities and constitutionally mandated protections.

Florida Steps In

Of course, as all members of this Committee know, Florida was the leader in stopping the tidal wave before it came crashing down as the final word on the subject by the ABA. The recommendation of the Florida Bar stated:

RESOLVED, that the American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until additional studies demonstrate that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty.

It carried the day. Which brings us to where we are now.

While this Committee has been in existence since July of 1997, it has been unable to agree on the issues which are implicated in Florida by the MDP debate. It has tried, heartfully. It appointed issues sub-committees who exchanged drafts. It held meetings. It debated, endlessly. It wrote letters, and articles, and speeches. But the process, quite frankly, faced the danger of becoming bogged down. It is against this backdrop that the committee decided to appoint sub-committees to study the pro's and the con's of the issue from the Florida perspective.

The foregoing is not a criticism of the Committee. It recognizes the dedication and heart of this collection of volunteers. And more than this, the efforts of the Committee and all of the debate and the process bringing us to this point has had valuable results. It revealed that the implications of this potential change are so far reaching and drastic for our profession and the public that it would be irresponsible to undertake such a change without clear and convincing evidence that the public and our system of justice will not be harmed. The Con Subcommittee respectfully submits that this brief reveals sufficient evidence of public harm that it would be irresponsible to vote for change in the face of those dangers. Sufficient evidence exists to decide that Florida

should not be the guinea pig for change in the face of these substantial issues. At bottom, the advocates of change have not carried their burden.

Where Do We Begin?

Steven Covey, the national best selling author of *The Seven Habits of Highly Effective People* says that we must “begin with the end in mind.” No matter how you chose to package the MDP issue, it boils essentially down to the question of whether Rule 4-5.4 should be amended. This Rule, as with all the rules Regulating the Florida Bar, is a result of an order of our highest court. It has a longstanding and rich history intended to protect the most essential core value of our profession – independent professional judgment. The Supreme Court has vigorously enforced its provisions and has intensely criticized the “disasterous results” that can occur when a practicing member of the Bar enters into a profit-making enterprise with a commercial business which *subordinates the practice of law to the activities of the commercial business.*” See *James, supra*.

The Rules Regulating the Florida Bar clearly define the obligations of the Board of Governors when considering any rule amendment:

The board of governors shall review proposed amendments by referral of the proposal to an appropriate committee thereof for substantive review. After substantive review, an appropriate committee of the board shall review the proposal *for consistency with these rules and the policies of The Florida Bar.*

Although only the philosophical concept of an amendment has been suggested, this rule will ultimately determine the duties of the Board if and when such a proposal is made.

The Policies of The Florida Bar.

The Rules Regulating the Florida Bar direct that the purpose of the Florida Bar shall be:

- to inculcate in its members the principles of *duty and service to the public,*
- to *improve* the *administration of justice,*
- and to *advance* the science of *jurisprudence.*

See Rule 1-2, Rules Regulating the Florida Bar. At no time in history has the Florida Bar been more dedicated to the importance of independence and public trust. Indeed, in May 1990, the Florida Bar adopted one of its most sweeping pronouncements intended to recapture the public trust in our system of justice – The Ideals and Goals of Professionalism. This statement by the Board of Governors provides that “a lawyer should counsel and encourage other lawyers to abide by these ideals of professionalism” which include:

contributing one’s skill, knowledge and influence as a lawyer to further the profession’s commitment to serving others and to promoting the public good, including efforts to provide all persons, regardless of their means or popularity of their causes, with access to the law and the judicial system.

So important is the principle of independence to the public’s confidence in our system, that the Board of Governors has articulated the ideal related to this principle as follows:

Ideal: A lawyer should exercise independent judgment and should not be governed by a client’s ill will or deceit. **Goals:** A lawyer should counsel the client or prospective client, even with respect to a meritorious claim or defense, concerning the public and private burdens of pursuing the claim as compared with the benefits to be achieved...

Id.

Professionalism and instilling the trust of the public in our system has become the mission of most of the last 10 year’s bar presidents. This term, an all out publicity campaign has started in this direction. Even the logo of the Florida Bar has changed to include the promotion of professionalism, the pursuit of justice and the protection of rights. Never in history has the Florida Bar been more dedicated to the professional aspect of our business existence. It is in this context that this problem must be addressed.

Consistency With The Rules Regulating The Florida Bar

Even proponents of change admit that any change to Rule 4-5.4 will have far reaching implications on other core values within the rules and on the administration and continuation of those rules as drafted. The following is an analysis of these core values in the context of the Rules Regulating the Florida Bar. As our mandate suggests, no analysis is complete without an eye towards ***consistency with these rules.***

A Lawyer’s Duty of Confidentiality:

The MDP model has been built on an underlying assumption that the bundling of services creates efficiency and efficiency creates savings. Part of this efficiency and savings is found in the notion that clients can simply walk down the hall from one professional to the next. The client will have economy through the ability to speak with multiple professionals at once and there will be a reduction in “up to speed time” or knowledge of various aspects of the client’s problem. In the context of any other profession, this may be wise, efficient, and even advisable. In the context of the legal profession, it is not possible without substantially threatening the protections afforded by the attorney client privilege and duties of confidentiality.

In three distinct areas, the law takes special care to encourage such a free flow of information that challenges to the confidentiality of that information are fiercely resisted. This is because certain elemental societal functions would be threatened by anything less than complete honesty.

The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment

In the words of the United States Supreme Court, “These privileges are rooted in the imperative need for confidence and trust.” *Trammel v. United States*, 445 U.S. 40, 51 (1980).

The principle of lawyer-client confidentiality is given effect in two related bodies of law, the attorney client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional rules of ethics. Both have ancient roots and predate any formal rule enactments:

The principle of lawyer-client confidentiality is a cornerstone of legal ethics and has ancient roots. The attorney client privilege... was already established at the time of reign of Elizabeth I in England.... The origin of the legal duty to preserve secrets, as distinct from the evidentiary privilege, has been traced back at least as far as the mid-19th century in England... The lawyer’s obligation of confidentiality also draws from the common law of agency, which governs obligations arising from fiduciary relationships generally... An agent is prohibited from disclosing or using information revealed in confidence by the principal or acquired by the agent in the course of the agency, relating to the principal or to matters which the agent has been

employed... This rule governs lawyers as well as agents.

ABA/BNA Lawyers' Manual on Professional Conduct, 55:301-302. See also, Keir v. State, 11 So.2d 886 (Fla. 1943) (Florida has long recognized and enforced the common law doctrines).

The lawyer's ethical obligation to protect these confidences appears in two places. First, as a condition to licensure, every member of the Florida Bar must swear an oath which states:

The general principles which should ever control the lawyer in the practice of the legal profession are clearly set forth in the following oath of admission to the Bar, which the lawyer is sworn on admission to obey and for the willful violation to which disbarment may be had...
I do solemnly swear:... I will maintain the confidence and preserve inviolate the secrets of my clients... so help me God.

Oath of Admission to the Florida Bar. Second, Rule 4-1.6 of the Rules Regulating the Florida Bar provides:

A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c) and (d), unless the client consents after disclosure to the client.

This rule of confidentiality applies not merely to matters communicated in confidence by the client but also ***to all information relating to the representation, whatever its source.*** *See Comment.* As the comment suggests, the entire system of justice is dependent on confidence by the public in providing all information related to a legal matter. A lawyer is part of that system and cannot uphold the law without complete and accurate information.

The lawyer is part of a judicial system charged with upholding the law.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but encourages people to seek early legal assistance.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

Comment, Rule 4-1.6. "The attorney client privilege is in fact the oldest confidential communications privilege known in the common law. It is therefore not only an interest long recognized by society but also one traditionally deemed worthy of maximum legal protection." *American Tobacco Co. v. State, 697 So.2d 1249 (Fla. 4th DCA 1997).* The relative certainty and predictability of this protection is essential to the public's

confidence in the legal system.

But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. *An uncertain privilege*, or one which purports to be certain but results in widely varying applications by the courts, *is little better than no privilege at all*.

Upjohn Co. v. U.S., 449 U.S. 383, 101 S.Ct. 677 (1981)..

The MDP proponents admit that there will be an impact on client confidentiality. Combined services, by definition, will implicate combined discussions, sharing of documents, etc. But, they contend, this impact can be minimized by mandatory disclosures by lawyers to clients that certain conversations may not be protected by the duty of confidentiality. *See Report at 3*. They further argue that the issues can be resolved through screening devices.

In addition, it may be necessary for an MDP to implement special procedures to protect confidential information such as building firewalls in the firm's computer information system, restricting access to client files by the use of special passwords, and physically separating the lawyers and their non-lawyer assistants, paralegals, and secretaries from other service units within the MDP.

See Proposed Comment 3 to Model 5.8 in Appendix to Report. Ironically, this defeats the alleged justification of MDP's – efficiency which leads to savings.

At least one observer notes, “Under existing case law, the ABA commission’s multidisciplinary proposal would *increase the costs of asserting the privilege*.” *See Perils of the law-plus firm*, Paul Rice, Miami Daily Business Review, June 25, 1999, emphasis added. Rice analyzes each element of proof in a privilege assertion. In a law firm setting, each of these elements is either easy to prove given the minimal number of non-legal professionals exposed to the information or are presumed because of the way a law firm setting is known to exist. When the lawyer is providing legal and non-legal advice or is in a setting where others provide such, the analysis will be more akin to an in-house counsel analysis. Each communication must be shown to have been for legal advice and not business advice. While the author does not cite it, this is the heightened standard which was articulated by the Florida Supreme Court in *Deason*.

The complications which are caused by mixing business advice with legal advice are demonstrated aptly

in *Southern Bell Telephone and Telegraph Company v. Deason*, 632 So.3d 1377 (Fla. 1994). In *Deason*, in house counsel for Southern Bell conducted an internal review of alleged illegal behavior. The documents were touched, read and used for a myriad of purposes which related to Southern Bell's business. The Public Service Commission sought discovery of these documents. The Florida Supreme Court reviewed an administrative order compelling production on the basis that they were used in connection with *ordinary business purposes and not solely for legal purposes*. The Supreme Court noted that the "line between law-related communications and business communications [was] particularly blurry." It then analyzed the complications caused by the mixing of business advice with legal advice and outlined a heightened standard for upholding the attorney client privilege in the corporate context.

... a corporation relies on its attorney for business advice more than the natural person. Thus, it is likely that the 'zone of silence' will be enlarged by virtue of the corporation's continual contact with its legal counsel... [C]laims of the privilege in the corporate context will be subjected to a heightened level of scrutiny.

The five part test attempts to separate the world of business from the world of law and limits the protection to latter with possible waiver if the information is disseminated beyond those with a need to know. Much of the information was deemed unprotected because of the overlap. The combination of business and legal advice in the context of MDP's will be even more extreme. Unlike an in house lawyer who serves one client, an MDP lawyer will serve many. In the words of the United States Supreme Court, this arrangement will threaten the certainty which is essential to the function of the system. *See Upjohn, supra*.

Conjecture about whether clients will *in fact* be inclined to withhold information because of fear of waiver should be viewed with caution. In the United States Supreme Court's most recent analysis of the privilege, the high Court refused to retreat from the long standing policies which underlie the privilege and rejected any speculation about how client disclosure may or may not be affected if protections were reduced. *Swidler & Berlin v. U.S.*, 118 S.Ct. 2081 (1998). In *Swidler*, the Court held that the privilege survives the death of the client:

Knowing that communications will remain confidential even after death encourages the client

to communicate fully and frankly with counsel... Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be feared as disclosure during the client's lifetime.... [T]he loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place... Without assurances of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real.

The Court rejected the argument that there would be no harm in one limited exception in a criminal context because the limited times the issue would arise would likely reduce the impediment to the free flow of information.

A 'no harm in one more exception' rationale could contribute to the general erosion of the privilege, without reference to common law principles or 'reason and experience.'.... While arguments against survival of the privilege are by no means frivolous, they are based in large part on speculation – thoughtful speculation, but speculation nonetheless – as to whether posthumous termination of the privilege would diminish a client's willingness to confide in an attorney.

At least one more compelling reason remains to reject this possible encroachment on these core values – and that is the affirmative disclosure obligations of various professions. More compelling than the affirmative obligation to remain silent is the affirmative obligation to disclose and the limitations on that obligation for lawyers compared to all other professionals. The ABA and other bar associations have dedicated great time and effort comparing the AICPA rules on confidentiality and a lawyer's obligations in this regard.¹² But this is not an issue about accountants. This is an issue about the combination of lawyers and any other non-lawyer that wishes to combine. This conceivably could include anything from a used car salesperson to an emergency room physician, to a clinical psychologist. *See Footnote 2, supra.* Little attention is given to the myriad of other business persons

¹²AICPA rules provide that a member in public practice shall not disclose any confidential client information without the specific consent of the client. The Rules goes on to provide that it shall not be construed to relieve his/her professional obligations under certain other rules, to affect in any way the member's obligation to comply with a validly issued and enforceable subpoena or summons, or to prohibit a member's compliance with applicable laws and government regulations. Moreover, Section 10A of the Securities Exchange Act of 1934 imposes upon the auditor under certain circumstances an obligation to report certain illegal acts directly to the SEC. SEC officials have opined that it is impossible to reconcile the role as private advocate with certain duties accountants and auditors owe to the investing public.

which may combine with a lawyer if MDP's were permitted. Indeed, most of the business interests which may conceivably combine with a law firm have no confidentiality restrictions whatsoever. To the extent that others have such restrictions, or affirmative disclosure obligations, the ability to chart and graph the possible conflicts and inconsistencies would be impossible.

The ramifications to the public of the erosion of confidentiality is simply too severe to justify change for the sake of the bottom line.

A Lawyer's Duty of Competence and Loyalty

Equality before the law is a basic ideal of American civilization and, indeed, of civilization itself. Despite *de facto* inequality of intelligence, education, experience, wealth and character, the ideal of the rule of law is *de jure* equality, that all are entitled to equal treatment before the law.

A society's legal system which reflects the society itself and the American legal system, founded on the notion of individual rights and procedural fairness, is complex. An understanding of the legal system requires extensive specialized education and years of practice. Those who have achieved minimum levels of the expertise necessary to advise the public on legal matters and who meet minimum standards of conduct and good character are admitted to the practice of law. Only then is an individual deemed a lawyer. And even this threshold acceptance is conditioned on continuing obligations to maintain a level of expertise and competence worthy to qualify one as a public advisor on the law.

While there may be wide disparities of ability among lawyers, the establishment of minimum standards of education and character assures the public of at least a basic level of competency and trustworthiness. It is this basic competency which assures *de jure* equality before the law. It is lawyers who help even the odds.

Lawyers protect client's rights. Loyalty is axiomatic to the lawyer's duty of protecting the client's rights. The unique relationship between a lawyer and a client is perhaps the ultimate fiduciary relationship and loyalty is at the heart of that relationship.

While a lawyer is rarely obligated to accept a client's cause, once accepted, the lawyer's loyalty is

defined. It is to that client and that client's cause, within the bounds of the law. The function of the system would surely falter if clients feared that the fiduciary entrusted with their cause could later accept benefits and burdens which advanced the lawyer's or others' interests over the client's. So important is the public's trust in that unwaivering loyalty, that the law imposes restrictions designed to limit the circumstances which are more likely than not to interfere with the lawyer's ability to place the client over the lawyer's own interests or the interests of others.

Nowhere in the rules is this duty more prominent than in Rule 4-1.7 prohibiting conflicts of interest. This rule prohibits both the representation of a client with interests adverse to another client and it prohibits representation of a client if that representation will be limited by the lawyer's responsibilities to another client, a third person or the lawyer's own interests.

The comment to Rule 4-1.7 illustrates the meaning and purpose of the rule in terms of loyalty:

“Loyalty to a Client”

Loyalty is an essential element in the lawyer's relationship to a client.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests.

The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Thus, the duties of loyalty and independence are inextricably intertwined. The lawyer must maintain an undivided loyalty to the client to enable the lawyer to exercise the lawyer's independent professional judgment. Conversely, the lawyer's ability to practice in an environment of independence makes loyalty possible.

Limitations Caused By Duties To Other Clients

Without express and informed client consent, a lawyer may not accept a representation directly adverse to a current client. Even with the consent of both parties, the lawyer may not do so if it is unreasonable to believe that the new representation will not adversely affect the lawyer's responsibilities to the first client. Rule 4-1.7.

Appearing on both sides of the same transaction inevitably presents an unwaivable conflict for the lawyer. See Comment, Rule 4-1.7. So important is this duty to the public's confidence in our system, that it is imputed to members of the organization in which the lawyer practices. See Rule 4-1.10. The duty survives the termination of the representation and prohibits the lawyer from taking on interests adverse to the former client in the same or substantially related matter. See Rule 4-1.9. As the comments to these rules suggest, no reasonable person would truthfully confide in their lawyer about an adversary if that adversary could later obtain the lawyer's unwaivering duty of loyalty in the same matter.

While other business organizations permit the use of screening devices to allow the business to profit from work for *and* against a client, or do not require screening at all¹³, the legal profession has found the potential impact on the public confidence in the system too great to allow such a profit over duty exception to exist. Rule 4-1.7 does not recognize or permit screening to cure this type of conflict. Even voluntary screening of the most impenetrable force will not save a lawyer from disqualification in these circumstances. *Edward J. DeBartolo Corp. v. Petrin*, 516 So.2d 6 (Fla. 5th DCA 1987). No amount of profit is more important than the public's perception that the lawyer can function within his duties of loyalty and confidentiality.

Indeed, the limited area where the Court has made exception to this rule reflects just this premise. The recognition of screening devices, or Chinese Walls as they are known, appears in the Rules in the context of transition from public to private employment. Rule Regulating the Florida Bar 4-1.11. The comments to the Rules make it clear that the limited exception is made to encourage public service, not to protect profit.

...the rules governing lawyers presently or formerly employed by a government agency should

¹³The conflict rules of the accounting profession are less restrictive than the conflict rules of the legal profession. Under the AICPA rules, accountants cannot simultaneously counsel current, or current and former clients, who are directly adverse. However, the rules allow a waiver and the use of screening devices. The legal ethics rules are more restrictive. The legal rules should be changed, accountants urge. *Testimony of Richard Spivak, Arthur Anderson partner and lawyer, 3/31/99*. Indirect conflicts are not imputed in accounting firms. Consider a situation where: One professional in the firm is representing client A. A second professional is representing B in an unrelated matter. A and B, however, are adverse in a third matter. The accounting rules do not require consent or disclosure. The legal rules should be changed, accountants urge. *Testimony of Richard Spivak, Arthur Anderson partner and lawyer, 3/31/99*.

not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against *entering public service*.

Accordingly, where such a transition is made, three requirements exist: a Chinese Wall must be erected, no portion of the fee from the overlapping representation must be directly apportioned to the screened lawyer, and written notice must be given to the government to enable it to marshal strict compliance with the rule. The Supreme Court did not choose to extend such an exception in the context of private employment and courts have refused to extend it. *Edward J. DeBartolo Corp. v. Petrin*, 516 So.2d 6 (Fla. 5th DCA 1987).

Even in contexts where Chinese Walls have been allowed or used, they have been subject to heavy criticism. See *Written Remarks of William Hannay, Chair Section of International Law and Practice*. (“there is no Chinese Wall that a grapevine cannot climb over”). See also *Testimony of Sydney Cone*. (Discussing the arrogance and unworkability of a “trust me” rule over a rule subject to independent safeguards for the client).

Limitations Caused by Duties to the Lawyer

Perhaps the most important limitation imposed upon a lawyer is the duty to put his/her client’s interests above his or her own financial and other interests. Above all, the prohibition on fee sharing and partnerships with non-lawyers recognizes the natural human instinct to protect self over others – particularly others not related by blood or marriage but by the mere payment of money for service. No lawyer can serve two masters and to suggest otherwise is to fly in the face of the human experience. The fee splitting prohibitions recognize this by minimizing the number of situations in which lawyers are motivated by their own economic incentives rather than by their client’s best interests. *Lawline v. American Bar Association*, 956 F.2d 1378 (7th Cir. 1992) cert. denied, 510 U.S. 992, 114 S.Ct. 551 (1993).

Maintenance of this loyalty is recognized repeatedly in the rules and elsewhere.

The lawyer’s own interests should not be permitted to have adverse effect on representation of a client.

See *Comment, Rule 4-1.7*.

... a lawyer’s need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee...

Id.

A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Id.

I will never reject, from any consideration personal to myself, the cause of the defenseless and oppressed, or delay anyone's cause for lucre or malice. So help me God.

Oath of Admission to the Florida Bar.

I will exercise independent judgment...

Creed of Professionalism.

A lawyer should exercise independent judgment...

Ideals and Goals of Professionalism, adopted by Board of Governors of the Florida Bar, May 16, 1990.

A financial interest in a lawyer's billing or financial control over a lawyer's practice by a non-lawyer would give such non-lawyer the economic power to compromise the lawyer's professional obligations of undivided loyalty to the client and freedom of exercise of the lawyer's professional independence of judgment. While modern culture holds that virtually anything can be made a "commodity" that can be bundled, consolidated and resold, neither loyalty nor any other virtue can be made a commodity. ***It's not all about money.*** The attorney/client relationship, the very practice of law, is grounded on the virtue of loyalty and any business organization where fees for legal services are shared with non-lawyers will destroy that virtue.

Regulation of The Legal Profession And Adverse Effects on Independence

The proponents of MDP's admit that there are regulatory implications on any scheme which affirmatively co-mingles the practice of law with the practice of other professions. Indeed, some of the proponents at the ABA level even went so far as suggesting that a "super-regulator" may ultimately be required to adequately monitor these newly created entities. Clearly the theme of the comments, report and testimony are that only lawyers in MDP's can be regulated by the state's highest court, this leaves much room for abuse, and the model appended by the ABA Commission to the Report gives a minimum possible solution which is not complete if these things

take hold. The system would be based on a “trust me” reporting scheme that depends almost entirely on the organization itself and puts the burden of compliance and discipline on the lawyer members. How great for public confidence in the justice system! There is no real enforcement ability because there is no disciplinary jurisdiction over non lawyers. The primary long term solution discussed by many proponents involves a revamping of the current system regulating lawyers and replacing it with either a global regulator [Department of Business and Professional Regulation -- DBPR] or a newly created regulator.

This issue has radical implications for the public. First, it impacts a separation of powers doctrine that has deep meaning in the administration of justice. Quoting one of our most well respected jurists:

We must never lose our independence or permit incursions into it. The danger is clearly present; an independent judiciary without an independent bar is like a scabbard without a sword.

Comments by the Honorable William M. Hoeveler, Senior District Judge, United States District Court, Southern District of Florida to ABOTA on Professionalism.

A Rich History

Every civilization that has embraced the notion of lawyers as advocates of client's rights, has likewise embraced the necessity of the regulation of lawyers. Traditionally, admission to the Bar was literally the permission granted by a sitting court for an individual to cross the bar of justice and argue before the bench of sitting judges. A person so admitted who thereafter did not live up to the required societal standards was disbarred and that permission was withdrawn. Today, constitutionally, that duty lies exclusively with the Florida Supreme Court. *Article V, Section 15, Florida Constitution.*

Earlier in this century, Florida lawyers had no mandatory organization. In the 1930s, it was first proposed that all lawyers, upon admission to practice, be required to be members of the state Bar system. The Supreme Court initially rejected this proposal. But in 1947, Bar leaders once again approached the Court to ask for compulsory membership requirements. Those Bar leaders argued that only through an integrated organization of all Florida lawyers could lawyers receive uniform education on changes in Florida law and court procedures. An integrated Bar would also pave the way for a uniform discipline system, capable of weeding out unethical lawyers and assuring the public that only lawyers with high standards would be allowed to practice law. In the

summer of 1949 the Florida Supreme Court told Bar leaders to form an integrated Bar. Since then, all lawyers who practice in Florida must be members of The Florida Bar.

We cherish our independent judiciary, a hallmark of our legal system. The judiciary balances and, where necessary, checks the power of the other two branches. Judges are necessarily protected from the influence of partisan politics in order to render decisions based on the law, rather than on popular opinion. The Florida Bar has long maintained that Florida's separation of powers doctrine precludes legislative entry into lawyer regulation. Rather, regulation of the legal profession is a unique and proper power of the courts in the exclusive exercise of the supreme court's judicial function, under Article V Section 15 of the Florida Constitution.

However, regulation of The Florida Bar by the Supreme Court has regularly come under attack. Proposals are made to place disciplinary regulation of lawyers under the executive branch or to subject the practice of law to legislative control. For example, an effort to have the legal profession regulated by the Department of Professional Regulation went before the Florida House of Representatives for the first time in 1984. (The measure failed by a close vote, 62-51.) In 1993, a bill was proposed to provide that admission of persons to practice law and discipline of persons admitted should be pursuant to general law rather than by exclusive jurisdiction of the supreme court. Similar measures, all calling for the restructure of regulation of Florida lawyers, were proposed in each subsequent legislative session, from 1994 through 1999.

The Florida Bar has responded that lawyers are members of the judicial branch in a real sense. They are "officers of the court." Their duties, which extend beyond representing a client's best interest, include duties to the system of justice itself. Regulation of the Bar and the practice of law is unlike regulation of any other profession because the court's functions are inextricably intertwined with the practice of law. Lawyers' conduct, therefore, is subject to special and stringent regulatory supervision because what lawyers do is an integral element of the judicial process. As the Florida Supreme Court asserted when it unified the former Florida State Bar: "It is hardly necessary to assert that the bar has responsibility to the public that is unique and different in degree from that exacted from the members of other professions." *Petition of Florida State Bar Association*, 40 So.2d 902, 908 (Fla. 1949).

The preamble to our Rules of Professional Conduct expressly affirm the importance of this commitment:

Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. Within that context, the legal profession has been granted powers of self-government. Self-regulation helps maintain the legal profession's independence from undue government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on the executive and legislative branches of government for the right to practice. Supervision by an independent judiciary, and conformity with the rules the judiciary adopts for the profession, assures both independence and responsibility.

Thus, every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.”

The Tallahassee Democrat eloquently communicated the same idea in a different way during one of the legislative attacks on regulation of the legal profession, April 8, 1988:

There is no doubt that lawyers are a unique group, charged as officers of the court with a higher calling—the stewardship of our justice system—and that there are valid reasons for that status. The Bar, supervised by the Supreme Court, does a better job of regulating its fraternity than DPR does of policing any of the other professions, and there is no good reason to change that unique status...This extraordinary power of self regulation requires an equally extraordinary sense of public responsibility and...restraint. Or it will surely one day be lost. And both the profession and the public would be the worse for that.

The inevitable conclusion of a mixed business entity will be the need for a different regulatory scheme. Unless and until the Constitution of the State of Florida is radically amended to grant the Florida Supreme Court sweeping new powers to regulate non-lawyers, any change to the Rules of Professional Conduct permitting the splitting of fees for legal services with non-lawyers will effectively strip the Florida Supreme Court of its constitutional mandate to regulate the practice of law. The separation of powers so integral to the function of our system will be seriously threatened thereby harming the public. In the words of the Honorable William Hoeweler, *the scabbard will have no sword.*

What Is the Relevant Inquiry?

Much of the MDP debate has centered around the concept that MDP's are already operating and that we will not be able to stop them so we might as well join them and regulate it as much as we can. The purported "support" for this conclusion is mixed. Some opine that the accounting profession has billions behind its offensive and would crush any bar association daring to challenge their public proclamations that the lawyers in their doors are not technically "practicing law." Some believe that other Bar associations have not pursued the accounting profession to conclusion in this context because the Bar did not have the resources to fight the fight. Others believe that the UPL laws will not be sufficient to stop the behavior because the facts are so incapable of independent verification and big business wants to add to the bottom line by consolidating service. Some believe that at least some segment of the public will endorse this and therefore the public harm element will be difficult to prove. Others simply focus on the potential adverse financial impact on lawyers and run for solutions before considering the consequences.

A quote from *Florida Bar v. Murrell*, 74 So.2d 221 (Fla. 1954) is poignant in response:

Chief Justice Stacy epitomized the essential quality of an upright lawyer to be that which 'expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing if it is right, and the resolve not to do the pleasant thing if it is wrong.'

Citing, In re Farmer, 191 N.C. 235, 131 S.E. 661, 663.

If the conclusion of the Bar is that the public will be harmed by such a change¹⁴, which we believe this brief clearly reveals, it is duty bound to do the right thing, regardless of the obstacles which stand in the way, regardless of the chance of success in the long run and regardless of impact to the bottom line of lawyers. No cause in recent history has made a more blatant attempt to elevate money over the public interest.¹⁵ The fact

¹⁴Ironically, many addressing the issue fear a public backlash at a decision ***not to allow*** MDP's. A real understanding of the issue reveals that the back lash should come publically from a decision ***to allow*** MDP's for the protection of lawyers over any harm to the public.

¹⁵The HMO issue comes close. The epilogue to that story is so well known, the mere mention of HMO's makes the point. But the analogy is apt.

that the financial impact most likely to be made is on the pocket books of lawyers places our motives at the center of public scrutiny. And our duty to do the right thing is heightened in this environment.

The UPL Implications

As Edith Osman, President of the Florida Bar, so aptly noted in presenting the Florida Bar's recommendation to the ABA Commission on Multidisciplinary Practice: no analysis would be complete without consideration of the UPL implications. The UPL implications are accordingly analyzed below.

The Public Will Be Harmed If Non-lawyers Who Are Neither Licensed Nor Regulated Participate in Giving Legal Advice.

What is the 'practice of law?' Since the seminal case of *State ex rel. Florida Bar v. Sperry*, 140 So.2d 587 (Fla. 1962), the Florida Supreme Court has recognized that protecting the public and reducing the financial loss that individuals suffer at the hands of unlicensed practitioners remain the primary rationales for prohibiting the unlicensed practice of law. See *The Florida Bar re Amendments to Rules Regulating The Florida Bar*, 685 So.2d 1203 (Fla. 1996).

In *Sperry*, the Court recognized that :

The reason for prohibiting the practice of law by those who have not been examined and found qualified to practice is frequently misunderstood. It is not done to aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop. It is done to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe.

Id. at 595.

The *Sperry* court also provided comprehensive guidelines to determine what activities constitute the practice of law. It determined that practicing law includes not only services in representing another before the courts, but also giving legal advice and counsel to others as to their rights and obligations under the law and preparing legal instruments, by which rights are either obtained, secured or given away. *Sperry* at 591. The Court said it was safe to follow the rule that:

[I]f the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law. *Id.*

Since *Sperry*, the Supreme Court has had many occasions to consider whether various activities, when performed by non-lawyers, constitute the practice of law. The Court has consistently been guided by twin pole stars -- whether the activity promotes public access and whether it either actually or potentially causes public harm.

In *In re: The Florida Bar*, 215 So.2d 613 (Fla. 1968), the Court determined that certain activities, when performed by a securities broker, constituted the unauthorized practice of law. These activities included legal advice given concerning the application, preparation, advisability or quality of any legal instrument, document or form in connection with the disposition of property, either inter vivos or upon death.

Distinguishing the preparation of living trusts from the preparation of pension plans, the Court held that non-lawyer companies selling living trusts were engaging in the unlicensed practice of law, and that the public was either actually being harmed or had the potential of being harmed, in *The Florida Bar Re: Advisory Opinion—Nonlawyer Preparation of Living Trusts*, 613 So.2d 426 (Fla. 1992) (emphasis added). The Court reasoned that practice in the pension area was before administrative agencies by authorized professionals, and thus the public was afforded protection through federal regulation and licensing. However, nonlawyer sellers and drafters of living trusts were not held accountable to any governmental agency or body. The Court further noted in its opinion the conflict of interest present when a lawyer was employed by a corporation selling the living trust, rather than by the client. In that event, the Court said that a lawyer who assembled, reviewed, executed, and funded a living trust document should be an independent counsel paid by the client and representing the client's interest alone. *Id.* at 428.

Further guidance on what activities constitute practicing law is found in UPL enforcement cases. The Supreme Court determined that preparing legal documents relating to domestic relations, and appearing in court on behalf of others in cases relating to domestic relations, is the unauthorized practice of law, in *The*

Florida Bar v. Strickland, 468 So.2d 983 (Fla. 1985). In *The Florida Bar v. Mickens*, 465 So.2d 2d 524 (Fla. 1985), the Court found that preparing legal documents and appearing in court in tenant eviction proceedings is the practice of law. And in *The Florida Bar v. Kaufmann*, the Court determined that the practice of law includes appearing in court or in proceedings which are part of the judicial process.

Are MDP's Engaged in the "Practice of Law?"

There isn't much challenge to the conclusion that lawyers employed by MDPs are engaged in the practice of law. Anecdotally, many have reached this conclusion. One lawyer was offered a position with an accounting firm, and was assured that the lawyer's day-to-day practice would be virtually the same as it is with the lawyer's private law firm. Accounting firms' websites confirm to the inquiring public that they offer legal services.

Moreover, activities MDPs are likely to perform include those which the Supreme Court has specifically prohibited non lawyers to engage in, because they result in public harm or have the potential of doing so. For example, MDPs likely give legal advice concerning the application, preparation, advisability or quality of legal instruments, documents or forms in connection with the disposition of property, either inter vivos or upon death, an activity prohibited by *In re: The Florida Bar*, 215 So.2d 613 (Fla. 1968). The concept of "one stop shopping," in which MDPs employ various personnel to perform multiple tasks for the same client, also presents conflict of interest problems. The Supreme Court has recognized, in *The Florida Bar Re: Advisory Opinion—Nonlawyer Preparation of Living Trusts*, 613 So.2d 426 (Fla. 1992) the inherent conflict of interest when a lawyer employed by a corporation—such as an MDP—assembles, reviews, executes, and funds a living trust document for a client. Unless the client pays for independent counsel who will represent the client's interest alone, the MDP's interest is likely to be paramount to the client's.

In sum: The Supreme Court has quite specifically defined a good number of activities which non-lawyers may not perform, because they constitute the unauthorized practice of law. Cases such as *Sperry* provide general guidelines, while other cases either condone or prohibit distinct activities. The competing goals of public access versus public harm provide the constant tension.

Based on the information available, MDPs are providing legal services, as specifically defined by the Supreme Court. Its definitions are never made in a vacuum, but always take the public access versus public harm tension into consideration. If it considered the issue today, the Court would likely find, that the public is being harmed by the MDPs' unauthorized practice of law.

What is Our Duty?

The Florida Bar Should Investigate and Vigorously Enforce the Rules Regulating the Florida Bar and Devote Such Assets as May Be Necessary to Diligently Prosecute All Violations Thereof.

By rule, the Supreme Court has vested three entities as “agencies of the Supreme Court” with all of the “jurisdiction...necessary to conduct the proper and speedy disposition of any investigation or cause.” Rule 3-3.1.

One such agency is The Board of Governors of the Florida Bar (BOG). The BOG has the authority and responsibility to govern and administer the Florida Bar and to take action it considers necessary to accomplish its purposes. [RRFB 1-4.2]. By express delegation, the BOG has been charged with “the responsibility of enforcing the Rules of Discipline and the Rules of Professional Conduct;” the obligation to “supervise and conduct disciplinary proceedings in accordance with” the Rules Regulating the Florida Bar; and “is assigned the responsibility of maintaining high ethical standards among the members of the Florida Bar.” See RRFB 3-2.1(b); 3-3.2; 1-8.1; 2-3.1. According to the Grievance Committee Handbook: “The bar is required to assume the initiative in disciplinary investigations. Therefore, if any member of the board of governors, a grievance committee, bar staff or a member of the bar is aware of potential unethical conduct or allegations thereof, ***it is their duty*** to report that action to the appropriate authorities and to undertake appropriate action. See Handbook, page 5 citing RRFB 4-8.3(a). See RRFB 3-7.3c stating that complaints by Florida Bar need not be in writing.

Enforcement is not only possible, it is mandated. And it can be accomplished in more than one way.

Most who throw up their hands at the Bar's ability to investigate and prosecute such conduct focus only on the first of these options.

Enforcement By UPL Committee.

The UPL Committee is empowered to handle this function. Critics have expressed little confidence in this option as funding is limited or resources limited. The fact is, if this is an issue of compelling importance, the Bar has the obligation to do what it takes to give this department the proper support. We think we can win the battle, but that is ultimately up to the Supreme Court of Florida. Sufficient evidence exists to investigate the practice.

Enforcement By Grievance Procedures

The second enforcement option is the formal grievance procedure. This option is little discussed by proponents or opponents but carries benefits for the marshaling of the MDP issue. The Florida Bar takes the position that only lawyers and law firms can render legal services in Florida. Thus, if multidisciplinary firms are rendering legal services, the lawyers who are part of those firms are assisting the unauthorized practice of law and violating other independent duties. MDPs such as Arthur Andersen advertise on their websites that their services include "legal services." If these services are provided to consumers (as opposed to in-house counsel types of services), the lawyers within the MDPs necessarily share their fees with non-lawyers. If one of the lawyer's defenses is that he or she is not practicing law or doing legal business, there would be no privilege and thus no prohibition against discovery because of confidentiality.

One of the differences of pursuing enforcement of The Bar's Rules through the grievance procedure, as opposed to UPL, is that each prosecution is individual. MDPs would not be permitted to intervene in the grievance process. Also, a UPL action would be filed directly against the MDP. Such an action would directly affect the MDP's rights and trigger its vast resources. On the other hand, in a lawyer regulatory or disciplinary action, the only private rights involved are those of the respondent lawyer. Although the MDP would undoubtedly participate behind the scenes in any action against a lawyer employee, the litigation should be somewhat tempered, compared to the potential hurricane forces other bar associations have feared.

At bottom, the UPL/Enforcement implications are this. If lawyers in MDP's are violating the law or the regulations of the profession, they are subject to regulation. Period. The Bar must decide to put its forces behind the effort.

Empirical Data

Proponents and opponents have debated the need for empirical data. But the question inevitably becomes, what kind of empirical data? How are you going to get the true sentiments of the 'public' rather than the views of interest groups that have a stake in the issue? Indeed, this is an issue on which lawyers are not fully informed. How can we credibly go to the public without understanding the issue ourselves? We submit that it would be irresponsible to do so. There are core values of the legal profession involved in this issue and to this date we have not seen any 'empirical' data that comes close to overcoming these core values.

Conclusions and Recommendations

Consistent with the recommendation at the beginning of this report, the Con Subcommittee of the Florida Bar Special Committee on Multidisciplinary Practice respectfully recommends that the Florida Bar adopt the following position:

POSITION OF THE FLORIDA BAR ON MULTIDISCIPLINARY PRACTICE

- V. IT IS IN THE PUBLIC INTEREST TO PRESERVE THE LAWYER'S DUTY OF UNDIVIDED LOYALTY TO THE CLIENT.
- VI. THE FLORIDA BAR FINDS NO CREDIBLE EVIDENCE OR PERSUASIVE ARGUMENT THAT IT WOULD BE IN THE PUBLIC INTEREST TO AMEND THE RULES REGULATING THE FLORIDA BAR OR THE CODE OF PROFESSIONAL RESPONSIBILITY TO ALLOW THE SHARING OR SPLITTING OF FEES FOR LEGAL SERVICES WITH NON-LAWYERS.
- VII. IT IS IN THE PUBLIC INTEREST FOR THE SUPREME COURT OF FLORIDA TO REGULATE THE PRACTICE OF LAW BY REGULATING THE ADMISSION OF PERSONS TO THE PRACTICE OF LAW AND THE DISCIPLINE OF PERSONS ADMITTED.
- VIII. THE FLORIDA BAR SHALL VIGOROUSLY ENFORCE THE RULES REGULATING THE FLORIDA BAR AND WILL DEVOTE SUCH ASSETS AS MAY BE NECESSARY TO DILIGENTLY PROSECUTE ALL VIOLATIONS THEREOF.