STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF PROFESSIONAL CONDUCT

IT IS HEREBY ORDERED that the Supreme Court will hold a hearing in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on June 18, 2002 at 2:00 P.M., to consider the petition of the Minnesota State Bar Association to amend the Minnesota Rules of Professional Conduct to permit multidisciplinary practice. Copies of the petition and appendix are annexed to this order.

IT IS FURTHER ORDERED that:

1. Petitioner shall file a supplemental statement that addresses on a state-by-state basis the status of multidisciplinary practice. Petitioner shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before May 1, 2002, and

2. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before May 30, 2002, and

3. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the Clerk of Appellate Courts together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before May 30, 2002.

Dated: March 14, 2002

BY THE COURT:

Kathleen A. Blatz
Chief Justice

No. C8-84-1650

State of Minnesota
In Supreme Court

In re:

Amendment of Minnesota Rules
of Professional Conduct

PETITION OF MINNESOTA STATE BAR ASSOCIATION

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Attorneys for Petitioner
Minnesota State Bar Association

No. C8-84-1650
STATE OF MINNESOTA
IN SUPREME COURT

In re:

Amendment of Minnesota Rules
of Professional Conduct

PETITION OF MINNESOTA STATE BAR ASSOCIATION

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

Petitioner Minnesota State Bar Association ("MSBA") respectfully submits this pleading to petition this Honorable Court to adopt amendments to the Minnesota Rules of Professional Conduct ("MRPC") to modernize those rules to accommodate multidisciplinary practice. In support of this Petition, the MSBA would show the following:

1. Petitioner MSBA is a not-for-profit corporation of attorneys admitted to practice law before this Court and the lower courts throughout the State of Minnesota.

2. Petitioner MSBA has been actively involved in studying a complex set of issues relating to what is commonly known as "Multidisciplinary Practice" or "MDP." In a multidisciplinary practice, lawyers work together with nonlawyers to provide clients with a variety of services. The MRPC currently permit some such arrangements. They do not, however, permit lawyers to form partnerships or share ownership with nonlawyers if any

of the activities of the entity consist of the practice of law. In 1999, the MSBA created a broad-based task force, chaired by United States Magistrate Judge Arthur J. Boylan and Minneapolis lawyer Rebecca Egge Moos, to study the issues relating to multidisciplinary practice and make recommendations for the Minnesota Bar. That task force prepared a comprehensive report and recommendations that were adopted by the MSBA General Assembly at the annual convention of the MSBA on June 23, 2000. A copy of the report is attached to this petition as Exhibit A.

Following the adoption of its report and recommendations, the MSBA multidisciplinary practice task force further studied the issue and prepared specific recommendations for amendments of rules to implement its recommendations. Those recommendations were adopted by the MSBA General Assembly at its annual convention on June 22, 2001, and are set forth in this petition.

The June 2001 report is attached to this petition as Exhibit B.

3. The MSBA believes that expanding opportunities for multidisciplinary practice in Minnesota would serve the interests of both clients and the legal profession. As the MSBA task force's June 2000 report indicates, there is broad public support in this state for the concept of multidisciplinary practice. The task force heard from representatives of the Minneapolis Chamber of Commerce, solo and small firm lawyers, and consumer and public interest groups, all of whom expressed an interest in the flexibility and efficiency offered by MDPs. (Ex. A at 5)

4. At the same time, the MSBA recognizes that its primary consideration in proposing changes to the MRPC on multidisciplinary practice must be in preserving what have been referred to as the core values of the legal profession: independence of judgment, loyalty to the client, and confidentiality. The MSBA believes that the amendments which follow effectively balance the client interest in more flexible delivery of legal services with the need to maintain ethical standards consistent with the profession's obligation to the justice system and the public.

5. The specific amendments proposed below would have the following effect and purpose:

(a) permit lawyers to engage in multidisciplinary practice by forming partnerships, professional firms, or other associations with nonlawyer professionals as long as the lawyers retain majority control of the entity;

(b) provide that only lawyers in the entity may engage in the practice of law;

(c) define “professionals;”

(d) define “practice of law;”

(e) require lawyers practicing law in the entity to obtain written confirmation from each member of the entity that there will be no interference with the lawyers’ independence of judgment or the lawyer-client relationship; and

(f) impute conflicts firm-wide by treating clients of nonlawyer professionals as clients of the firm's lawyers for purposes of the rule on imputed conflicts.

The specific amendments necessary to effect this proposal are set forth below:

1. The "Preamble - Terminology" section of the MRPC should be amended as follows:

TERMINOLOGY

"Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" denotes both a law firm and a multidisciplinary practice. See Rule 5.4(b).

~~"Firm" or "Law Firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.~~

"Fraud" or "Fraudulent" denotes conduct having purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Law Firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.

"Partner" denotes a lawyer member of a partnership and a lawyer shareholder in a ~~law~~ firm organized as a professional corporation.

"Practice of law" denotes the following activities:

1. Rendering legal consultation or advice to a client;
2. Appearing on behalf of a client in any hearing, proceeding or related deposition or discovery matter or before any judicial officer, court, public agency, referee, magistrate, commissioner or hearing officer, except where rules of the tribunal involved permit representation by nonlawyers;
3. Engaging in other activities that constitute the practice of law as provided by statute or common law.

"Professionals" denotes individual licensed professionals who are governed by promulgated codes of ethical conduct.

"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

"Tribunal" includes all courts and all other adjudicatory bodies.

2. MRPC Rule 110 (a) should be amended as follows:

Rule 1.10 Imputed Disqualification: General Rule

(a) Except as provided in this rule, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2. Solely for purposes of this paragraph, the clients of nonlawyer professionals who are partners or employees of a firm shall be regarded as clients of the lawyers of the firm.

3. MRPC Rule 5.4 should amended as follows:

Rule 5.4 Professional Independence of a Lawyer

(a) A lawyer or ~~law~~ firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer the proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

(3) A lawyer or ~~law~~ firm may include nonlawyer partners and employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed upon purchase price.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law~~.~~ except as set out in Rule 5.4(e).

(c) 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.

(d) Except as set out in Rule 5.4(e), ~~A~~ a lawyer shall not practice with or in the form of a professional firm or association authorized to practice law for a profit, if a nonlawyer:

(1) Owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of a lawyer for a reasonable time during administration;

(2) Possesses governance authority, unless permitted by the Minnesota Professional Firms Act; or

(3) Has the right to direct or control the professional judgment of a lawyer.

(e) Notwithstanding the foregoing provisions of this Rule, a lawyer may form and practice in a partnership, professional firm or other association that is a multidisciplinary practice which meets the following requirements:

(1) A majority percentage of ownership in the entity must be held by lawyers licensed to practice law and practicing law in that entity;

(2) Only lawyers in the entity shall be engaged in the practice of law;

(3) The lawyers practicing in the entity must ensure that they retain the control and authority necessary to ensure lawyer independence in the rendering of legal services;

(4) The lawyers practicing law in the entity must obtain an affirmative written agreement signed by each member of the entity that there will be no interference with the lawyers' independence of professional judgment or with the client-lawyer relationship; and

(5) The nonlawyer owners must be professionals actively practicing their professions in the entity and may not be passive investors.

4. For the sake of consistent terminology, MRPC Rules 1.15, 5.1, 5.3 and 7.2(g) should also be amended as follows:

Rule 1.15. Safekeeping Property

(a) All funds of clients or third persons held by a lawyer or ~~law~~ firm in connection with a representation shall be deposited in one or more identifiable interest bearing trust accounts as set forth in paragraphs (d) through (g). No funds belonging to the lawyer or ~~law~~ firm shall be deposited therein except as follows:

(1) funds of the lawyer or ~~law~~ firm reasonably sufficient to pay service charges may be deposited therein.

(2) funds belonging in part to a client or third person and in part presently or potentially to the lawyer or ~~law~~ firm must be deposited therein,

(b) A lawyer must withdraw earned fees and any other funds belonging to the lawyer or the ~~law~~ firm from the trust account within a reasonable time after the fees have been earned or entitlement to the funds has been established and the lawyer must provide the client or third person with: (i) written notice of the time, amount and the purpose of the withdrawal; and (ii) an accounting of the client's or third person's funds in the trust account. If the right of the lawyer or ~~law~~ firm to receive funds from the account is disputed by the client or third person claiming entitlement to the funds, the disputed portion shall not be withdrawn until the dispute is finally resolved. If the right of the lawyer or ~~law~~ firm to receive funds from the account is disputed within a reasonable time after the

funds have been withdrawn, the disputed portion must be restored to the account until the dispute is resolved.

* * *

(i) Every lawyer subject to paragraph (h) shall certify, in connection with the annual renewal of the lawyer's registration and in such form as the Clerk of the Appellate Court may prescribe, that the lawyer or the lawyer's ~~law~~ firm maintains books and records as required by paragraph (h).

* * *

(l) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(i) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors.

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or ~~law~~ firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby.

Such reports shall be made simultaneously with, and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within (5) banking days of the date of presentation for payment against insufficient funds.

* * *

(n) Nothing herein shall preclude a financial institution from charging a particular lawyer or ~~law~~ firm for the reasonable cost of producing the reports and records required by this rule.

* * *

Rule 5.1. Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a ~~law~~ firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

* * *

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the ~~law~~ firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

* * *

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner in a ~~law~~ firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the ~~law~~ firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

* * *

Rule 7.2. Advertising and Written Communication

* * *

(g) Every lawyer associated with or employed by a ~~law~~ firm which causes or makes a communication in violation of this Rule may be subject to discipline for failure to make reasonable remedial efforts to bring the communication into compliance with this rule.

Based upon the foregoing, Petitioner Minnesota State Bar Association respectfully asks this Court to adopt the Petition on Multidisciplinary Practice and amend the Minnesota Rules of Professional Conduct as set forth above.

Dated: January 23, 2002.

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

By _____
Jarvis C. Jones (#0167952)
Its President

and

MASLON EDELMAN BORMAN & BRAND, LLP

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ATTORNEYS FOR PETITIONER
MINNESOTA STATE BAR ASSOCIATION

170543.1

MSBA MULTIDISCIPLINARY PRACTICE TASK FORCE
REPORT AND RECOMMENDATIONS
as adopted by the MSBA General Assembly
June 23, 2000

MSBA President Wood Foster formed the Multidisciplinary Practice Task Force (the "Task Force") in 1999 to conduct a broad study of multidisciplinary practice ("MDP") and make recommendations regarding the conditions under which lawyers should be permitted to engage in MDP arrangements. The Task Force is chaired by U.S. Magistrate Judge Arthur J. Boylan and Rebecca Egge Moos with Bassford Lockhart Truesdell & Briggs, and its members are listed in Appendix A to this report. The first section of this report provides background about MDP, the ABA's efforts to address it, and the work of the Minnesota MDP Task Force. The second section of this report explains the issues considered and positions taken by the MDP Task Force. The third section of this report sets forth the specific recommendations of the MDP Task Force.

I. BACKGROUND

A. Multidisciplinary Practice And Its Limitations

The term "multidisciplinary practice" refers to arrangements whereby lawyers practicing law work with nonlawyers to help clients solve multi-faceted problems. The Minnesota Rules of Professional Conduct (the "MRPC") currently permit many such arrangements. For instance, lawyers may make cooperative referral arrangements with other professionals so long as they do not receive or pay referral fees. Lawyers may themselves or through employees of the firm provide multidisciplinary services, such as accounting, financial planning and legal services, to clients. A few Minnesota law firms[1] own consulting firms providing nonlaw services, and others are reported to be exploring this option.

Lawyers retain ownership and control in all of the above arrangements, but there also appear to be permitted MDP arrangements in which nonlawyers have ownership interests and sometimes even managerial control. For instance, many lawyers work as in-house counsel providing legal services to corporate employers. In addition, numerous lawyers work for insurance companies and captive insurance defense firms providing legal representation to insureds.[2] Although not "practicing law," some lawyers have formed mediation firms co-owned with other professionals, such as social workers.

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[1] Fredrickson & Byron P.A., Halleland Lewis Nilan Sipkins & Johnson, P.A, Mackall Crounse & Moore P.L.C and Moss & Barnett P.A.

[2] Some believe that this kind of practice violates ethical and legal rules governing permitted practice of law. However, some courts have upheld certain instances of it; others have been struck down and still others are currently in dispute. See ABA Commission on MDP Updated Background and Informational Report, December 1999, text accompanying note 16. Since this type of arrangement is not uncommon, we have included it among the forms of MDP that may be permitted under the current rules. In doing so, we do not intend to take a position on the ethical or legal status of these arrangements.

Nonetheless, the MRPC place significant limits on multidisciplinary practice involving ownership or control by nonlawyers. Specifically, Rule 5.4 prohibits:

(1) sharing legal fees with a nonlawyer, with some exceptions (most notably for profit-sharing by nonlawyer employees as part of a compensation or retirement plan);
(2) forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law;
(3) permitting 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; and
(4) practicing with a for-profit law firm in which a nonlawyer owns any interest or possesses governance authority not permitted by the Minnesota Professional Firms Act or has the right to direct or control the professional judgment of a lawyer.

Other rules limit collaboration between lawyers and nonlawyers. For instance, Rule 5.5 prohibits a lawyer from assisting a nonlawyer in the performance of activity that constitutes the unauthorized practice of law. Rule 7.2 forbids payment of referral fees to nonlawyers. Together, these and other rules clearly prohibit any nonlawyer ownership of a firm that practices law, limit other collaborative arrangements that might be construed to involve fee sharing or referral fees and raise substantial doubt about whether lawyers may ethically provide legal services, whether as owner or employee, for clients of a multidisciplinary firm that is not owned and controlled by lawyers practicing law.

Against this backdrop, client demand for a wider range of multidisciplinary law practice is growing. A number of trends seem to explain the push for expanded MDP, including globalization of trade, which gives clients access to legal service providers around the world who are not subject to the constraints on MDP found in the U.S.; consolidation of industries and increasing regulatory complexity, which increase pressure for efficient and multi-faceted problem-solving; and growing technological capacity and sophistication, which make it possible for large enterprises to manage the vast stores of information, as well as the conflicts, inherent in multidisciplinary firms. In addition, ABA Commission testimony and information provided to the Task Force reveals that those concerned about access to legal services see an opportunity to make access more affordable and user-friendly through "one-stop shopping."

Given these trends, it is not surprising that multidisciplinary consulting firms, including the "Big Five" accounting firms, are hiring lawyers at a great rate to provide legal services to their customers and clients. Nonlaw organizations that provide such legal consulting services include large and medium-sized accounting firms, actuarial firms, human resources consulting firms, bank trust departments, brokerage firms, financial services firms and insurance companies. These firms take the position that their lawyers are not practicing law when providing "consulting" services to a third party. Most draw the line at representation in court and drafting final documents.

For additional information on client interests and about MDP in Minnesota, across the U.S. and worldwide, see the MDP Task Force Subcommittee Reports attached as Exhibit B hereto.

B. ABA Commission Recommendations

Recognizing the growing client demand for nontraditional, multidisciplinary delivery of legal services, ABA President Philip S. Anderson in August, 1998, appointed the ABA Commission on Multidisciplinary Practice (the "ABA Commission") to determine what changes, if any, should be made to the ABA Model Rules of Professional Conduct with respect to the delivery of legal services by professional services firms. In June of 1999, the ABA Commission issued a controversial report recommending that fee sharing with nonlawyers, as well as ownership and control by nonlawyers, be permitted in MDP's, subject to safeguards the Commission believed would protect clients and the core values of the profession. Key safeguards included prohibiting nonlawyers from practicing law, subjecting the MDP to firm-wide imputation of conflicts for purposes of applying the lawyers' Rules of Professional Conduct, and requiring that MDP's controlled by nonlawyers certify compliance with lawyers' ethical rules to, and submit to audit by, state supreme courts.

Concerned about the threat to lawyers' core ethical values and independence, the ABA House of Delegates in August, 1999, effectively tabled the Commission's recommendations and sent the Commission back to the drawing board. The House of Delegates adopted the following resolution:

> 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 study demonstrates that such changes will further the public interest, without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients.

After additional hearings and study, the ABA Commission recently indicated it will stand its ground on MDP, with some modifications designed to address concerns raised by commentators. It has indicated that it will recommend that lawyers be allowed to share ownership only with "professionals" and that lawyers be required to ensure control and authority necessary to ensure compliance with lawyers' ethical obligations. It is reported to have dropped the recommendation for a state supreme court reporting and audit mechanism, which many charged was unworkable.

Additional information about the work of the ABA Commission, including considerable testimony and commentary on all aspects of MDP, may be found at the Commission's web page, located at http://www.abanet.org/cpr/multicom.html.

C. MSBA MDP Task Force

Responding in part to the ABA Commission recommendations, but broadly charged to study all aspects of MDP, the MSBA's MDP Task Force began its work in September of 1999. The Task Force conducted much of its preliminary research through four subcommittees: (1) Clients' Interests, chaired by Lowell Noteboom, to study clients' current and future needs and how the profession might address them; (2) Practice of Law, chaired by Bill Wernz, to determine

which legal services are unique to lawyers and how "practice of law" might be defined; (3) Current Practices, chaired by Denise Roy, to examine current practices in MDP's, including those not permitted to engage in law practice, both in Minnesota and elsewhere; and (4) Legislative/Disciplinary, chaired by Leo Brisbois, to study the legislative and judicial system issues that are raised by expanding permitted MDP's.

Through these subcommittees and otherwise, the Task Force studied current and potential multidisciplinary practice by:

- reading available materials, including the considerable testimony and written comments gathered by the ABA Commission on Multidisciplinary Practice, as well as news reports and scholarly articles (see Appendix C for a list of some of the resources consulted by the Task Force);
- meeting with Minneapolis Chamber of Commerce representatives to discuss clients' interests, and gathering other written input about client perspectives;
- attending meetings and conferences discussing MDP, including ABA and Association of American Law Schools meetings, a University of Minnesota Law Review symposium, William Mitchell College of Law and Lawyers' Board of Professional Responsibility programs, and an HCBA/RCBA conference;
- meeting with MSBA section representatives, including members of the following sections: Business Law, Conflict Management and Dispute Resolution, Family Law, International Law, Probate and Trust Law, and Tax;
- meeting with individuals who have relevant expertise, including Ward Bower, an Altman Weil legal consulting firm partner and expert on MDP; Vanderbilt University School of Law Professor Harold Levinson, an attorney-CPA who is an expert on CPA business, ethics and culture; William Mitchell College of Law Professor Daniel Kleinberger, one of the drafters of the Minnesota Professional Firms Act; Keith Halleland of Halleland Lewis Nilan Sipkins & Johnson, P.A., which owns Halleland Consulting Services; John James, who has practiced with the Gray, Plant, Mooty, Mooty & Bennett and Fredrikson & Byron law firms, served as Minnesota Department of Revenue Commissioner and most recently was a partner at Deloitte & Touche; Barbara Colombo, Director of the Center for Health Law and Policy at William Mitchell, for insights on the managed care analogy; and
- meeting informally with attorneys working in accounting firms, insurance defense firms, financial services firms, managed health care corporations and law firms to gather information about ethical challenges they face.

After studying the issues and engaging in considerable discussion, the Task Force approved the recommendations in part III of this report for the reasons set forth in Part II. For additional information not included in this report, see the MDP Task Force Subcommittee Reports, which are attached as Appendix B hereto.

II. EXPLANATION OF RECOMMENDATIONS

Many Task Force members came to this task very skeptical about the need for expanded multidisciplinary practice by lawyers and concerned that expanding MDP would endanger the

independence and core ethical values we believe essential to our role as professionals with obligations to the justice system and the public. We spent many hours following developments in the ever-changing market for legal services, studying the complex ethical and enforcement issues surrounding MDP and listening to the concerns of clients and lawyers. In the end, despite our initial concerns, we agree on two things: MDP serves client interests, and ethical legal practice can co-exist with some level of fee sharing and co-ownership with nonlawyers. In this section, we will share what we learned about client interest in MDP, detail the limitations on MDP that Task Force believe necessary to protecting core values and acknowledge the issues not resolved by our recommendations.

A. Client Interests

The Task Force believes that client and public interests must be the paramount consideration in determining whether and how MDP options should be expanded. After studying the available evidence and attempting to assess client interests in Minnesota, the Task Force concludes that there is ample evidence that some clients prefer to receive legal advice and counsel from lawyers practicing in a multidisciplinary context. Moreover, there is ample evidence that the interest is not limited to wealthy, sophisticated clients of Big Five accounting firms. More difficult to determine is the extent of client interest in obtaining lawyers' services through a multidisciplinary firm, but the Task Force does not believe it is necessary to make this determination in light of the evidence that some clients see value in MDP, and that the number of such clients is growing.

Evidence of client interest comes in many forms and from many quarters. Minneapolis Chamber of Commerce representatives told the Task Force that they were interested, while other client groups sent a similar message to the ABA Commission. Many clients already seek legal advice from lawyers working for a variety of consulting firms. Many lawyers in law firms are already responding to client interest by providing limited multidisciplinary services through referrals to, employment of and contractual affiliations with nonlawyers. (About 20 percent of the Am Law 200 law firms own nonlaw affiliates.) Solo and small firm representatives testifying before the ABA Commission and providing information to the Minnesota Task Force have consistently shared the view that their clients could benefit from MDP. Consumer and public interest groups argue that MDP would be good for poor and middle-class clients, who otherwise face financial and logistical obstacles to obtaining lawyers' services. For instance, the Task Force received a letter from Urban League President Clarence Hightower stating,

> We understand that making as many services as possible available 'under one roof' is important to the successful resolution of the unique issues faced by those who are poor and disenfranchised. . . . It's clear that MDP's would more broadly and more effectively serve the legal needs of our constituency.

Given the evidence of client interest, the Task Force believes that unnecessary barriers to multidisciplinary practice should be eliminated. Therefore, the Task Force recommends that lawyers be permitted to practice law in an entity at least partially owned by licensed professionals who are not lawyers. These nonlawyer professionals must be individuals, not firms, who are licensed and subject to promulgated codes of ethics and who are actively

practicing their profession in the firm. The Task Force rejected a requirement that the firm have as its sole purpose the delivery of legal services on the ground such a limitation would be unnecessary and fundamentally inconsistent with the purpose of expanded MDP. For similar reasons, the Task Force rejected a limitation that would prohibit MDP firms from engaging in litigation-related representation. On the other hand, the Task Force recommendations specify that only licensed lawyers should be permitted to practice law to clarify that it intends no change in the prohibition on unauthorized practice of law by nonlawyers.

While the Task Force believes that some expansion of permitted MDP is warranted by client interests, the Task Force also believes that there are a number of important constraints on the ethical delivery of legal services in a multidisciplinary setting. In fact, there is evidence that clients, including sophisticated clients, value the protections afforded by confidentiality, loyalty, independence and other lawyer core values. At the same time, they seem unaware of the inherent challenges to core values presented by MDP, and their interests are not always aligned with public interests that lawyers are obligated to protect. Therefore, the Task Force is not confident that the market alone can be trusted to protect client and public interests.

B. Constraints Imposed by Ethical Obligations of Lawyers

The preamble to the Minnesota Rules of Professional Conduct provides, "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." The Task Force believes that lawyers practicing law, as professionals necessarily entrusted with a great deal of public confidence and ultimately responsible for the justice system, should be held to ethical standards of some kind and that those standards should be promulgated and enforced by the judiciary. Specifically, the Task Force believes that lawyers' professional independence and the lawyers' core ethical values of loyalty, confidentiality and pro bono service serve important public interests and so should be preserved.

While there is widespread agreement among Task Force members about the importance of core values, there is no consensus as to whether <u>all</u> lawyers providing legal services should be subject to them. A large majority of Task Force members believe that all lawyers practicing law should continue to be governed by the Rules of Professional Conduct, and that the "practice of law" for that purpose should be defined broadly. This view is reflected in the Task Force recommendations. However, a minority believes that lawyer independence, core values and professionalism are essential only in the litigation context. They believe that in nonlitigation matters informed consumers should be free to choose representation by lawyers who are either subject to lesser ethical obligations promulgated by the judiciary or governed only by consumer protection laws promulgated by the legislature.

MDP's present special challenges for applying the Rules of Professional Conduct. Professionals with whom lawyers would be permitted to share ownership in an MDP might have very different obligations and practices about such matters as confidentiality, conflicts of interest, solicitation and holding client funds. For instance, a certified public accountant's duty to the public may conflict with a lawyer's duty of loyalty. The obligation of a social worker, psychologist or health professional to disclose child abuse under Minn. Stat. Sec. 625.556 may

conflict with the lawyer's duty of confidentiality. In addition, special care may need to be taken to prevent inadvertent waivers of attorney-client privilege.

For the most part, the Task Force believes that these differences can be worked out or co-exist without undermining the lawyers' obligations or client interests. However, the Task Force recommends that conflicts of interest be imputed firm-wide, but solely for purposes of applying the lawyers' ethical rules and not for the purpose of imposing any obligation on nonlawyers. The Task Force further believes that while some kind of disclosure would help clients understand the limits of lawyers' ethical obligations in an MDP context, it is premature to develop such detailed requirements at this stage of the MDP discussion.

The Task Force recommendations envision enforcement of the Rules of Professional Conduct by the Supreme Court against individual attorneys practicing within a permitted MDP entity and not against the entity itself or the nonlawyer professionals working within the MDP. However, the Minnesota Professional Firms Act may create limited recourse against the entity for interference with lawyers' ethical obligations. Furthermore, the lawyers working in a permitted MDP must secure written assurances from nonlawyer owners that they will not interfere with the lawyers' ethical obligations. The Supreme Court would have the authority only to require that the lawyer obtain the agreement and not to enforce compliance by a nonlawyer owner or the MDP itself.

C. Constraints Imposed by Enforcement Considerations

Most Task Force members believe that conditions under which lawyers practice law are critical to ensuring widespread adherence to the Rules of Professional Conduct and to engendering a spirit of professionalism. Therefore, the Task Force recommends that passive investment by nonlawyers be prohibited and that lawyers be allowed to practice in MDP's only with other professional individuals who are both licensed and subject to promulgated codes of ethics. Both of these limitations would help limit the economic pressures to act unethically. The Task Force believes that the experience other professionals have complying with their own ethical obligations will make it more likely they will support the lawyer's obligation to act ethically.

A majority of the Task Force present on the day the final vote was taken believes lawyer control over the MDP entity is the only practical means to prevent economic conflicts from overwhelming lawyers' ethical obligations. The Task Force does not believe that it would be effective to rely on either individual honor and self-discipline or external policing and enforcement by the Supreme Court and the Lawyers' Board of Professional Responsibility. Furthermore, a majority of the Task Force remains unconvinced that there is sufficient means to ensure that lawyers retain the control and authority necessary to ensure adherence to the ethical rules in an entity owned or controlled mostly by nonlawyers.

Therefore, the Task Force recommendations include a requirement that lawyers practicing law must hold a majority percentage ownership in permitted MDP entities. This requirement is bolstered by a requirement that lawyers practicing in an MDP must retain the control and authority necessary to assure lawyer independence in the rendering of legal services.

These requirements are not intended to prohibit a lawyer who practices law in the entity from also providing nonlaw services.

A substantial minority of the Task Force believes that majority lawyer ownership is unworkable and unnecessary and should not be required. In fact, the majority ownership requirement was rejected at one meeting of the Task Force. The issue was reopened at a later meeting and the majority lawyer control requirement adopted. Those opposed to the majority control requirement are concerned that it is a significant barrier to delivery of legal services in a truly "multidisciplinary" context. Practically, it means that the "multidisciplinary" firm will most likely be dominated by lawyers practicing law. If all professions were to insist on majority control, multidisciplinary practice at any level would be impossible. The requirement is a particular problem for small MDP's. For instance, while the Task Force recommendations permit formation of a two-person MDP, the nonlawyer owner would have to be willing to cede majority ownership to the lawyer owner. Those opposed to majority lawyer ownership believe that lawyers with a minority ownership interest could nonetheless ensure sufficient control and authority necessary to ensure adherence to lawyer ethical values.

D. Constraints Imposed by Human Nature

Lawyers and clients are accustomed to relying on the segregation of lawyers as a principal means of assuring ethical behavior. The Task Force is accutely aware of the law of unintended consequences. It is difficult to anticipate all the issues that may arise when lawyers attempt to combine their practices with other professionals subject to different ethical standards. It is therefore prudent to move incrementally toward the very different practice structure required, and ethical challenges created, by true "multidisciplinary" practice.

E. Issues Not Addressed by Task Force Recommendations.

The Task Force recommendations do not fully resolve all questions regarding provision of legal services by insurance company lawyers representing insureds or by lawyers providing legal consulting services to clients and customers of nonlawyer employers such as accounting firms, trust companies, investment firms and banks. However, to the extent lawyer consultants are practicing law, the Task Force recommendations would allow such practice only within permitted multidisciplinary entities. The Task Force recommendations do not illuminate the situations in which contractual affiliations with nonlawyers may violate fee sharing and other ethical obligations of lawyers. The Task Force recommendations do not include reforms to the unauthorized practice of law statute beyond that which would be needed to permit nonlawyer professionals to share ownership with lawyers in a permitted multidisciplinary entity.

III. RECOMMENDATION

The MSBA Multidisciplinary Practice Task Force (the "Task Force") recommends that the MSBA Board of Governors adopt the following resolution:

> Resolved, that the Board of Governors recommends to the General Assembly that the Minnesota delegates to the ABA House of Delegates be encouraged to communicate the

following position to the ABA House of Delegates and to take action consistent with such position in any ABA proceedings:

1. General Position. The Model Rules of Professional Conduct should be amended to permit lawyers to practice law in an entity at least partially owned by licensed professionals who are not lawyers, subject to the limitations set forth below. The limitations are intended to ensure that the multidisciplinary entity operates consistently with applicable Rules of Professional Conduct, as amended, and the core ethical values reflected therein, and with statutory prohibitions on unauthorized practice of law.

2. Definitions.

    a. The ABA should amend the Model Rules of Professional Conduct to include a definition of "practice of law" to clarify which lawyers are subject to the Model Rules, including any limitations on multidisciplinary practice, and to clarify which services provided by a permitted MDP entity may only be provided by its lawyers. For instance, "practice of law" could be defined to mean:

        (1) rendering legal consultation or advice to a client;

        (2) appearing on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer unless the rules of the tribunal involved permit representation by nonlawyers;

        (3) appearing as a representative of a client at a deposition or other discovery matter; and

        (4) engaging in other activities that constitute the practice of law as provided by statute or common law.

    b. "Professionals" means "individual licensed professionals who are governed by promulgated codes of ethical conduct."

3. Limitations on Permitted Multidisciplinary Practice.

    a. The nonlawyer owners must be actively practicing their professions in the entity and may not be passive investors. Only lawyers may practice law within the entity.

    b. A majority percentage of ownership in the entity must be held by lawyers licensed to practice law and practicing law in that entity. In addition, the lawyers practicing law in the entity must ensure that they retain the control and authority necessary to assure lawyer independence in the rendering of

legal services. A substantial minority of the Task Force opposes this particular recommendation.

c. The lawyers practicing law in the entity in any state must be licensed to practice law in that state and abide by the Rules of Professional Conduct in effect in that state, including the rules governing client confidentiality and conflicts of interest. Conflicts will be imputed firm-wide for purposes of applying applicable Rules of Professional Conduct to lawyers practicing in a permitted MDP entity. No change is intended with respect to Rule 8.5 regarding application of the Rules of Professional Conduct to lawyers providing services outside of the state.

d. The lawyers practicing law in the entity must obtain an affirmative written agreement signed by each member of the entity that there will be no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship.

Appendix A

Multidisciplinary Practice Task Force Members

Co-Chairs

Magistrate Judge Arthur J. Boylan
U.S. District Court

Rebecca Egge Moos
Bassford Lockhart Truesdell & Briggs

Members

Judge G. Barry Anderson
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Suzanne Born

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Jeffrey S. Johnson
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Senator Ember Reichgott Junge
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Kathleen A. Knutson
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Eric D. Larson
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Nicholas Ostapenko
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Denise D.J. Roy
William Mitchell College of Law

Clinton A. Schroeder
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Oscar J. Sorlie, Jr.
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Appendix B

MSBA Multidisciplinary Practice Task Force
Current Practices Subcommittee Report
March 1, 2000

Submitted by: Dan O'Connell, Rick Nelson, Nick Ostapenko, Denise Roy (chair) and Bob Webber (secretary).

Charge: To examine current multidisciplinary arrangements in Minnesota, the United States and the rest of the world. We interpreted our charge to include (1) identifying the various arrangements that are or could be used to provide multidisciplinary services; (2) determining what kind of work lawyers do in multidisciplinary arrangements where they are controlled or influenced by nonlawyers, whether or not they are "practicing law" in those settings; (3) looking for evidence of threats to independence or ethical behavior when lawyers work in multidisciplinary settings; (4) looking for evidence of and beliefs about advantages to lawyers and the legal profession from multidisciplinary arrangements; (5) studying local, national and global trends in MDP; and (6) determining the extent to which law schools teach about ethics in the context of MDP.

Methodology: In conducting our research, we focused specifically on multidisciplinary arrangements in the areas of tax, accounting, estate planning, insurance defense litigation, employee benefits and other employment consulting, financial services, and health care. We also kept our eyes open for information in other areas. We have more detailed reports about developments in most of these areas and about developments outside the U.S. that we would be happy to provide upon request.

- We read as much as possible about multidisciplinary arrangements in news reports, the ABA MDP Commission materials and law review articles.
- We met informally with attorneys working in accounting firms, insurance defense firms, financial services firms, managed health care corporations and law firms.
- We held more formal informational meetings with Keith Halleland of Halleland Lewis Nilan Sipkins & Johnson, P.A., which owns Halleland Consulting Services, and with John James, who has practiced with Gray, Plant and Fredrikson law firms, served as Minnesota Department of Revenue Commissioner and most recently was a partner at Deloitte & Touche.
- We collected examples of advertising and promotional materials distributed by persons selling services that are potentially multidisciplinary.
- We met with members of the MSBA Tax Section Council, Family Law Section, Business Law Section, CMDR Section and International Law Section. We expect to receive a report from the Probate and Trust Section sometime after our March 4 meeting.
- We attended a number of events about MDP, including the U of M Symposium, Task Force meetings with Ward Bower and Prof. Harold Levinson, William Mitchell and Lawyers Board programs with Prof. Charles Wolfram, Association of American Law Schools annual meeting session on MDP, and the HCBA/RCBA conference on MDP.
- We met with members of the William Mitchell College of Law faculty and the Director of the Center for Health Law Policy at William Mitchell.

- We have begun gathering law graduate placement information and information about law school professional responsibility courses. Because this research is in preliminary stages, we have not, for the most part, included information on these topics in our report.

We did not conduct or, for the most part, come across any statistically valid surveys to tell us the extent of the phenomena we observed, so we can provide only anecdotal information.

Findings:

In this section, we use the term "multidisciplinary arrangement" to mean any arrangement through which lawyers work for or with, or refer clients to, other professionals in the course of providing legal or law-related services, whether or not the lawyers are "practicing law."

1. **Minnesota lawyers currently engage in a variety of multidisciplinary arrangements.**

a. **Many such arrangements appear to fall within the bounds of the law and the rules of professional conduct.** Some lawyers individually provide multidisciplinary services, such as accounting, financial planning and legal services, to clients. Some lawyers practicing law make cooperative referral arrangements with other professionals. Some employ nonlawyers, such as accountants and economists, in law firms. A few law firms—Halleland, Fredrikson, Moss & Barnett and Mackall Crounse—own ancillary consulting businesses, and others are reported to be exploring this option. Numerous lawyers work for insurance companies and captive insurance defense firms providing legal representation to insureds.[1] Many lawyers work as in-house counsel providing legal services to corporate employers. Some lawyers have formed mediation firms with other professionals, such as social workers. While mediation does not constitute "practicing law," it is part of the trend toward multidisciplinary problem-solving by lawyers. Some lawyers believe that the existing structures for multidisciplinary work are adequate and need not be expanded. Others, including the ABA Commission, believe there is no clear line between multidisciplinary arrangements already in place and those that would be permitted if MDP opportunities were expanded.

b. **A growing number of Minnesota lawyers work in multidisciplinary settings that appear to push the boundaries of the current rules.** Lawyers employed as in-house counsel increasingly provide legal "consulting" services to third parties. Nonlaw organizations that provide such legal consulting services include large and medium-sized accounting firms, actuarial firms, human resources consulting firms, bank trust departments, brokerage firms, financial services firms and insurance companies. Where not allowed to provide tripartite representation (as they would be in the insurance defense context), these lawyers take the position they are not practicing law when providing "consulting" services to a third party.

[1] This kind of multidisciplinary arrangement may belong in the next category—arrangements that push the boundaries of ethical and legal practice. However, according to the ABA Commission, only two of the thirteen states that have considered the issue have condemned it. See ABA Commission on MDP Updated Background and Informational Report, December 1999, text accompanying note 16. Most recently, the Supreme Court of Indiana, in October, 1999, held that the use of in-house counsel by an insurance company to defend its insureds did not constitute the unauthorized practice of law by the employer-insurer. Cincinnati v. Wills, 717 N.E.2d 151 (Ind. 1999).

c. **Some Minnesota lawyers engage in multidisciplinary arrangements that clearly violate the current rules.** For instance, we have been told that some lawyers engage in under-the-table fee sharing with other professionals. Some solo and small firm lawyers who abide by the rules have told us that they would welcome the opportunity to compete openly with those who currently flout the rules.

d. **Increasing availability of legal advice and documents through publishers and web sites makes it easier to get legal help without consulting a lawyer.** We did not generally study the practice of law or provision of legal services by nonlawyers. However, we came across many examples of sample documents that clients can use without obtaining advice from a lawyer. For instance, many publishers sell sample employee benefit plan documents and other materials that employers can use to adopt and administer employee benefit plans without legal advice. We are told that often it is lawyers that start the businesses making sample documents available to nonlawyers through books, web sites and software.

2. **Similar multidisciplinary arrangements can be found across the U.S.** For instance, Lowell Noteboom's survey of web sites maintained by the Am Law 200 firms found that 10 percent had ancillary businesses. We found evidence that legal and law-related services are being provided in multidisciplinary settings in the following areas: tax, financial and estate planning, government relations, environmental, employee benefits and other employment, real estate, entertainment, health care, liability insurance, conflict management and mediation, and litigation support, as well as litigation in U.S. Tax Court in the tax area.

a. **In addition, certain forms of MDP exist elsewhere in the U.S. that do not exist in Minnesota.** These include Washington D.C. law firms controlled by lawyers with nonlawyer partners and the recently announced contractual arrangement between Ernst & Young and the McKee Nelson Ernst & Young law firm. Contractual affiliations ("strategic alliances") also exist between KPMG and San Francisco law firm Morrison & Forester and between PriceWaterhouseCoopers and Washington, D.C., law firm Miller & Chevalier.

3. **The delivery and regulation of legal services throughout the world varies greatly.** These differences make it very difficult to compare MDP in other countries to the situation in the United States. They also make it difficult to summarize briefly the forms of MDP's existing abroad. In some places they are fully integrated, and in others they are contractual. In some places they are very large and pose a competitive threat to traditional law firms, and in others they are small and fill gaps in service not provided by traditional law firms.

4. **We have not found evidence that lawyers working in multidisciplinary settings provide less competent advice or are less likely to behave ethically than lawyers practicing law in law firms.** On the other hand, it would probably be difficult to obtain such evidence even if it existed. Beliefs among law firm lawyers about the extent to which lawyers employed or supervised by nonlawyers or working in tripartite representation settings retain independence and comply with ethical rules vary greatly. However, none of the lawyers we interviewed who work in-house, including those working for the Big Five, believe their independence is particularly threatened by the setting in which they work. They believe their experiences mirror those of colleagues working in law firms and other traditional settings. Many of those lawyers did

complain about increasing commodification of legal "products" by consulting firms, but some perceived a similar phenomenon in law firm marketing. Some junior lawyers expressed discomfort with the blurry line between practicing law and providing consulting services. At the same time, beliefs about the extent to which lawyers working in law firms retain independence and comply with ethical rules also vary greatly.

5. **Adhering to lawyers' core values while working in a multidisciplinary setting presents different challenges in different settings.** For instance, lawyers who wear different hats in providing services to clients need to be especially cautious about communicating the limits of attorney-client privilege and face the challenge of determining which of their services constitute "legal services." Law firms with ancillary businesses, strategic alliances or other contractual affiliations with nonlaw businesses similarly face disclosure issues and also have arm's-length pricing issues to guard against fee sharing with the affiliated nonlaw business. Lawyers working in settings where they are controlled by nonlawyers and represent third parties may face greater pressures on their independence than lawyers who work in-house for one client or who work for a law firm. Lawyers working in a fully integrated multidisciplinary firm would face special conflicts challenges.

a. **In any setting, there may be conflicts between the professional obligations of lawyers and the professional obligations of other professionals.** In the accounting firm setting, for instance, there is a glaring conflict between the CPA's duty to disclose information to the public and the attorney's obligation to maintain client confidences. With the size of some accounting firms, it is difficult to determine how the lawyers' conflicts rules could work firmwide, as the ABA Commission proposal envisions. Other potential differences in values exist in the areas of solicitation, segregation of client funds, prospective waivers of confidentiality, noncompetition agreements, and contractual limitations on liability. The need to work out the specific differences between lawyers and accountants will disappear to the extent accounting firms spin-off their audit departments in response to pressure from the SEC, as KPMG has done (although a speaker at the U of M symposium reported the audit arm continues to perform some consulting services). Nonetheless, different conflicts exist between the values of other professions and the legal profession, and those would have to be worked out in any fully integrated MDP regime.

b. **Concern about threats to independence may depend on the size of the multidisciplinary partnership and the level of control retained by lawyers within the multidisciplinary partnership.** For instance, lawyers we have interviewed seem more concerned about nonlawyer control in large organizations than in very small organizations.

6. **World-wide, we found no documentation of a great public outcry in opposition to MDP's.** The greatest outcry in opposition to MDP's has generally come from the organized Bar.

7. **Nonlawyer professionals have a hard time understanding lawyers' concerns about MDP.** In particular, nonlawyer professionals we talked with had a hard time accepting the argument that economic segregation and retention of lawyer-control are either necessary or sufficient to preserve independence and ensure ethical behavior.

8. **Additional information about lawyers working in "consulting" firms.**

a. **Attorney/consultants perform services very similar to services they would perform in a law firm, although they are not generally permitted to appear in court and do not generally provide the final draft of legal documents.** However, the U.S. Tax Court permits nonlawyers to appear on behalf of taxpayers, and at least one of the Big Five does provide that service. In addition, Big Five and other consulting firms provide litigation support services. At least one Big Five firm drafts initial or prototype documents stamped with a disclaimer recommending review by legal counsel. The following is a typical disclaimer:

> Sample language for review by legal counsel. [Consulting firm] does not practice law and makes no representation regarding the legal effect of this document.

We have been told that documents drafted by attorneys with the Big Five often are not reviewed by counsel outside the Big Five, either because outside lawyers decline to risk liability for documents they did not produce or because clients do not seek outside review.

b. **The Big Five are hiring many lawyers, but graduates may still prefer law firm employment.** The Big Five currently employ about 5,000 lawyers in the U.S. They are hiring at a much higher rate than law firms. Still, they currently employ only about 0.05% of the total lawyers in the U.S. While the Big Five have recently attracted a number of high powered senior-level attorneys, many entry-level attorneys still find law firm jobs more prestigious and better paying. For instance, the average salary for a 1998 William Mitchell graduate beginning work with an accounting firm was $47,200, while the average salary for a 1998 graduate beginning work at a medium to large law firm (26 lawyers or more) ranged from $49,500 to $69,333.

c. **Big Five lawyers may hold themselves out as lawyers, though not as practicing lawyers, to some extent.** They generally do not include any designation as a lawyer on their business cards. Some accounting firm lawyers claim that they and their clients do not know who among the team is a lawyer. However, some lawyers in accounting firms post their diplomas on the wall, and we have seen promotional materials providing information about lawyer employees that includes information about their legal training. In contractual or ancillary business arrangements, there appears to be some room for confusion about the relationship between the law firm and the associated nonlaw firm, as indicated by the following names: McKee Nelson Ernst & Young and Halleland Consulting Services (wholly owned subsidiary of Halleland law firm).

MINNESOTA STATE BAR ASSOCIATION

"MDP" Task Force
Legislative/Disciplinary Subcommittee Report

March 4, 2000

Subcommittee Members:

Chair, Leo Brisbois, *Stich, Angell, Kreidler, Brownson & Ballou, P.A.*
Ember Reichgott-Junge, *Minnesota State Senate*
Edward Cleary, *Lawyers Professional Responsibility Board*
Clinton Schroeder, *Gray, Plant, Mooty, Mooty & Bennett, P.A.*
Jeffery Johnson, *Barna, Guzy & Steffen, Ltd.*
David Fisher, *Minnesota Department of Administration*
Mary Grau, *Minnesota State Bar Association*

Introduction:

The Legislative/Disciplinary Subcommittee faced the initial challenge of simply trying to adequately define its mandate; the resolution of this question alone held the potential to overwhelm the resources of the subcommittee if it were expected to draft and recommend a final, specific regulatory framework applicable to Multi-disciplinary Practices (MDPs) for approval and implementation by the Bench and Bar. To paraphrase one presenter to the subcommittee: trying to develop a specific regulatory frame work for MDPs before it has even been determined whether MDPs should be permitted in the first place (and if so to what degree) is like trying to draft the specific final details of a complex business contract before the parties have ever met in order to first negotiate the salient points in principle.

Accordingly, after careful consideration, the subcommittee felt that its mandate should be limited to a consideration of what general statutory and regulatory restrictions might exist or what general statutory and regulatory revisions may be needed in the event any one of several possible general recommendations regarding MDPs were to be issued by the Task Force en banc.

The comments of the subcommittee below are intended to be only advisory and are therefore general in nature. Efforts to determine the specific language of necessary regulatory or statutory revisions, if any, must ultimately wait until the Task Force en banc has resolved the greater philosophical questions of whether or not MDPs should be permitted in Minnesota, and if so, in what form or to what degree.

Questions and Issues Raised and Contemplated By the Subcommittee:

The following non-exhaustive list represents just some of the many questions and issues which were raised and discussed during meetings of and in communications between members of the subcommittee. This list is presented here at the request of the Task Force Co-chairs for consideration by the Task Force en banc as it begins its final deliberations on the MDP question.

1. Does the Minnesota State Supreme Court have the constitutional or inherent authority to regulate the conduct of non-lawyers?

2. If the Minnesota Legislature granted the Minnesota State Supreme Court the authority to regulate non-lawyers would this be a violation of the constitutional doctrine of separation of powers?

3. If the Minnesota State Supreme Court lacks the authority to fully regulate MDPs because of the participation therein of non-lawyers, should the Minnesota Legislature be the governmental body to exercise regulatory oversight for MDPs?

4. If the Minnesota State Supreme Court concedes to the Minnesota Legislature regulation and oversight of lawyers participating in MDPs would this be a violation of the constitutional doctrine of separation of powers?

5. Does the potential regulatory authority of either the Minnesota State Supreme Court or the Minnesota Legislature over MDPs change (i.e., expand or contract) depending on whether the MDP is controlled by lawyers or non-lawyers?

6. Does Minn. Stat. § 481.02 (1999) as presently written adequately define what services or functions are currently considered to be included in "the practice of law?"

7. Does Minn. Stat. § 481.02 (1999) need to be revised to more precisely or more comprehensively define what services or functions are to be included in "the practice of law?"

8. If MDPs are permitted, should certain services or functions which are included in "the practice of law" be limited exclusively to performance by lawyers working independently or in traditional law firm settings?

9. Should MDPs be permitted or precluded from engaging in litigation work?

10. Should transactional legal services even be treated differently than litigation services? If so, should there be different ethical rules applicable to lawyers performing transactional work in all instances or only where the transactional work is performed by lawyers engaged in MDPs?

11. If (as the Big 5 currently claim) MDPs claim to only be in the business of consulting and not engaged in "the practice of law," should they therefore be precluded from asserting that such concepts as the attorney/client privilege and the work product doctrine apply to the consulting services they provide their clients even if a lawyer is a member of the consulting

teams? If so, should MDPs be required to inform their clients at the outset that no attorney/client relationship will be formed or recognized if they engage the consulting services of the MDP?

12. If the MDP claims to be providing legal services (i.e., practicing law) as a part of their business along with other non-legal services, should the Rules of Professional Conduct apply to the lawyer members of the MDP fully and at all times even when the lawyers might be performing non-legal services for the client? Or, should different (less comprehensive) rules of professional ethics apply to lawyers participating in MDPs (e.g, no attorney/client privilege, no work product doctrine, no imputation of conflicts, or full waiver of all types of conflicts by the client permitted following full disclosure), and if so, should clients be fully informed by the MDP of the fact that their lawyers are subject to lesser professional standards than are lawyers in traditional legal service delivery settings?

13. Would there be advantages to clients if they could choose, on a case by case basis, between a traditional law firm subject to the full Rules of Professional Conduct and a MDP subject to relaxed Rules of Professional Conduct?

14. What impact, if any, would Minn. Stat. ch. 319B (Professional Firms Act) have on the sanctioning or regulation of MDPs?

15. Should participation in MDPs be limited to only certain callings or professions? If so, which ones? What restrictions would Minn. Stat. ch. 319B, if any, currently place on the potential types of professions which could participate in MDPs?

16. Does Minn. Stat. ch. 319B, or any other rule or statute, provide any guidance for reconciling the possibly conflicting or varying degrees of ethical duties which might be applicable to different professions participating in an MDP?

17. To what extent should members of one profession participating in an MDP be protected from individual, personal liability for professional malfeasance of another member of the MDP who is from a different profession? Will insurance companies be willing to develop insurance products to provide errors & omissions and professional liability coverages for MDPs or individual professionals participating in an MDP?

18. Can the various regulatory authorities for the different professions that might be participating in an MDP discipline only the individual members

of the MDP over whom they exercise jurisdiction, or can those regulatory authorities hold the MDP (as an entity in and of itself) responsible (e.g., vicariously or respondeat superior) for the malfeasance of the individual members of the MDP over whom they exercise jurisdiction?

19. If MDPs are permitted, should the establishment of a compensation fund be sought as a means of redress for MDP clients who are harmed by malfeasance of MDP members, or do currently available tort remedies provide adequate avenues for MDP clients to seek recovery for injuries suffered at the hands of the MDP or its individual members?

20. Must MDPs, if permitted, be exclusively controlled by lawyers? If so, would regulatory and statutory revisions be necessary to give effect to such a restriction?

21. Does the Minnesota State Supreme Court have inherent authority to require non-lawyer members of MDPs to create IOLTA like trust accounts for client property? Does it make a different whether the clients are or are not seeking legal services from the MDP?

22. If an MDP has a multi-state presence, will lawyer members of the MDP who are from outside of Minnesota and not admitted to the Minnesota Bar be entitled to practice law or perform legal services in Minnesota without first being admitted here (pro hac vice)?

23. Should the practice of law be de-regulated entirely in favor of letting market forces regulate the delivery of legal services?

24. Could the U.S. Congress, through its plenary power to regulate interstate commerce, pass legislation pre-empting the likely varied and inconsistent regulation of MDPs by the individual States?

25. Do international treaties such as GATT and WTO have an impact on attempts by individual States to regulate or prohibit MDPs, and if so, under what circumstances?

Possible MDP Recommendations by the Task Force en banc and potential regulatory or statutory provisions implicated:

I. The Task Force could ultimately recommend **no change to the current Rules of Professional Conduct.** Such a recommendation would essentially continue the prohibition on lawyer participation in MDPs.

A. If the Task Force were to ultimately make this recommendation, obviously **no revisions to the Rules of Professional Conduct** would be necessary.

B. If the Task Force were to ultimately make this recommendation, it might also consider or recommend that **Minn. Stat. § 481.02 (1999) be revised to more clearly and precisely define what functions and services are included in "the practice of law."** This statutory revision could possibly facilitate the prosecution of potential "unlawful practice of law" cases where non-lawyer controlled business entities (such as the Big 5 Consulting Firms) attempt to provide legal work as part of the sale of "bundled" consulting services.

II. The Task Force could ultimately recommend that Minnesota **adopt the ABA MDP Commission's proposed Model Rule 5.4** as originally reported to the ABA's Annual Convention in the Summer of 1999.[1]

[1] If the Task Force en banc determines to pursue this option following its deliberations,

A. The Minnesota State Supreme Court has the inherent power to direct that the **Minnesota Rules of Professional Conduct be amended to conform** to the ABA MDP Commission's proposed Model Rule 5.4.

B. **No significant amendments to Minn. Stat. ch. 319B would be needed** as it would provide controlling statutory authority in its current form for how an MDP could be configured.

1. Minn. Stat. ch. 319B generally prohibits one profession within an MDP from pressuring another professional group within the MDP to violate its unique professional/ethical rules.

2. Minn. Stat. ch. 319B incorporates by reference the Minnesota Rules of Professional Conduct where an MDP has lawyer members.

3. Although the Minnesota State Supreme Court could not discipline

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the Legislative/Disciplinary Subcommittee does not at this time include in its general recommendation herein the ABA MDP Commission's recently up-dated proposal to require IOLTA type trust accounts for non-lawyer members of MDPs even for the property of clients who have not sought legal services from the MDP. Such a regulatory attempt by the Minnesota State Supreme Court over non-lawyers would be subject to strong challenge as being beyond its inherent authority, and if the Minnesota Legislature were to delegate such regulatory oversight over non-lawyers to the State Supreme Court, significant questions about a potential violation of the constitutional doctrine of separation of powers would be raised.

the non-lawyer members of an MDP formed under Minn. Stat. ch. 319B, it can discipline lawyer members within the MDP, and under Minn. Stat. ch. 319B generally, the Minnesota State Supreme Court could impute the malfeasance to the MDP permitting sanctions by the Lawyers Professional Responsibility Board or the State Supreme Court to be levied against the MDP itself as an entity.

4. Minn. Stat. ch. 319B currently has a finite definition of which types of professions are permitted to participate in an MDP. Accordingly, if the possibility of greater participation by a wider variety of professions and callings were to recommended by the Task Force en banc, some legislative intervention to **amend the definition of "professional" as used in Minn. Stat. ch. 319B** would be necessary.

5. If the Task Force were to ultimately make this recommendation, it might also consider or recommend that **Minn. Stat. § 481.02 (1999) be revised to more clearly and precisely define what functions and services are included in "the practice of law."** This statutory revision could possibly facilitate enforcement of the Minnesota Rules of Professional Conduct in regard to lawyers engaged in MDPs as well as the prosecution of potential "unlawful practice of law" cases where non-lawyer controlled business

entities (such as the Big 5 Consulting Firms) attempt to provide legal work by non-lawyers as part of the sale of "bundled" consulting services.

III. The Task Force could ultimately recommend that MDPs be alternatively permitted in the form as envisioned in section II above, and/or in the form envisioned infra where the MDP were to claim that (although it had lawyers as members) it was not engaged in "the practice of law" but was **an MDP providing only consulting services**.[1] In the latter alternative form of MDP, no attorney/client relationship (and consequently, none of the restrictions, rights, or protections under the Minnesota Rules of Professional Conduct) would exist even if lawyer members of

[1] Various speakers on the subject of MDPs, either to the Task Force, this subcommittee, or in other public seminars conducted by the local law schools, have on occasion stated generally that this is a characterization used by the Big 5 Consulting Firms in describing what they do and why the lawyers in their employ should not be subject to rules of professional conduct which govern the practice of law.

the MDP were part of the consulting team advising the client.[1]

A. The MDP would have to make a formal election upon its inception as to which form of MDP it would be, and **Minn. Stat. ch. 319B would have to be slightly amended to incorporate the election requirement**.

B. **Minn. Stat. § 481.02 (1999) could possibly be revised to more clearly and precisely define what functions and services are included in "the practice of law."** This statutory revision would facilitate enforcement of the Minnesota Rules of Professional Conduct in regard to lawyers engaged in MDPs operating under the form envisioned in section II above, as well as the prosecution of potential "unlawful practice of law" cases where MDPs which have elected the form envisioned in section III herein

[1] The Task Force could also recommend that MDPs could elect between a full service form which adheres to the ABA MDP Commission's proposed Model Rule 5.4 or a form of MDP where the legal work performed is restricted to transactional work (e.g., the MDP would be precluded from engaging in litigation on behalf of its clients). This latter form of transactional work only MDP could also be subject to the ABA MDP Commission's proposed Model Rule 5.4 provisions, or it could be subject to a reduced level of professional conduct standards such as those discussed generally in section III infra. The subcommittee has not made a general recommendation as to this latter option because it believes that the Task Force en banc must first resolve the greater philosophical and problematic issue of whether transactional lawyers should be treated differently than litigation lawyers.

attempt nonetheless to "practice law" as part of their sale of "bundled" consulting services.

C. **Revisions to the Minnesota Rules of Professional Conduct,** the **Minnesota Rules of Civil Procedure**, and the **Minnesota Rules of Evidence** at a minimum would be necessary to clarify that no attorney/client relationship would exist between a client and an MDP (even if a lawyer were part of the consulting team working with the client) which had elected to operate under the form envisioned in section III herein, and consequently, the concepts of attorney/client privilege, attorney-work product, etc., would not be applicable.

D. **Minn. Stat. ch. 319B would have to be amended to require an MDP operating in the form envisioned in section III herein to make full disclosure** to its clients that the MDP was not engaged in "the practice of law" and no attorney/client relationship (or privileges or protections commensurate therewith) would exist in favor of the client even though lawyer members of the MDP may be participating as part of a consulting team working with the client.

Conclusion:

The Legislative/Disciplinary Subcommittee respectfully submits this report to the Task Force en banc and hopes that the members thereof find it useful during their further deliberations.

The recommendations of the Legislative/Disciplinary Subcommittee set out above are admittedly general and in bare bone form. This was necessary for the reasons set forth in the introduction to this report. However, as this report and the reports and recommendations of the other subcommittees are considered by the Task Force en banc along with its further deliberations, the subcommittee believes that these bare bones will begin to be fleshed out as progress is made toward a resolution of the over-riding question of whether or not to permit MDPs (and if so to what degree).

For the Legislative/Disciplinary Subcommittee,

Leo Brisbois, Chair

Report to the MSBA MDP Task Force:

ANSWERS TO TASK FORCE QUESTIONS REGARDING "OPTION TWO" AS PROPOSED IN MINUTES OF MARCH 4, 2000 TASK FORCE EN BANC MEETING

Prepared and submitted on behalf of
the Legislative/Disciplinary Sub-committee.

March 30, 2000

Reporter:
Leo I. Brisbois
Chair, Legislative/Disciplinary Sub-Committee

INTRODUCTION

The essence of "Option Two," also referred to as the "MDP Election Option," is that MDPs involving lawyer and non-lawyer ownership would be sanctioned,[1] but only if the MDP elected to be organized as a "professional firm" under Minn. Stat. § 319B.03, subd. 2 (3) (1999); Minn. Stat. § 319B.06, subd. 1 (b) (1999).[2] The MDP could provide any legal service except litigation.[3]

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[1] This would require that the answer to the basic underlying issue which gave rise to the MSBA MDP Task Force would be that RPC 5.4 should, at a minimum, be amended to allow "fee sharing."

[2] A professional firm may provide more than one category of professional services so long as each of the professional firm's owners is licensed to provide professional services in at least one of the categories of services specified in the firm's organizational documents. *See,* Minn. Stat. § 319B.06, subd. 1 (b) (1999); Minn. Stat. § 319B.03, subd. 2 (1999).

[3] This limitation would need to either be written into Minn. Stat. ch. 319B or the RPCs. A working definition of "litigation"could possibly include any *advice, document drafting, document filing, representation, or appearances on behalf of the client in any judicial, quasi-judicial, or administrative tribunal or forum where parties are attempting to enforce rights or remedies available under law or equity against each other or where the client is attempting to enforce rights or remedies or defend against civil, regulatory or criminal proceedings involving any sovereign entity or agency thereof.*

The MDP, in its organizational documents, would have to make a further election as to whether the conduct of its lawyer owners and lawyer employees would be regulated by the full weight of "traditional" Rules of Professional Conduct or by amended, less stringent Rules of Professional Conduct.[1]

[1] Minn. Stat. ch. 319B would generally have to be amended to incorporate a requirement for this "election" option to be made when the professional firm (MDP) first organizes. However, the specific details of the effects of such an election could be left to the enactment of amendments by the Minnesota Supreme Court to the RPCs. *See gen.,* Minn. Stat. § 319B..06, subd. 1 (e) (1999); Minn. Stat. § 319B.11, subd. 1 (1999).

a) If the MDP elects to have its lawyer owners and lawyer employees operate subject to the "traditional" Rules of Professional Conduct, then the probable statutory, regulatory changes necessary could largely be limited to amending RPC 5.4 to permit "fee sharing," and amend Minn. Stat. § 481.02 (1999) to reflect that the MDP and the non-lawyer owners of the MDP would not be practicing law without a license. All currently accepted practices regarding attorney-client privilege (as well as waiver thereof), lawyer conflict of interest rules, IOLTA responsibilities, etc., would have to be observed by lawyer owners and lawyer employees, and they would not only face individual Lawyer Professional Responsibility Board (LPRB) consequences for violations of the RPCs, but the MDP itself could be subject to LPRB actions pursuant to Minn. Stat. § 319B.11, subd. 8 (1999).

b) If the MDP elects to have its lawyer owners and lawyer employees be regulated by amended, less stringent Rules of Professional Conduct (which would necessarily need to be promulgated by the Minnesota Supreme Court, *see*, Minn. Stat. § 319B.11, subd. 1 & subd. 2(b) (1999) consistent with this proposed option), then the RPCs would have to be amended to reflect that in dealing with any lawyer owner, lawyer employee or any other individual associated with the MDP acting in concert with or under the supervision or control of a lawyer within or without the MDP there would be no attorney-client relationship created as "traditionally" conceived of so that no attorney-client privilege would exist, all conflicts of interest (even direct conflicts) could be waivable by the client following full disclosure, no IOLTA requirements would apply to the MDP's handling of client property, the notes, documents and papers generated by the MDP in the course of performing work on behalf of the client would not be subject to the attorney work product doctrine, etc., and at the inception of the relationship between the client and the MDP, the client would have to be fully informed as to the consequences of the MDPs election to operate and provide legal services under such amended RPCs. [1]

ANSWERS TO MSBA TASK FORCE QUESTIONS

1. *How would the proposal define the coverage of (the persons, activities, firms or relationships subject to) the RPC? Among lawyers providing legal services, who would be required to be covered by the RPC? Who would have the option of being*

[1] **An MDP may elect to operate in this fashion because it wants to be able to provide legal services as part of a "bundled package" of professional services available to a client without the "hamstringing" effects of the traditional fee sharing prohibitions, conflicts of interest rules, and fiduciary obligations over client assets, etc., applicable to lawyers which complicate and in some instances could outright prevent the delivery of such "bundled packages" of professional services by an MDP with both lawyer and non-lawyer owners.**

covered by the RPC?

If an MDP organized under Minn. Stat. ch. 319B for the purposes of performing legal services as part of a "bundled" delivery system of professional services, the delivery of legal services by the MDP would still be required to be performed by a lawyer licensed by the Minnesota Supreme Court. *See*, Minn. Stat. § 319B.06, subd. 2 (b) (1999). All lawyers in an MDP (whether owner or employee) would still be subject to the RPCs, however, the election option available to the MDP under this proposal to have its lawyers regulated by amended, less stringent RPCs simply provides the flexibility MDP proponents say is lacking under the "traditional" RPCs now in place (particularly in regard to conflicts of interest rules).

1a. *Of those persons in the MDP who would not be bound by the RPC, would they be bound by other rules? If so whom would be responsible for drafting implementation and enforcement (e.g, Supreme Court vs. Dept. of Commerce, etc.)?*

Non-lawyer owners of an MDP organized under Minn. Stat. ch. 319B would have to be licensed professionals in one of the enumerated professions set out in Minn. Stat. § 319B.02, subd. 17, subd. 19 (1999). These non-lawyers professionals (and presumably any un-licensed employees of the MDP providing other than legal services) would be subject to the regulation and discipline of their respective licensing boards. *See*, Minn. Stat. § 319B.06, subd. 1 (e) (1999); Minn. Stat. § 319B.11, subd. 1, subd. 8 (1999).

2. *Would lawyers covered by the RPC be permitted to share fees with non-lawyers? If so, under what circumstances? Would non-lawyer control be permitted? would there be any restrictions on who lawyers could partner with? How would conflicts between professional obligations represented in the MDP be handled? Specifically, how would the firm be required to deal with conflicts of interest?*

Fee sharing and non-lawyer control would be permitted provided RPC 5.4 is appropriately amended. Non-lawyer participants in an MDP would be limited to those professions identified in Minn. Stat. § 319B.02, subd. 17; subd. 19 (1999). A non-lawyer could "not adopt, implement, or follow a policy, procedure, or practice that would give [the LPRB] grounds for disciplinary action against a professional who follows, agrees to, or acquiesces in the policy, procedure or practice." *See*, Minn. Stat. § 319B.06, subd. 1 (e) (1999); § 319B.11, subd. 8 (1999). If the MDP elected to operate under less stringent, amended RPCs as envisioned by this option then any conflict of interest (even direct ones) could be waived by the client upon full and complete disclosure; otherwise, current rules applicable to lawyers in regard to conflicts of interest would be unchanged.

2.a. *Should the main or sole purpose of the MDP be offering legal services?*

This would not be a necessary requirement. If the MDP wants to offer any legal services whatsoever, it should still be required to do so consistent with all points discussed in the present report.

3. *In contexts where lawyers would not be permitted to share fees, what other forms of multi-disciplinary arrangement would be permitted? What regulation would govern such MDPs and who would enforce it?*

   Absent an amendment to RPC 5.4 to permit fee sharing, Minn. Stat. ch. 319B would not provide a vehicle by which lawyers could lawfully participate in a professional firm which was owned in part by non-lawyers. Lawyers might still be able however to engage in "ancillary businesses," but only with lawyer ownership and subject to the full RPCs as they currently exist.

4. *What other changes to the RPC would the proposal require?*

   The RPCs would need to be amended consistent with the general comments made in paragraph (b) of the introduction above. (However, the precise language and full extent of any necessary amendments for suggestion to the Minnesota State Supreme Court would necessarily need to be worked out and drafted by a subsequent implementation committee should "Option Two" be recommended to and passed by the MSBA House of Delegates.) Further, the Minnesota Rules of Civil Procedure, Minnesota Rules of Evidence, and any other statutes or regulation which address or relate to such doctrines as the attorney-client privilege, conflicts of interest, or work product doctrine, etc., would need to allow for the effect of an MDP's election to offer legal services under a set of amended, relaxed RPCs; this could be done simply by amending Minn. Stat. ch. 319B to state generally that when applicable the amended, relaxed RPCs would control over any conflicting rule, regulation or statute.

5. *What regulation of lawyers does the proposal envision in addition to or instead of enforcement of the RPC by the state supreme court? How would such regulation interact with state supreme court regulation?*

   No regulation by any agency other than the Minnesota State Supreme Court through enforcement of the RPCs would be required (or permissible under Minn. Stat. ch. 319B) to oversee the conduct of lawyers participating (either as owners or employees) in an MDP providing legal services and organized under Minn. Stat. ch. 319B. *See*, Minn. Stat. § 319B.11, subd. 1 (1999); and Minn. Stat. § 319B.06, subd. 1 (b)(3); subd. 1(e); subd. 2 (b) (1999).

6. *What legal services would nonlawyers be permitted to perform? Would nonlawyers be subject to any regulation or disclosure requirements with regard to their provision of legal services? If so, who would promulgate and enforce*

such requirements?

The performance of legal services would be generally considered the performance of "professional services," *see*, Minn. Stat. § 319B.02, subd. 19 (1999), and therefore, the furnishing of such services on behalf of the professional firm (or MDP) would have to be done by a licensed attorney. *See*, Minn. Stat. § 319B.06, subd. 2 (b) (1999). Of course there could be a permissible exception so long as the RPCs allow the performance of some legal services by non-lawyers under circumstances where the licensed attorneys are responsible for the direct supervision and control of the work done by a non-lawyer. *See*, Minn. Stat. § 319B.11, subd. 1 (1999). Either the PRCs or Minn. Stat. ch. 319B could be amended to require full disclosure to a client of an MDP whenever they are receiving legal services from a non-lawyer eventhough the non-lawyer is ostensibly performing under the direct supervision and control of a licensed attorney owner or licensed attorney employee of the MDP.

7. *How would the proposal define the coverage of the UPL statute, if any? How would the UPL statute be enforced?*

Minn. Stat. § 481.02 (1999) would need to be amended so a professional firm and the non-lawyer owners of said professional firm organized under Minn. Stat. ch. 319B would not be engaged in the unauthorized practice of law. Ideally, enforcement of the RPCs against lawyer owners or lawyer employees participating in an MDP organized under Minn. Stat. ch. 319B would be facilitated if a clearer definition of "the practice of law" or "delivery of legal services" could be fashioned which would more accurately reflect current practices and be acceptable to the bar.[1] Lawyers who direct, aide or abet a violation of Minn. Stat. § 481.02 (1999) through their actions as part of an MDP organized under Minn. Stat. ch. 319B would presumably be subject to discipline by the LPRB, and non-lawyers would still have to be dealt with either by way of injunctive remedies or in the criminal courts. A clearer definition of "the practice of law" or "the delivery of legal services" would certainly facilitate enforcement of RPC and UPL violations against both lawyers and non-lawyers.[2]

[1] A clearer definition of "the practice of law" or "the delivery of legal services" may make UPL enforcement easier by state and county criminal authorities by providing greater "political cover" for prosecuting attorneys.

[2] At least, the statutes and the RPCs should be clarified to eliminate the "loop hole" in UPL cases raised by Wood Foster during the March 4, 2000, meeting of the Task Force en banc which provides that a lawyer cannot be found to have engaged in the unauthorized practice of law (i.e., presumably concepts of *respondeat superior* are presently inapplicable to UPL cases).

8. *What would be the consequence under the proposal of relinquishing one's license to practice law?*

An MDP which intends to deliver legal services as part of its operations could not be formed under Minn. Stat. ch. 319B without at least one of the professional firm's owners being a licensed attorney subject to the oversight of the Minnesota State Supreme Court through the LPRB. *See*, Minn. Stat. § 319B.03, subd. 2 (3) (1999); Minn. Stat. § 319B.06, subd. 1 (b) (2) (1999). Therefore, even if other employees of the MDP relinquish their "license" to practice law, the remaining licensed attorney owner(s) of the MDP could be subject to sanctions and discipline by the LPRB for the conduct of the unlicensed employees (whether they have J.D. degrees or not) deliverying legal services under the lawyer owner's supervision and control. *See*, Question No. 6 above and Answer thereto.

9. *Would the proposal create categories of lawyers subject to different ethical or other regulations? Might lawyers in one category be in competition with lawyers (or nonlawyers) in another category? Put another way, would clients in need of certain legal services be able to choose a lawyer (or nonlawyer) from any of the available categories to provide those services? Explain.*

Depending upon what election was made by the MDP at its initial organization under Minn. Stat. ch. 319B (as contemplated by "Option Two" now under consideration), it is possible that lawyers (other than those engaged in litigation) could be performing the same work subject to slightly different ethical rules. Lawyers would not be in competition with non-lawyers since Minn. Stat. § 319B.06, subd. 2 (b) (1999) would require that the delivery of professional services (i.e., legal services) be performed by a licensed attorney.[1] The ability of a client to chose among lawyers providing legal services (other than litigation) either in "traditional" (100 % lawyer owned) law firms; Minn Stat. ch. 319B organized MDPs which elect to have their lawyer owners and lawyer employees subject to the full weight of existing RPCs; or the delivery of legal services by an MDP organized under Minn. Stat. ch. 319B which has elected (and therefore would have to make full disclosure to the client) to provide legal services under amended, less stringent RPCs cannot be shown at this time to create any material competitive disadvantages. Opponents of MDPs (as envisioned under the ABA Proposed Amended Model Rule 5.4) have not produced any statistically valid evidence that there is indeed a ground swell of "consumer" demand or preference for the delivery of wholely unregulated legal services by MDPs whether by lawyer or non-lawyer. Further, it may be just as likely that on a case by case basis, a potential client (fully informed as to the effect of an election by an MDP organized under Minn. Stat. ch. 319B to provide legal services under amended,

[1] Or at least the legal services if performed by a non-lawyer would, under the RPCs, have to be done under the direct supervision and control of a licensed attorney who could ultimately be held responsible and disciplined by the LPRB for any nefarious conduct by the non-lawyer.

less stringent RPCs) may just as often desire the greater protections (i.e., attorney-client privilege, IOLTA accounts, stringent conflict of interest rules, etc.) that are available from traditional law firms or MDPs of the type described in paragraph (a) of the introduction above.

10. *Address the effect of the proposal on the following lawyers: in-house counsel providing legal services only to the employer; in-house counsel providing legal services to insureds or clients of the employer; legal aid counsel; lawyers providing dual services (legal and something else); transactional lawyers; litigators; lawyers engaged in multi-state practice; lawyers in captive insurance defense firms; lawyers owning a separate firm that engages in an ancillary business; lawyers engaged in a contractual alliance with a consulting business.*

    a. In-house counsel providing legal services only to the employer would be unaffected by "Option Two."

    b. In-house counsel providing legal services to insureds or clients of the employer would potentially be subject to discipline under the RPCs and the employer would be subject to a UPL proceeding if the lawyer were not one of the owners of the employer and the employer was not organized under Minn. Stat. ch. 319B.

    c. Government counsel would be unaffected by "Option Two." And in any event, the RPCs and Minn. Stat. ch. 319B could easily be amended to state as much. Likewise, a simple amendment to the RPCs and/or Minn. Stat. ch. 319B could clarify the status of legal aid corporations and legal aid counsel as being unaffected by "Option Two."

    d. Lawyers providing dual services (legal and something else) would be unaffected by "Option Two," but they would be subject to any RPCs requirements (particularly those concerning the conduct of ancillary business).

    e. Transactional lawyers would be unaffected by "Option Two" unless they were lawyer owners or lawyer employees of an MDP organized under Minn. Stat. ch. 319B which had elected to provide legal services under amended, less stringent RPCs.

    f. Litigators would be unaffected by "Option Two" because an MDP organized under Minn. Stat. ch. 319B would be prohibited from engaging in litigation. *See*, footnote 3 above.

    g. Lawyers engaged in multi-state practice, if a participant in an MDP organized under Minn. Stat. ch. 319B, would still have to be concerned with possible prohibitory statutes and RPCs existing in states other than

Minnesota where he/she may also be licensed and practice law.

h. Lawyers in captive insurance defense firms. *See*, 10 b above. In this context, since the "captive firm" typically is separate from the insurance company in its location, office management, personnel decisions, case management, and operations (other than that the staff and lawyers are paid a salary/benefits by the insurance carrier), some provision could possibly be made by way of amendment to the RPCs, Minn. Stat. ch. 319B, and Minn. Stat. § 481.02 (1999) to treat this model as analogous to a "traditional law firm" since the lawyers in this setting would be subject to the full weight of discipline under the RPCs.[1]

i. Lawyers owning a separate firm that engages in an ancillary business would be subject to the existing RPCs. *See also*, 10 d above.

j. Lawyers engaged in a contractual alliance with a consulting business would be unaffected by "Option Two." However, the lawyers would remain subject to discipline under the RPCs if any of the aspects of the alliance were in violation thereof; likewise, the consulting business would be faced with possible UPL proceedings if any of the aspects of the alliance were in violation of Minn. Stat. § 481.02 (1999).[2]

[1] Further, the ability of the insurer to exercise some measure of control over the cost of the defense provided and negotiation of any settlement is only marginally different that the same degree of influence it has on independent insurance defense firms who are retained by a carrier to provide legal services for one of the carrier's insureds. The possibility of a "bad faith" claim against the insurer because of its attempt to control the legal defense to the detriment of its insured also exists to temper the influence of the carrier over the independent legal judgment of the lawyers working in a "captive insurance defense firm."

[2] *See also*, Question No. 7 above and Answer thereto.

W.F.: *Would there be any increased costs in connection with "Option Two," and who or what entity would bear them?*[1]

No significant increased cost is anticipated since the LPRB would simply be performing its intended function of supervising licensed attorneys in Minnesota to insure compliance with the RPC. "Option Two" would simply affect the analysis and determination of what would or wouldn't be sanctionable conduct by a lawyer owner or lawyer employee of an MDP organized under Minn. Stat. ch. 319B.

11. *Should outsiders be allowed to make passive investments in MDPs?*

No. Minn. Stat. § 319B.02, subd. 13, subd. 14 (1999); Minn. Stat. § 319B.06, subd. 1 (b) (2) (1999); and Minn. Stat. § 319B.07 - .10 (1999) provide specific provisions as to ownership and governance of an MDP organized under this chapter. In general, all owners of an MDP organized under Minn. Stat. ch. 319B would have to be a licensed professional performing services on behalf of the MDP in at least one of the categories of professional services identified in the MDP's organizational documents at its inception.

12. *How should client trust accounts be managed in the MDP?*

If an MDP organized under Minn. Stat. ch. 319B did not elect to have its lawyer owners and lawyer employees subject to amended, less stringent RPCs, the lawyers would be required to adhere to all current IOLTA regulations. Under the amended, less stringent RPCs envisioned consistent with "Option Two," the IOLTA regulatory scheme would not apply to client assets controlled by the MDP; however, the client would have to be fully informed of this fact at the inception of the relationship with the MDP.

13. *Rule 5.4 speaks to the professional independence of a lawyer. How will lawyer autonomy be preserved in the MDP being proposed?*

[1] This question was suggested by MSBA President Wood Foster in a 3-24-00 email to the Task Force Membership from Mary Grau. This same 3-24-00 email from Mary Grau also set forth the additional questions 1a, 2a, 11 - 14 suggested by Magistrate Boylan.

A non-lawyer could "not adopt, implement, or follow a policy, procedure, or practice that would give [the LPRB] grounds for disciplinary action against a professional who follows, agrees to, or acquiesces in the policy, procedure or practice." *See*, Minn. Stat. § 319B.06, subd. 1 (e) (1999). The LPRB could not only sanction the individual lawyer for RPC violations, but it could also pursue "involuntary dissolution and rescission of the professional firm [MDP] status." Minn. Stat. § 319B.11, subd. 8 (1999).

14. *Will the nonlawyers in the MDP be prohibited from providing legal services? If so, who will be responsible (and to whom) for ensuring that this is so?*

See, Question No. 6 above and Answer thereto.

Appendix C

Resources

Reports of Other Bar Associations

American Bar Association Commission on Multidisciplinary Practice reports and recommendations:

a. Report to the House of Delegates: June 1999

b. Updated Background & Informational Report and Request for Comments: January 2000

c. Postscript to February 2000 Midyear Meeting: February 2000

d. Draft Recommendation to the House of Delegates: March 2000

The testimony and statements gathered by the ABA Commission on Multidisciplinary Practice and made available on the Commission's website (www.abanet.org/cpr/multicom.html) were invaluable to the Task Force. Because these materials are voluminous and easily accessible via the website, they are not listed here.

Nonlawyer Activity in Law-Related Situations, A Report with Recommendations, ABA Commission on Nonlawyer Practice, August 1995

Facing the Tide of Change — An Analysis of the Effect of MDPs on the Public in Florida by the "Con" Subcommittee of the Florida Bar Special Committee on Multi-Disciplinary Practice, December 1999

Facing the Inevitability, Rapidity and Dynamics of Change (A Report Favoring Adoption of MDP Model and Other Actions) Report to the Board of Governors of The Florida Bar submitted by the Pro-MDP Subcommittee, January 7, 2000

The Association of the Bar of the City of New York Statement of Position on Multidisciplinary Practice, July 20, 1999

New York County Lawyers' Association Special Commission on MDP Response to Report of the ABA Commission on Multi-Disciplinary Practice, June 14, 1999

Report of Special Committee on Multi-Disciplinary Practice and The Legal Profession, New York State Bar Association, January 8, 1999

Preliminary Report of New Jersey State Bar Association Ad Hoc Committee on Multidisciplinary Practice, July 1999

Resolution on Multidisciplinary Practice adopted by the New Jersey State Bar Association Board of Trustees, January 14, 2000

Recommendation of the Pennsylvania Bar Association Commission on Multidisciplinary Practice & Related Trends Affecting the Profession, July 27, 1999

Philadelphia Bar Association Multidisciplinary Practice Task Force Report & Recommendation, March 10, 2000

State Bar of Texas Task Force Preliminary Report on the ABA Commission's Multidisciplinary Practice Proposal, October 1999

Current Statutes and Rules

AICPA Code of Professional Conduct Section 101 Independence and Section 301 Confidential Client Information

District of Columbia Rules of Professional Conduct, Rules 5.1 - 5.6

Minnesota Statute Chapter 319B — Minnesota Professional Firms Act

Minnesota Statute Chapter 481.02 — Unauthorized practice of law

Monographs, Papers and Prepared Remarks

Model Rules of Professional Conduct Proposed Final Draft, ABA Commission on Evaluation of Professional Standards (Kutak Commission), May 30, 1981

Multidisciplinary Partnerships in the Law Practice of European & American Lawyers, paper presented by Charles W. Wolfram, July 5, 1997 and August 7, 1997 at symposia sponsored by Cornell Law School and the ABA Section of International Law & Practice

The Rapidly Changing Field of Tax Practice: Attorneys Working in Professional Service Firms, Ronald E. Friedman, University of Southern California Law School 50th Tax Law Institute, 1998

Inter-Professional Practice Issues: A Debate & Discussion, Steven C. Salch, University of Southern California Law School 50th Tax Law Institute, 1998

World Trade Organization, Council for Trade in Services Background Note by the Secretariat on Legal Services, July 1998

Multidisciplinary Practice: Focus Shifts to States, L. Harold Levinson, The Attorney - CPA, 1999 (Volume XXXV, Number 2)

LLD + CPA = ?, Pat Dunnigan, Florida Trend, May 1999

The Future of CPAs — Fee, Fi, Foe, Fum Look Out Lawyers Here We Come, Address by Lloyd "Buddy" Turman, CAE, Executive Director, Florida Institute of CPAs, to Southeast Accounting Show, June 3, 1999

Lawyers, accountants and beyond — ABA fee splitting idea would spark multidisciplinary firms, Richenya A. Shepherd, The National Law Journal, June 21, 1999

The Risks of Multidisciplinary Practice, L. Harold Levinson, New York Law Journal, June 21, 1999

City Bar Supports MDP, With Limits, Anna Snider, New York Law Journal, July 21, 1999

Practice Debate Heats Up — State bar leaders say multidisciplinary plan needs study, John Gibeaut, ABA Journal, August 1999

Comments Concerning an Article on Multidisciplinary Practice, Sydney M. Cone, III, September 24, 1999

Conflict of Interest Rules, One of the Core Values of the Legal Profession, Statement made by Dr. Hans-Jurgen Hellwig, Vice President of the German Bar Association at the International Bar Association Section of Business Law meeting in Barcelona, Spain, October 1, 1999

Remarks to the Corporate Bar Association by SEC Commissioner Norman S. Johnson, October 1, 1999

Remarks to the Panel on Audit Effectiveness of the Public Oversight Board by SEC Chairman Arthur Levitt, October 7, 1999

October 13, 1999 letter to Robert Grey, Chair of ABA House of Delegates from Paul Sax, Chair of ABA Section of Taxation

Selected Provisions and Reporter's Notes: Minnesota Professional Firms Act, Daniel S. Kleinberger, William Mitchell College of Law, November 3, 1999

The Professions are Dead, Long Live the Professions: Legal Practice in a Post-Professional World, Herbert M. Kritzer, paper prepared for publication at the 1999 Legal Aid Research Conference, University College, London, November 4 & 5, 1999

January 10, 2000 letter to the Minnesota MDP Task force from Clarence Hightower, President/CEO of the Minneapolis Urban League

The Current Status of MDPs, prepared for the Minnesota State Bar Association by Ward Bower, January 14, 2000

February 1, 2000 letter to the Minnesota MDP Task Force from Susan Lynx, RN, JD, Program Director, Minnesota Nurses Association

Converging Professional Services: Lawyers Against the Multidisciplinary Tide, The American Antitrust Institute, February 2000

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MSBA Multidisciplinary Practice Task Force

Proposed Amendments to the Minnesota Rules of Professional Conduct
June, 2001

Adopted by the General Assembly - June 22, 2001

Introduction

On June 23, 2000, the MSBA General Assembly adopted the report and recommendations of the MSBA Multidisciplinary Practice Task Force. The full text of the report is attached. In doing so, the MSBA went on record as supporting MDP's—entities which combine legal and other professional services and in which lawyers share ownership with non-lawyers—as long as the lawyers retain majority control of the enterprise and as long as the non-lawyer owners are members of licensed professions with promulgated codes of ethics. The MSBA task force report urged the American Bar Association to authorize amendments to the Model Rules of Professional Conduct that would permit multidisciplinary practice under these circumstances.

At its July 2000 annual meeting, the ABA House of Delegates adopted a resolution rejecting all forms of multidisciplinary practice. The ABA also dissolved its own Commission on Multidisciplinary Practice, which had urged acceptance of MDP's "provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services." After the ABA annual meeting, MSBA President Kent Gernander asked the MSBA MDP Task Force to reconvene to determine what recommendations, if any, it wished to make to the MSBA membership in light of the ABA action.

Mindful of the MSBA's tradition of leadership on issues of concern to the legal profession, the task force recommended that the Association move forward—in spite of the ABA position opposing multidisciplinary practice—to develop proposed amendments to the Minnesota Rules of Professional Conduct (MRPC) consistent with the June 2000 report. At its December 2000 meeting the MSBA Board of Governors adopted this recommendation and authorized the task force to draft proposed amendments to the MRPC for consideration by the Association membership.

The amendments which follow would:

1) permit lawyers to engage in multidisciplinary practice by forming partnerships with non-lawyer professionals as long as the lawyers retain majority control of the entity;
2) provide that only lawyers in the entity may engage in the practice of law;
3) define "professionals";
4) define "practice of law";
5) require lawyers practicing law in the entity to obtain written confirmation from each member of the entity that there will be no interference with the lawyers' independence of judgment or the lawyer-client relationship; and
6) impute conflicts firm wide by treating clients of non-lawyer professionals as clients of the firm's lawyers for purposes of the rule on imputed conflicts.

EXHIBIT B

Preamble
Under the heading “Preamble” in the "Terminology" section in the appropriate alphabetical location, make the following changes:

> “Firm” denotes both a law firm and a multidisciplinary practice. See Rule 5.4(b).
>
> ~~“Firm” or~~ “Law Firm” denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, and lawyers employed in a legal services organization. See Comment, Rule 1.10.
>
> “Partner” denotes a lawyer member of a partnership and a lawyer shareholder in a ~~law~~ firm organized as a professional corporation.
>
> “Practice of law” denotes the following activities:
>
> (1) Rendering legal consultation or advice to a client;
>
> (2) Appearing on behalf of a client in any hearing, proceeding or related deposition or discovery matter or before any judicial officer, court, public agency, referee, magistrate, commissioner or hearing officer, except where rules of the tribunal involved permit representation by nonlawyers;
>
> (3) Engaging in other activities that constitute the practice of law as provided by statute or common law.
>
> “Professionals” denotes individual licensed professionals who are governed by promulgated codes of ethical conduct.

Rule 1.10 Imputed Disqualification: General Rule
Rule 1.10(a) should be changed as follows:

> Except as provided in this rule, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2. Solely for purposes of this paragraph, the clients of nonlawyer professionals who are partners or employees of a firm shall be regarded as clients of the lawyers of the firm.

Rule 5.4 Professional Independence of a Lawyer
Rule 5.4 should be changed as follows:

> (a) A lawyer or ~~law~~ firm shall not share legal fees with a nonlawyer, except that:
>
> (1) an agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer the proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

(3) A lawyer or ~~law~~ firm may include nonlawyer partners and employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed upon purchase price.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law except as set out in Rule 5.4(e).

(c) 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.

(d) Except as set out in Rule 5.4(e), a lawyer shall not practice with or in the form of a professional firm or association authorized to practice law for a profit, if a nonlawyer:

(1) Owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of a lawyer for a reasonable time during administration;

(2) Possesses governance authority, unless permitted by the Minnesota Professional Firms Act; or

(3) Has the right to direct or control the professional judgment of a lawyer.

(e) Notwithstanding the foregoing provisions of this Rule, a lawyer may form and practice in a partnership, professional firm or other association that is a multidisciplinary practice which meets the following requirements:

(1) A majority percentage of ownership in the entity must be held by lawyers licensed to practice law and practicing law in that entity;

(2) Only lawyers in the entity shall be engaged in the practice of law;

(3) The lawyers practicing in the entity must ensure that they retain the control and authority necessary to ensure lawyer independence in the rendering of legal services;

(4) The lawyers practicing law in the entity must obtain an affirmative written agreement signed by each member of the entity that there will

be no interference with the lawyers' independence of professional judgment or with the client-lawyer relationship; and

(5) The nonlawyer owners must be professionals actively practicing their professions in the entity and may not be passive investors.

Miscellaneous

The following clerical changes should be made to incorporate multidisciplinary practice:

In Rules 1.15, 5.1, 5.3 and 7.2(g) delete the word "law" before the word "firm" throughout the Rules.