Washington State Bar Association

FUTURE OF THE LEGAL PROFESSION STUDY GROUP

REPORT TO THE BOARD OF GOVERNORS

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ABSTRACT: *Over the course of almost one year, a group of attorneys appointed by the Washington State Bar Association Board of Governors reviewed and met to discuss issues of "multidisciplinary practice" (MDP) and "multijurisdictional practice" (MJP). After several months of information gathering, the Study Group met to determine the position of the group on MDP and MJP. MJP was embraced by the Study Group as a whole, with a clear consensus favoring recommendations to change the Rules of Professional Conduct to allow for certain defined situations involving a multijurisdictional practice. However, the Study Group was just as clearly divided on the issue of MDP, and was unable to reach a consensus on any recommendation to the Board of Governors, either to change or not change the Rules of Professional Conduct prohibiting sharing of legal fees and control of law firms.*

I. PREAMBLE: As the legal profession has developed, two different aspects of it have been identified, which some consider to compete or even conflict with each other. These are commonly referred to as the "profession" of law and the "business" of law. It was long viewed that the profession of law precluded lawyers from engaging in common business activities such as advertising. However, in the late-20th century this changed with the United States Supreme Court ruling that blanket restrictions on lawyer advertising violate lawyers' First Amendment rights.[1] Similarly, the Washington State Supreme Court held that "entrepreneurial" aspects of the practice of law may be regulated by the legislature without violating the separation of powers doctrine.[2]

During the same period, questions of who may practice law and what constitutes the unauthorized practice of law have been addressed by the courts and legislatures. The Washington Supreme Court established a court rule that grants a limited license to lay persons to engage in the practice of law in defined areas of closing of real and personal property transactions,[3] and held that lay persons employed by mortgage lenders are authorized to prepare legal documents ordinarily incident to their financing activities.[4] The California Supreme Court held that lawyers duly admitted in New York but not admitted in California who provided arbitration-related legal services to a California client were engaged in the unauthorized practice of law.[5] The California legislature, which regulates the practice of law in that state, responded by statutorily authorizing out-of-state lawyers to represent parties in California arbitrations by associating with California counsel in the same way out-of-state lawyers may gain *pro hac vice* admission in court proceedings.[6]

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[1] *Bates v. State Bar of Arizona*, 433 U. S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1978) and its progeny.
[2] *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984).
[3] Admission to Practice Rule 12.
[4] *Perkns v. CTX Mortgage Co.*, 137 Wn.2d 93, 969 P.2d 93 (1999).
[5] *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal. 4th 119, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998).

[6] California Code of Civil Procedure, 1282.4 (1999.

Now, the debate is focussed on issues of "multidisciplinary practice," or whether nonlawyers should be permitted to share legal fees and control of law firms, and "multijurisdictional practice," or whether lawyers should have broader authority to practice law in jurisdictions where they are not admitted. At the center of this debate is the question of what the "core values" of the legal profession are, and how they may be best preserved.

A. THE PROFESSION OF LAW:

- *I will support the constitution of the State of Washington and the constitution of the United States*
- *I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with the business of my client unless this compensation is from or with the knowledge and approval of the client or with the approval of the court.*
- *I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay unjustly the cause of any person.*[7]

When the Washington State Bar Association was established as a mandatory bar in 1933, the "code of ethics of the American Bar Association" was adopted as "the standard of ethics of the members of the bar of this state."[8] That "code" was based on the Canons of Professional Ethics adopted in 1908 during the ABA Annual Meeting in Seattle. In 1933 the Canons contained aspirational language about "the law whose ministers we are." It reminded us that Justice should be "so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration." Then like now, it required lawyers to maintain the client's confidences, to avoid and to disclose conflicts of interest, and "to represent the client with undivided fidelity."[9] It stated, "In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."[10] It required that "a lawyer's responsibility should be direct to the client."

These attributes of confidentiality, avoidance of conflicts of interest, loyalty to the client, independent judgment, and competent representation are often identified as core values of the legal profession. In short, lawyers are fiduciaries.

Both the Oath of Attorney and the Rules of Professional Conduct remind lawyers that they have an obligation to ensure access to justice for all persons. Unlike most other professions, lawyers have a specific obligation to render *pro bono publico* and public interest legal service.[11]

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[7] Washington Oath of Attorney (excerpts), Admission to Practice Rule 5(c).

[8] RCW 2.48.230.
[9] Canons 6 and 37.
[10] Canon 12.
[11] RPC 6.1.

While the world has changed dramatically over the past 200 years, these basic values of the legal profession have remained at its core, just as the Constitution has remained the source of liberty, justice, and individual rights in this country. It is the obligation of lawyers, judges, and the organized bar to preserve these core values for the benefit and protection of the public whom we serve. Any considerations of multidisciplinary practice and multijurisdictional practice must have these core values in mind.

B. THE BUSINESS[12] OF LAW:

The 1933 Canons of Professional Ethics also included prohibitions against sharing fees with nonlawyers[13] and against practicing law in partnership with nonlawyers.[14] Practicing law in the state required admission to the bar, either as an active member of the WSBA or by special admission pursuant to court rules.[15] Unlawful practice of law was made a misdemeanor.[16]

The societal changes since 1933 have been dramatic. Technology has taken us from communication by post and by telephone, to faxes, e-mail, and the Internet. The automobile and the airplane have changed travel from a challenge to a commonplace. Business has changed from local interests to global commerce. Although the legal profession has embraced these technological changes as they have developed, the basic core values of the profession as fiduciaries to their clients has remained steadfast. Nevertheless, some have suggested that changes in the business world should now lead to changes within the legal profession, and its ethical rules, as well.

For the legal profession, the question is thus whether changes in society, current or future, require changes in the rules with regard to *who* can practice law and *how* it can be practiced. The current debate is whether the Rules of Professional Conduct should be amended to allow lawyers and nonlawyers to share legal fees and the direction and control of law firms (commonly called multidisciplinary practice); and should the rules be changed to allow lawyers to practice law in jurisdictions in which they are not licensed (commonly called multijurisdictional practice).

Among the significant changes driving these questions are the following:

Business of law: In the past 30 years, revenues of the legal profession in Washington have grown from $74 million to ~~a~~ $1.3 billion. Nationally, the figures are even more astounding: from $4.2 billion to $148 billion between 1965 and

[12] Some felt than even discussing these issues in terms such as the "business of law" was objectionable, and that business considerations did not properly belong in a discussion regarding the ethics of the profession.
[13] Canon 34.
[14] Canon 33.
[15] RCW 2.48.170.
[16] RCW 2.48.180.

1999.[17] Advertising legal services was forbidden in 1970; it is commonplace today. Significant new areas of practice have developed: environment, occupational health and safety, nuclear energy, discrimination, health and mental health, biotechnology, computers.

Practice of law: As the legal business grows, other forces are also at work on the practice of law. Consumers question the cost of legal services, deciding whether to hire a lawyer, act pro se, or find other alternatives. Corporations bring more and more work in-house. Insurance companies place limits on fees and costs for defense lawyers. Critics question the legitimacy of contingent fees. And nonlawyers increasingly seek entry into the practice of law – "typing services" and "independent paralegals" advertise their services, and other professionals perform legal services as part of their package of business as a "convenience" to their clients and customers. Competition for delivery of legal services has become a major factor.

At the same time, there has been a growth of indigent legal services – institutionalized lawyers for the poor and court-appointed public defenders. And lawyers in government have increased. According to an ABA statistical report, in 1995 7.6% of all lawyers in the U. S. were employed by government. [18]

That same ABA report found that more than half of all lawyers in the U.S. continue to be in solo-to-10-lawyer practices. It found that during the 1970s, 1980s, and 1990s, the number of solo practitioners nationwide more than doubled, and that by 1995 nearly half of all lawyers in private practice were solo practitioners.

In Washington, the most recent comprehensive survey of WSBA members[19] found:

27%	solo practice
46%	2 or more person law firm
19%	public agency
6%	in-house
3%	other or not practicing

C. THE CHALLENGES: MULTIDISCIPLINARY PRACTICE AND MULTIJURISDICTIONAL PRACTICE.

Despite the changes in society and in the practice of law, the rules with regard to *who* can practice law and *how* it can be practiced remain essentially unchanged today. We continue to prohibit sharing fees with nonlawyers and practicing law in

[17] U. S. Department of Commerce Bureau of Economic Analysis.
[18] Carson, Clara N., *The Lawyer Statistical Report: The U. S. Legal Profession in 1995*, American Bar Foundation (1999).
[19] *WSBA Membership Survey*, Gilmore Research Group (1993).

partnership or other business relationships with nonlawyers; we prohibit lawyers from other states practicing law in Washington except as an active member of the WSBA or by special admission pursuant to court rules; we continue to make unlawful practice of law a misdemeanor.

It is argued by some that with all of the other changes in and around the practice of law, restrictions established for the legal profession in the 20th Century do not meet the needs of the public and the lawyers in the 21st Century. Proponents argue for the ability of lawyers and nonlawyers to join in the delivery of broad-based professional services to meet the demands of the consumer and to compete with nonlawyers who engage in activities once thought to belong exclusively to the province of lawyers. Opponents argue that allowing nonlawyers to join with lawyers in the practice of law threatens the independence of the legal profession and the "core values" of client loyalty and confidentiality.

Some argue for the ability of lawyers to be admitted and to practice law wherever they are competent to do so, regardless of jurisdictional boundaries. Others counter with issues of how competency can be assured and where public protections such as lawyer discipline and client protection programs, including client protection funds, attorney-client dispute mediation, and fee arbitration, will be administered in multijurisdictional practices.

These issues are multiple and complex. They do not afford easy answers. They require careful and deliberate consideration, and may require a commitment of resources and a reevaluation of long-held precepts about the legal profession. Resolution of them will determine the future of the legal profession. This report of the Futures of the Profession Study Group of the Washington State Bar Association seeks to address these issues.

II METHODOLOGY: In August 2000 the Board of Governors of the Washington State Bar Association authorized President Jan Eric Peterson to appoint a group to study questions raised by the issues of multidisciplinary practice (MDP), multijurisdictional practice (MJP), and Internet practice of law, and to report to the Board of Governors with policy recommendations for the Washington State Bar Association. The initial charge to the Study Group was:

- to consider the issue of whether to amend the Rules of Professional Conduct to allow multidisciplinary practice and to issue reports and recommendations to the Board of Governors;

- to study, report, and recommend on the issue of multijurisdictional practice; and

- if the study group were so inclined, to undertake consideration of questions raised by the provision of legal services by nonlawyers on the Internet, and what policy, rules, or

> regulations the Bar should undertake to address these issues in light of consumer demand, consumer protection, and access to justice.

Seattle attorney Tom Fain was appointed chair, and the following were appointed to the Study Group: Dan Ballbach, Seattle; Tim Carlson, Yakima; Paul Cressman, Sr., Seattle; Brian Dano, Moses Lake; Pete Dewell, Seattle; Brian Gosline, Spokane; Peter R. Jarvis, Portland, OR; Paul Lehto, Everett; Evan Loeffler, Seattle; Seattle; Mark Paben, Seattle; Leonard Schroeter, Seattle; and David Tang, Seattle. In addition, faculty from each of the 3 law schools in Washington were invited and agreed to serve as ex officio members of the Study Group: Prof. Thomas Andrews, University of Washington School of Law; Prof. David Boerner, Seattle University School of Law; Prof. John Morey Maurice, Gonzaga University School of Law; and Prof. John Strait, Seattle University School of Law.

Early in their deliberations, the Study Group discussed the breadth of its mission, and, after discussion, it was agreed to defer consideration of Internet issues.

To ensure that both the MDP and MJP issues were addressed, the Study Group broke into two subcommittees, one for MDP (chaired by Brian Dano) and one for MJP (chaired by David Tang). Each subcommittee was able to study its assigned topic in depth and to report to the full Study Group.

The Study Group reviewed and debated written material from American Bar Association, the WSBA Report of the Committee to Define the Practice of Law (1999), and several reports from other jurisdictions on MDP and MJP issues. A bibliography of significant sources is included at Appendix A. The MDP Subcommittee conducted an informal state-by-state telephone survey to determine the current status of any MDP action in each state. A summary of that survey is at Appendix B.

In June, 2001, the Study Group met to determine the position of the group on MDP and MJP. As mentioned above, MJP was embraced by the Study Group as a whole, with a clear consensus favoring recommendations to change the Rules of Professional Conduct to allow for certain defined situations involving a multijurisdictional practice. However, the Study Group was just as clearly divided on the issue of MDP, and was unable to reach a consensus on any recommendation to the Board of Governors, either to change or not change the Rules of Professional Conduct prohibiting sharing of legal fees and control of law firms.

III MULTIDISCIPLINARY PRACTICE (MDP)

A. INTRODUCTION

The term "Multidisciplinary Practice" (MDP) is a generic label, with numerous forms and definitions. Some of the definitions require no change in current Rules of Professional Conduct (e.g., professionals from multiple disciplines, such as lawyers and accountants, being jointly retained to represent a client). Other definitions are prohibited under current RPC's (e.g., professionals from multiple disciplines sharing in the direction and control of a law firm, or sharing fees of lawyers). However, the definition most often associated with MDP in the context of the current debate is:

> A partnership, professional corporation or other association or entity that includes lawyers and nonlawyers, and has as one, but not all, of its purposes the delivery of legal services to a client(s), or that holds itself out to the public as providing non-legal, as well as legal, services. Under this definition, the owners of the entity, lawyers and nonlawyers alike, would share in the legal fees derived from providing legal services, and would share in the direction and control of the entity.

Among many examples of various occupations or professions that could join together in an MDP firm might be:

- Accounting firms hiring lawyers and providing legal services;
- Lawyers and chiropractors working together on behalf of persons injured in traffic accidents;
- Environmental consulting firms that handle the entire range of environmental issues for a client, including legal services;
- Real estate development firms that construct, manage and lease the completed structure, having accountants, lawyers and other professionals on staff to provide services in their respective fields;
- Elder assistance firms that hire accountants, social workers, lawyers and other professionals to provide appropriate services; and

- Financial planning firms that hire securities dealers, lawyers, CPAs and financial planners to provide estate and trust planning services.

As noted above, many lawyers currently combine their expertise with other professions and occupations to render joint services to clients, but the difference between this traditional bundling of services and an MDP firm is that in the MDP firm the client may not have a direct relationship with the other practitioners and there would be a sharing of fees and control among the practitioners.

B. BACKGROUND

One of the principal purposes of historic and current rules of legal ethics is to preserve and protect the confidentiality and privilege of the client and the exercise of a lawyer's independent professional judgment on behalf of the lawyer's clients, and to that end a number of precepts included in ethics rules are designed to limit the influence and control of third parties in the delivery of legal services. In Washington, the creation or maintenance of an MDP firm is faced with the restraints imposed by the Rules of Professional Conduct (RPC) and, in particular, RPC 5.4. It is this rule which is the primary subject of much of the MDP debate. RPC 5.4 provides:

> (a) A lawyer or law firm shall not share legal fees with a non-lawyer, 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 that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and
>
> (3) A lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.
>
> (b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.
>
> (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) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) A non-lawyer is a corporate director or officer (other than as secretary or treasurer) thereof; or
(3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

In summary, the provisions of RPC 5.4 (a), (b) and (d) prohibit a lawyer from sharing fees with a non-lawyer (except under very limited circumstances); from forming a partnership with a non-lawyer if any of the activities of the partnership consist of the rendition of legal services; and from practicing in a professional corporation or association if a non-lawyer is a corporate director or officer or has a right to direct or control the professional judgment of the lawyer.

Other potential RPC restraints on MDP would be RPC 1.6 [prohibiting a lawyer from revealing confidences or secrets relating to the representation without the client's consent]; 1.7 (b) [conflict of interest where representation of a client may be materially limited by a lawyer's own interests]; 1.8(f) [conflict of interest if lawyer accepts compensation for representing a client from one other than the client]; 1.9 (b) [conflict of interest where a lawyer uses confidences or secrets relating to the representation to the disadvantage of a former client]; 1.10 [imputed disqualification from representing a client, where another person in the firm could not represent the client because of a conflict of interest or where confidences and secrets may be involved]; 2.2 [where a lawyer acts as an intermediary between clients]; 2.3 [evaluation of a matter affecting a client for use by a third person]; 5.2 (a) [lawyer bound by ethical rules, notwithstanding that the lawyer acts at direction of another person]; 5.5 (b) [assisting a non-lawyer in the unauthorized practice of law]; 6.2 [representation of a client is likely to result in a violation of the RPC's]; 7.2 (c) [prohibiting a lawyer from giving anything of value to a person for recommending the lawyer's services]; and 7.3 [prohibiting solicitation of legal business through a third party].

There is nothing in these various rules that prohibits a lawyer from working with professionals trained in other disciplines where such cooperation is reasonably needed to resolve the client's problems. A lawyer may directly employ professionals from other disciplines on the lawyer's staff, retain an unaffiliated professional with the client's consent, or assist an unaffiliated professional who has been separately retained by the client. Further, a lawyer may own a company employing a professional offering certain services provided by non-lawyer professionals. The key is that the RPC's forbid an integrated practice in which a lawyer shares fees with non-lawyers or enters into a partnership or an analogous relationship with non-lawyers to deliver legal and other professional services to clients.

C. MULTIDISCIPLINARY PRACTICE IN THE UNITED STATES AND EUROPE

Substantial amounts of data have been amassed in the ongoing national debate over MPD regarding MDP-related activity currently conducted in the United States and in Europe. One report[20] identified several forms of "cooperative relationships" between lawyers and other professionals:

- ad hoc relationships of short and long term between lawyers and other professionals such as accountants, financial advisors, investment bankers, engineers, social workers, etc. for providing service to clients.

- nonlegal business activities of lawyers and law firms to provide nonlegal services to clients. Examples are lawyers who maintain dual licenses as lawyers and CPAs, insurance brokers, doctors, and so on. The New York State Bar report notes a North Carolina law firm that created a technology department of the firm which helps clients manage multi-district mass tort litigation, and assists creditors and collection agencies cut the cost of recovering on bankruptcy claims. Other examples include law firms that employ social workers, nurses, appraisers, and economists.

- ancillary businesses conducted as law firm subsidiaries. An example in Washington is lawyers in real estate practices who establish separate business entities staffed by Limited Practice Officers for the purpose of handling real estate closings. Other examples are firms with ancillary business in governmental relations, international trade consulting, environmental consulting, and general business consulting.

- ancillary businesses in which autonomous nonlawyers have a financial interest. There are at least a few instances where law firms and nonlawyers have engaged in joint ventures to provide investment services to clients; "strategic alliances" with accounting firms; and in the frequently used example, Washington D.C., where nonlawyers are permitted some ownership and control of law firms, the formation of the law firm McKee Nelson Ernst & Young LLP, which was at least in part financed by the accounting firm Ernst & Young.

Some proponents of MDP cite the existence of MDP in European countries. Some opponents of MDP point to differences in the "core values" in the legal

[20] Report of the New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation, April 2000.

systems of those European countries that do permit MDP, and to the prohibition against MDP in several other European countries.[21] The New York State Bar conducted a survey of MDP in selected jurisdictions abroad.[22] The survey concluded that any evaluation of MDP experience in other countries must take into account the differences between the legal profession in the United States and elsewhere. In many other countries, services which are traditionally thought of as being the practice of law performed by lawyers in the U.S. may be instead performed by tax advisors, notaries, and other professionals. For example, France has not a single legal profession but rather several distinct legal professions of which *avocats*, which are roughly the equivalent of the U. S. attorney, are but a part. Similarly, in Sweden, the use of the title "*advokat*" is protected, but anyone can give legal advice, and a person who is trained in the law but not an *advokat* may be employed as a legal professional.

A "simplified distillation" of the NYSB survey identified three forms of MDPs in Europe:

- MDPs controlled by lawyers
- MDPs controlled by nonlawyers with lawyers in a noncontrolling capacity in which providing legal services may be only an ancillary activity ("integrated MDPs")
- MDPs controlled by nonlawyers but which maintains a separate legal practice ("non-integrated MDPs")

The driving forces for MDPs in Europe (and, some argue, the US) have been major accounting firms. This has created a concern about relative competitive positions of traditional law firms and has raised issues as to whether law firms ought to be allowed access to nonlawyer investors. The corresponding concern is that allowing nonlawyer investors to provide financing to law firms will weaken the professional independence of lawyers. The NYSB survey concluded that the issues raised by MDP activity in European countries has not yet resulted in any set of rules for lawyers practicing in MDPs.

D. THE PRACTICE OF LAW

Before it can be determined whether or not to allow MDP, one has to have a well-conceived definition of the practice of law. In February, 1998, the Board of Governors created a Committee to Define the Practice of Law, feeling that a workable definition of "the practice of law" would be fundamental to any effort to protect the public from untrained and unregulated persons who hold themselves out as able to offer advice and counsel in matters customarily performed by lawyers that affect individuals' legal rights, property and life. Surprisingly, no

[21] 1996 Survey of IBA Councilors.
[22] NYSB Report at 185.

formal definition of the practice of law had theretofore been put forth in Washington, although the Washington Supreme Court had, with limited success, made efforts at such a definition.

The Committee to Define the Practice of Law eventually developed a definition of "the practice of law" which has been adopted by the Supreme Court effective September 1, 2001. (*See* Appendix C).

There is or would appear to be some urgency in dealing with MDP because of the proliferation of "do-it-yourself" legal kits, unauthorized Internet practice (and ease of access thereto), the increasing provision of services falling within the definition of the practice of law being provided by non-lawyers, and the rapidly escalating provision of legal services, directly or indirectly, by lawyers employed by many accounting firms. There are many sides and shades to the debate.

E. THE DIVISION ON THE ISSUE

The division on the issues of whether the WSBA should eliminate the current prohibitions against sharing direction and control of law firms, and legal fees, with nonlawyers can best be demonstrated by the response to the Study Group to the following questions, which were submitted to the Study Group at its next-to-last meeting on June 16, 2001. It is noteworthy that this divergence of views persisted after several months of review and debate. View on the subject tended to be strongly held and vigorously defended, as was the case when the ABA undertook the issue.

The Study Group, by a large majority[23], felt that the core values of the profession were more susceptible to erosion if the current RPC prohibitions against sharing fees and control with nonlawyers were eliminated.

1. **Are the core values of a) fiduciary concepts, b) avoidance of conflicts of interest, c) ability to provide independent professional judgment, and d) maintaining client confidences and secrets, more susceptible to erosion if the prohibitions against sharing: a) direction and control of law firms, and b) legal fees, with non-lawyers are eliminated?**

   Answer: Yes

[23] "Yes": Fain, Lehto, Strait, Cressman, Schroeter, Dewell Jarvis, Andrews, Boerner, Ballbach. In addition, Loeffler voted yes at a later date. "No": Paben, Tang. In addition, Dano and Gosline voted no at a later date.

However, the Study Group was divided[24] on the issues of whether the core values could be maintained if the RPC prohibitions against sharing fees and control with nonlawyers were eliminated, and whether the current prohibitions should be eliminated, or even modified. Consistent with experience in other forums and other jurisdictions, attorneys with a transactional practice tended to favor MDP, whereas attorneys with a litigation practice tended to oppose MDP. The *ex-officio* members were also somewhat divided on the issue, with no apparent background features associated with their respective positions.

2. ***Can the core values*** **of a) fiduciary concepts, b) avoidance of conflicts of interest, c) ability to provide independent professional judgment, and d) maintaining client confidences and secrets, *be maintained* if the prohibitions against sharing: a) direction and control of law firms, and b) legal fees, with non-lawyers are eliminated?**

   Answer: Divided

3. **Should the prohibitions against sharing: a) direction and control of law firms, and b) legal fees, with non-lawyers *be eliminated*?**

   Answer: Divided

4. **Should the prohibitions against sharing: a) direction and control of law firms, and b) legal fees, with non-lawyers *be modified to permit MDP*?**

   Answer: Divided

5. **Should the RPC's be modified in any way to facilitate the delivery of legal *and nonlegal* services?**

   Answer: Divided

If You Had To Have MDP, Which One Would You Accept?

The Study Group then ranked the acceptability of various models of "MDP" (defined as forms of MDP which would require modification of the existing RPC's regarding fee sharing and control of law firms), **if it were assumed** that some form of MDP was going to be permitted. The votes reflect the number of members who would find the position acceptable **given the assumption**:

[24] "Yes": Jarvis, Paben, Tang, Andrews, Boerner, Ballbach. In addition, Dano and Gosline voted yes at a later date. "No": Fain, Lehto, Strait, Cressman, Schroeter, Dewell. In addition, Loeffler voted no at a later date.

a. **"District of Columbia" model** (modify RPC 5.4 with conditions including that the MDP's principal purpose is delivery of legal services, nonlawyers must agree to abide by lawyer conduct rules, lawyers responsible for conduct of nonlawyers): 11
b. **Ancillary business model:** 10[25]
c. **Lawyer-controlled MDP** (not necessarily principally engaged in the practice of law; *nonlawyers must agree to abide by lawyer conduct rules*): 6
d. **Fully integrated MDP** (permit nonlawyers to have ultimate ownership and management control; lawyer ethics rules apply): 6
e. **Fully integrated MDP of licensed professionals** (nonlawyers must be *licensed professionals* to have ultimate ownership and management control; lawyer ethics rules apply): 6
f. **"Pro – MDP" subgroup proposal** (attached as Appendix D): 6
g. **Lawyer-controlled MDP** (not necessarily principally engaged in the practice of law; *nonlawyers not bound by lawyer conduct rules*): 0

For & Against – the Reasons for the Split

As stated earlier, the Study Group was divided on the issue of MDP. Therefore, in order to assist the Board of Governors, it was determined that this Report would set out the most commonly expressed views in support of, and against, eliminating the prohibitions against sharing legal fees and direction and control of law firms with nonlawyers.

Because the Study Group was strongly divided on the MDP issue, it was agreed that the proponents and opponents would be free to state their arguments without editorial revision by the other. The comments of the proponents and opponents, therefore, reflect only the views of those subgroups, and not the views of the Study Group as a whole.

Multidisciplinary Practice – The Arguments For

Multidisciplinary Practice, as understood here, is the provision of legal services to members of the public by lawyers in a business entity in which nonlawyers may share ownership, control and legal fees with the lawyers. A fuller description of the model supported by the following arguments is set out in Appendix D to this report.

- The law is increasingly interrelated to many fields that have traditionally been viewed as not falling within the practice of law, such as economics, finance, business, engineering, management, medicine and psychology. An MDP firm could offer not only legal expertise, but also expertise in one or more law related fields.

[25] Many questioned whether this form of MDP would require any change in the RPC's.

Treating nonlawyers as equals in MDP's could help get the best individuals from other professions involved in MDPs.

- Law is frequently closely related with other disciplines. Indeed, law permeates our society at all levels of human action and interaction. The MDP firm could have the ability to diagnose more accurately whether a given client's problem is strictly speaking a legal one, or, for example, an economic, engineering or psychological one, or a combination of them. Instead of referring the client to another firm or firms or series of professionals for the non-legal needs, the MDP firm could provide the necessary legal and non-legal services. Referrals are possible and have occurred, but the closer interaction of professions in a common enterprise offers some clients an opportunity which the rules currently preclude.

- Not only could the MDP firm probably have a greater level of competence to determine and analyze the presence of legal and non-legal problems, but it could have the ability to provide the required services to the client in a much more practical, efficient and economical manner. The client would not need or be forced to work with two or more unrelated firms or individuals. Much if not all of the information required to solve a client's problem would be obtained only once and the professionals themselves would find it much easier and efficient to collaborate.

- MDP firms (particularly the larger ones) would more than likely require professional managers who may be far better than lawyers at determining how quality legal services may be delivered most efficiently and at the lowest cost to the consumer.

- Closer and less structured access to non-lawyer professionals could enhance lawyer professional judgment by having ready access to non-lawyer professionals for the problem-solving function.

- The MDP firm could allow lawyers to increase their client base and revenues, thus allowing lawyers to enhance their business skills to the benefit of their clients.

- The elimination of the restrictions on nonlawyer ownership of law firms could permit law firms to raise capital from private nonlawyer participants in the MDP, thus providing working capital for innovative marketing, practice and management strategies, as well as more economical training programs for new lawyers or transitional programs for existing lawyers.

- There may be a considerable market among the public for MDP firms. Regardless of the extent of client preference for so-called one-stop shopping, an MDP respects client autonomy and ability to chose how its professional services will be delivered.

- It is at least arguable that the greater impact and use of MDP will be at the small firm level as opposed to large law or accounting firms. The oft cited example is the lawyer who seeks to provide services with an accountant. With large law firms flocking to ancillary businesses, the recognition of MDP will enable small firms to better compete.

- Combinations between lawyers and other professionals may enhance the availability of legal information and service for the public.

- If lawyers do not take the lead in modifying ethical rules that restrain MDP, such restraints may be eliminated by state or federal governments or even by legal action brought by consumer groups, which may not be in the best interests of the legal profession or the rendition of legal services to the public while maintaining the core values of the legal profession.

- MDP firms could reduce the impact of those engaged in the unauthorized practice of law To the extent nonlawyers in an MDP are subjected to some form of regulation, such as contractually recognizing the responsibility of the lawyers for the provision of legal services and the independence of lawyers, the public achieves additional protection.

- The rules regarding conflicts need not be compromised by MDPs. Lawyers would continue to be subjected to existing requirements and nonlawyers can be required to respect those lawyer requirements. Analogous potential conflicts of interest exist under our current practices, for example, in connection with in-house counsel and third party payers, such as insurance companies and prepaid legal insurance, and we think those forms of practice are consistent with current rules.

- Confidentiality protection need not be eroded with MDP. Lawyers would continue to be bound by their duties of confidentiality to clients and clients would be fully informed to the extent that communications with nonlawyers within the entity are not subject to the same degree of protection as communications with the lawyers. In fact, lawyers are not the only profession with confidentiality requirements.

- MDP firms are already in existence in a variety of contexts as evidenced prominently by the Big 5 accounting firms where licensed lawyer's are delivering legal services on behalf of the accounting firms' clients and also in many other varied settings. These forms of practice seem to have found sufficient public demand to expand in recent years and the nonlawyer public has not complained of harm from such practices.

- Lawyers are largely information brokers and, because of increased use of the legal self-help offered over the internet, suffer the risk of becoming an endangered species along with travel agents, insurance salesmen, stock brokers, auto salesmen and other middle men who are finding their traditional roles limited as consumers go directly to the primary product or service.

- Various devices can already be used under current ethical rules to create *de facto* MDP firms, for example, captive law firms, strategic alliances, ancillary businesses, etc. Thus, the entire MDP debate may be one of form over substance. An open system which enables some acceptable models of MDP and includes protections of core concepts is more honest than ad hoc development of variations on the theme.

- The MDP firm, as an alternative practice model, may provide additional economic and employment opportunities for lawyers and help "level the playing field" in the very competitive market for rendition of professional services. It may level the playing field between lawyers and nonlawyers, such as accountants and escrow officers, who are entitled to provide certain kinds of legal services. It may also level the playing field between small law office practitioners who cannot afford to establish ancillary businesses and/or strategic alliances and large firms that can.

- Limitations on MDPs are anticompetitive and there should be a presumption against such anticompetitive rules. They should only be retained if they can be shown to be in the public interest, rather than simply in the profession's interest. Limitations analogous to RPC 5.4 were once imposed on the medical profession but were eliminated under pressure from the Federal Trade Commission. Limitations on advertising and solicitation are also anticompetitive and were struck down under the first amendment. There has been no showing that RPC 5.4 is necessary to protect the public interest.

- Core values of the profession can be preserved with MDPs. While those favoring MDP do not see a need to undercut historical and

current core values, it is reasonable to observe that core values should be subject to scrutiny when the times require change.

Multidisciplinary Practice – The Arguments Against

Whether or not MDP is acceptable, depends upon what one means by the word "Practice" in the term Multidisciplinary Practice. Where "practice" means simply working with other professions who each earn their own fee, these types of arrangements are common, uncontroversial, and don't violate any RPCs. However, if "practice" in Multidisciplinary Practice means forming a firm and sharing fees and control with nonlawyers, then it violates RPC 5.4. Proponents of MDP are seeking rule changes in RPC 5.4, so to be accurate, MDP should be called "Fee Sharing Practice", not Multidisciplinary Practice.

The arguments most often presented in opposition to eliminating the prohibitions against lawyers sharing legal fees and direction and control of law firms with nonlawyers are:

- Allowing nonlawyers to share in legal fees and direction and control of the firms practicing law inherently tends to erode the duties of lawyers to uphold their unique constitutional and ethical responsibilities. The particular core values of the legal profession most frequently discussed in this debate are:

    - The lawyer's duty of undivided loyalty to the client;
    - The lawyer's duty to exercise independent legal judgment for the benefit of the client;
    - The lawyer's duty to hold client confidences inviolate; and
    - The lawyer's duty of avoiding conflicts of interest with the client.

- By allowing nonlawyers to direct and control a law firm, and share in its legal fees, the firm's clients become subject to the economic influences of members of professions that do not share the core values of the legal profession.

- Consistent with their fiduciary duties, lawyers can and do involve many other professions in collaborative work, with those professions either earning their own fees or being directly employed by the law firm. However, when a lawyer's referrals to another professional are contaminated by the profit sharing of an MDP Firm, the lawyer is likely to be under increased economic pressure to recommend internal firm services that are not in the client's best interests, thus compromising lawyer integrity and violating the lawyer's fiduciary duty through conflicts of interest and self-dealing.

- Although there are some conflicts of interest already (lawyers may recommend unneeded legal work be performed by their own firm), this does not justify a wholesale expansion of the range of conflicts.

- The motive behind MDP is purely financial – to capture “books of business” – having some claim to the total expenditures of each client on multiple professional fees. Although no studies are known, lawyers must refer out billions of dollars in business annually. MDP Fee Sharing is all about capturing some profit on that “otherwise referred” business.

- To the extent that the large accounting firms are major proponents of MDP, it appears to be because, as the Dean of Yale Business School stated in Business Week, accounting firms are "obsessed with leveraging the 1040" business. Because the "captured" tax client simply must return each year to do have their tax return done, that annual visit is an opportunity to "spot issues" and sell the client numerous other professional services. The professional relationship thus becomes a cross-marketing platform.

- The apparent effectiveness of this "cross marketing approach" is related to the fact that clients tend to heed the advice of their lawyers or accountants, whereas clients tend to be resistant to the overtures of advertising. MDP Fee Sharing Practice is based on exploiting the attorney’s perceived independence, when in fact the MDP Firm attorney has a large conflict of interest tending to decrease his or her objectivity.

- All of the benefits of engaging multiple disciplines in providing legal services (i.e., the benefits of “synergy”) can be obtained without the need to the jeopardize core values of the profession. Lawyers can, and do, currently specialize in particular areas of the law, and retain or associate with accountants, engineers or other professionals to provide a multidisciplinary approach to problem solving.

- The movement for MDP was not started by clients. The one study[26] that did look at “client demand”, found a notable absence of demand for “one stop shopping.”

- Although proponents of MDP try to create the anecdotal impression that there is consumer demand for MDP, most consumers can

[26] MDP Survey Results, January 8, 2001, A Study Jointly Sponsored by: Legal Marketing Association, Martindale-Hubbell and Illinois CPA Society.

hardly afford legal representation alone, much less the services of a lawyer plus a counselor and an accountant on top of that.

- The conclusions of the supporters of MDP concerning increased competence and improved efficiency are nothing more than unsupported opinions. There are no facts put forth to demonstrate that

    - lawyers who work with accountants or other professionals are more competent that lawyers who do not work with accountants or other professionals,
    - legal fees in MDPs are less than legal fees in traditional law firms, or
    - economies of scale, if they exist in an MDP Firm, result in increased savings to the client.

- As for capitalization, if an MDP firm can "bankroll" the development of a sophisticated product, then the same can occur with a law firm working with an accounting firm.

- If a new product is developed by capitalization, then it will doubtless be used for multiple clients, who will each be charged for the product. Value billing has been around for a number of years.

- MDP firms open law firms to capital flows (with unlimited MDP firms) which would have the same effect on law firms as "globalization" generally, that is, mergers, consolidations, fewer firms, less diversity, and less competition.

- If we allow the legal profession to merge with other professions, then control of the profession of law will likely not remain the exclusive province of the Washington State Supreme Court, as the powers will have "lost their separation."

- Although it has been suggested by proponents of MDP that we make nonlawyers subject to rules of attorney ethics as a means of decreasing the erosion of our core values, such an expansion may implicate the separation of powers, and lead to the legislature asserting control over the practice of law because lawyers are no longer confined simply to the judicial branch but instead have reached out to attempt to assert control over nonlawyers.

- Analogies to the experience of doctors and HMOs suggest that MDP firms will become a bureaucratic law practice governed by legislatures that may, among other things, impose limitations on

what functions lawyers may provide to clients and how those functions are to be performed.

- If partnership with accountants is contemplated, accountants undertaking an audit function have ethical duties of public disclosure that are totally inconsistent with the lawyer's duty of confidentiality.

- Confidential information obtained from legal clients could be shared with other professions within the firm without violating current standards of confidentiality. However, such sharing would likely defeat the client's normal expectations regarding the use and dissemination of the client's confidential information (e.g., the lawyer who sets up a trust shares the asset information with his partner who sells securities).

- Sometimes, being a fiduciary is not "efficient". Putting the practice of law into the partial or total control of nonlawyer managers trained to seek "efficiency" will have a deleterious effect on the fiduciary nature of lawyers, who must sometimes do things that are costly to the firm because ethics require it.

- MDP fee sharing practice undermines the core value of lawyer independence. For example, clients go to lawyers to evaluate whether their insurance contract is fair, not to have their lawyer sell them a new contract of insurance. Similar arguments can be made for any profession with whom lawyers propose to share fees.

- Because extremely few legal decisions are made in courts, the effectiveness of our system of justice depends upon independent lawyers (where the circumstances dictate) telling clients not to take certain courses of action. Anything that tends to undermine lawyer independence is a threat to our entire system of justice, because that system depends to such a high degree upon voluntary compliance after consultation with an independent lawyer with an ethical duty to uphold the law.

- MDP may lessen assistance to those who are underrepresented because the high cost of MDP firms will not lead to substantially more pro bono work or lower costs because of higher management costs to optimize work among the various professions.

- It has been often stated around the country that lawyers or bar associations don't have the power or the gumption to stop MDP profit sharing from moving forward. This, properly speaking, is not an "argument" for MDP but rather a political statement that lawyers

lack the power to prevent the will of nonlawyers to convert the legal profession to a pure business. It is rather remarkable that any lawyer would make an argument that suggests a commitment to inevitably violate ethical rules based on perceived "business needs".

- MDP is often "justified" by the hype about the "new economy" and "changes" that we are seeing. It doesn't follow that our ethics would change, even if we buy into the "new economy" hype. Although new technology and business conditions may occasionally create difficulties in applying existing rules to new fact situations, and may occasionally necessitate the development of new special rules, proponents of MDP have failed to explain why "business conditions" should dictate the elimination of ethical rules designed to protect clients by minimizing conflicts of interest. It is actually the other way around, our legal ethics rules are designed to limit the business side of law so that it remains predominantly a profession.

- Contract legal services are now being offered by the AARP, the AFL-CIO, offered as the hottest new employee benefit, and sold as extras along with health insurance plans. When a client has such a plan, they naturally contact the plan first. If any form of fee-sharing is legalized, many attorneys will in effect be purchasing their clients from these insurance organizations, because those organizations can make joining their "MDP" a condition of obtaining referrals. This is what controlling a “block of business” is all about.

- Fundamentally, lawyers are hired to give conflict-free objective advice. The public still would expect that objectivity, even if MDP lawyers made them sign disclosures stating that their advice may not be objective when it comes to referrals to other professions within the firm. It is in the public interest for lawyers to protect the public's natural expectations in this regard. Far from being a case of lawyers protecting their own "turf", it is a protection of the public and of professionalism to oppose fee sharing MDPs.

- Supporters of fee sharing MDPs seem to assume that any problems that occur by creating MDPs can be dealt with by later adjustment and regulation, thus avoiding a “slippery slope.” However, once MDP “conduct” is permitted, then the profession would be limited by free speech doctrines that do not necessarily include the power to prohibit or regulate “speech about the conduct". The RPCs could not be used to prevent the attorney-client relationship from being transformed into a cross-marketing relationship, and self-dealing will become constitutionally

protected.

- The concept of burden of proof is well founded in the law, and would seem to apply to the debate at issue – those in favor of changing the existing ethical rules should have the burden of persuasion regarding the need for such change. The proponents for changing the current ethical prohibitions have failed to persuade most of the profession, locally and nationally, despite a concerted effort.

IV MULTIJURISDICTIONAL PRACTICE (MJP)

A. INTRODUCTION

In the United States, authorization to practice law in a state has long been deemed to be a matter solely within the judicial authority of that state. In Washington, this is embodied in both Supreme Court rule and statute. Rule 1(b) of the Admission to Practice Rules provides:

> Prerequisites to the Practice of Law. Except as may be otherwise provided in these rules, a person shall not appear as an attorney or counsel in any of the courts of the State of Washington, or practice law in this state, unless that person has passed the Washington State bar examination, has complied with the other requirements of these rules, and is an active member of the Washington State Bar Association. . . . A person shall be admitted to the practice of law and become an active member of the Bar Association only by order of the Supreme Court.

Similarly, RCW 2.48.170 provides:

> Only active members may practice law. No person shall practice law in this state subsequent to the first meeting of the state bar unless he shall be an active member thereof as hereinbefore defined: PROVIDED, That a member of the bar in good standing in any other state or jurisdiction shall be entitled to appear in the courts of this state under such rules as the board of governors may prescribe.

There have been a few limited exceptions to this general rule established by the Supreme Court. There is provision for a lawyer from another state to be admitted for the trial in a particular action or proceeding (APR 8(b)) (pro hac vice admission); lawyers may be granted a limited license to practice in Washington as House Counsel for a single employer (APR 8(f)); and lawyers from other countries may be granted a limited license to practice in Washington to advise or consult about foreign law (Foreign Law Consultants) (APR 14). In addition, the Washington Supreme Court has adopted a "reciprocity" admission rule which provides that lawyers from other jurisdictions may be admitted in Washington without taking the Washington State bar exam if the state where they are admitted affords the same privilege to Washington lawyers (APR 18).

These limited exceptions to the general rule may not meet all the needs of lawyers and clients. The California Supreme Court caused considerable discussion of these issues with the *Birbrower* decision.[27] In that case, the Supreme Court held that a New York law firm that had been hired by a California company, which was a subsidiary of a New York client of the firm, engaged in the unauthorized practice of law in California and could not collect its claimed fees for services performed for the client in preparation for an arbitration proceeding in California. The court held that UPL activity not only included services performed by the New York lawyers in California, but could also extend to services performed "virtually" in California via "modern technological means" such as "telephone, fax, [or] computer."

Birbrower raises questions that go far beyond its immediate facts. Ethical rules forbid lawyers to engage in UPL or to aid the unauthorized law practice of others. Rules of Professional Conduct, Rule 5.5. Over the years the courts have not found it easy to determine whether a layperson is guilty of UPL, and the question is even more complex when the subject is a lawyer licensed in another jurisdiction. True, lawyers are rarely if ever disciplined for giving occasional, transitory advice in another jurisdiction, but a lawyer who does so may nevertheless want to be assured that the contemplated work is proper even if the conduct carries little professional risk as a practical matter. *Birbrower* makes clear that risk cannot always be anticipated.

Risk of discipline aside, the conduct could have adverse consequences. Clients have sometimes successfully cited the lawyer's alleged UPL as a defense to a fee claim, as in *Birbrower*. In *Ranta v. McCarney*,[28] for example, the North Dakota Supreme Court denied a fee to a Minnesota lawyer who had been giving federal tax advice to a small business in North Dakota. The Court said the lawyer could get paid for work he did in his home state, but not for work while physically in North Dakota.

Further, lawyers who are employed by corporations or other entities, including government, have a special concern. They may be relocated to offices in states in which they are not admitted. This may happen several times in a career, each assignment lasting a few years. Their work in the new state will often fall within the definition of law practice. While they need not worry about getting paid, they still have a legitimate interest in knowing that they are not violating the new state's UPL laws. For one thing, they may someday seek permanent admission in another state and will want to be able to say, in the character inquiry, that they have never practiced law in a state in which they were not admitted. Some states have met this concern, at least in part, through statutes that license these

[27] *Birbrower, Montalbo, Condon & Frank, P.C. v. Superior Court*, 17 Cal. 4th 119, 949 P.2d 1 (1998).
[28] 391 N.W.2d 161 (N.D. 1986),

lawyers to practice law solely for their employers. See, e.g., Washington APR 18; Florida Supreme Court Rule 3-6.1; Missouri Supreme Court Rule 8. 105.

This uncertainty can confront trial lawyers, too. The lawyers in *Birbrower* intended to represent their client in an arbitration proceeding. In most jurisdictions, if not all, there is no pro hac vice process for arbitration or mediation (except where conducted under supervision of a court). Even when pro hac vice admission exists, as it does in conventional litigation, it is not available until a case is filed. So work done in a jurisdiction prior the time a case is filed (if it ever is) can constitute UPL. There also are issues for trial lawyers participating in discovery activities out of their licensing state or advising a client in an office that is outside the lawyer's licensing state.

The current vague state of the rules governing UPL by lawyers admitted in other jurisdictions creates obvious uncertainty for the counseling and transactional practices of lawyers (such as business, environmental, and government lawyers) whose clients' matters may take them into other jurisdictions to advise or negotiate. And even if those lawyers do not travel to other jurisdictions, they may advise clients or negotiate for them in those jurisdictions, via fax, e-mail, and other technology, to such an extent that a court could later characterize their activity as the virtual practice of law "in" those jurisdictions and therefore unauthorized.

We should be clear what the multijurisdictional practice debate is not about. Work done in a lawyer's home state for a client who is physically in that state will not be UPL even if the lawyer must construe the law of another state or foreign country. A lawyer in Illinois whose in-state client asks about a legal problem in Indiana or in France, and who is competent to advise on Indiana or French law, is licensed to do so from his Illinois office. That is why the *Birbrower* and *Ranta* lawyers could get paid for work performed in their home states.[29]

At the other end of the spectrum, a lawyer who creates a permanent physical presence (i.e., hangs out a shingle) in a state in which he or she is not admitted, or who holds himself or herself out as admitted in a state in which he or she is not admitted, almost certainly violates that state's UPL law. And an in-state lawyer who helps the other lawyer do so, risks a disciplinary violation for aiding UPL. *See, e.g., Office of Disciplinary Counsel v. Pavlik*, [30] where the Ohio Supreme Court reprimanded an Ohio lawyer who, through neglect or omission, aided an Illinois lawyer in the unauthorized practice of law in Ohio. Earlier, the Court had enjoined the Illinois lawyer from law practice in Ohio.[31]

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[29] *See also*, *Estate of Condon*, 65 Cal. App. 4th 1138, 76 Cal. Rptr. 2d 922 (1998); *Fought & Co., Inc. v. Steel Engineering & Erection, Inc.*, 87 Haw. 37, 951 P.2d 487 (1998).
[30] 89 Ohio St. 3d 458, 732 N.E.2d 985 (2000)
[31] *Cleveland Bar Assoc. v. Misch*, 82 Ohio St. 3d 256, 695 N.E.2d 244 (1998).

B. REASONS FOR CHANGE

1. Recent changes in our economy clearly show that interstate and international commerce, transportation and communications have expanded and will continue to expand at an increasing rate. Today, clients often reside in more than one state, often conduct business in more than one state, and often contract with others with places of business in multiple states. Accordingly, corporate and individual clients have increasing need of lawyers who are not geographically restricted from practicing law by state rules put in place in a very different environment.

2. Fair and effective regulation of lawyers should recognize the changing requirements of the economy and respect the principle of client choice and needs. Clients would be seriously inconvenienced and would incur substantial costs and delays, without commensurate benefit, if they are required to engage local counsel in every state where a lawyer is needed. Moreover, these current restrictions make the legal profession less competitive with other providers of services.

3. Washington has already demonstrated its progressive attitude towards allowing out-of-state lawyers to practice in Washington: as in-house counsel; in adapting a liberal reciprocity rule; in accommodating lawyers working for legal service organizations.

C. AMERICAN BAR ASSOCIATION ACTIVITY

The ABA has initiated two separate projects around multijurisdictional practice. First, there is the Commission on Multijurisdictional Practice established in 2000. The Commission is scheduled to issue an Interim Report in November 2001 and to submit its Final Report at the 2002 ABA Annual Meeting.

Second, the Commission on the Evaluation of the Rules of Professional Conduct, or "Ethics 2000," has issued a report with various recommendations for amendments to the Model Rules of Professional Conduct, some of which address MJP issues.

The Ethics 2000 Commission has recommended changes to Model RPC 5.5 and 8.5. *See*, Appendix E. These and the other amendments proposed by Ethics 2000 are scheduled be considered by the ABA House of Delegates at their February, 2002, meeting.

D. PROPOSED RULE:

The Study Group embraces the changes proposed by the Ethics 2000 Commission, and proposes the following addition to the Admission to Practice

Rules, as part 1(c). Also set out below are proposals for amendments to RPC's 5.5 and 8.5, to be consistent with this proposed rule.

> An attorney duly licensed and authorized to practice law in another state, territory or the District of Columbia, is authorized to practice law in the State of Washington while such attorney is temporarily in this state and is engaged in either a particular matter or particular matters to the extent such matters arise out of or are otherwise reasonably related to the lawyer's practice in such other state, territory or the District of Columbia.

1. This proposed rule supports the changes that have been proposed in Model Rule 5.5 by the Ethics 2000 Commission, subject to the comments noted below;

2. It supports the Ethics 2000 Commission's Proposed Model Rule 8.5;

3. Adoption of this rule proposes that Model RPC 5.5's safe harbor for lawyers admitted to practice in another jurisdiction be expanded to permit a lawyer to act in a jurisdiction in which he or she is not admitted, provided that

a. the lawyer is not permanently based in the jurisdiction in which he or she is not admitted,

b. the lawyer does not hold himself or herself out as admitted to practice in the jurisdiction in which he or she is not admitted, and

c. he or she is acting with respect to a matter that arises out of or is reasonably related to the lawyer's practice in the jurisdiction where he or she is admitted;

4. Adoption of this rule also proposes the addition to Model RPC 5.5 of a safe harbor for a lawyer admitted in another jurisdiction when acting with respect to a matter involving issues of federal law or the law of one or more other (i.e., other than the jurisdiction in which the lawyer is acting) domestic or foreign jurisdictions, provided that

a. the lawyer is not permanently based in the jurisdiction in which he or she is not admitted, and

b. the lawyer does not hold himself or herself out as admitted to practice in the jurisdiction in which he or she is not admitted.

5. Adoption of this rule also proposes the addition to Model Rule 5.5 of a safe harbor for services in a jurisdiction by a lawyer admitted to practice in

another jurisdiction that would not constitute UPL if performed by a non-lawyer in the jurisdiction in which the lawyer is not admitted;

6. Adoption of this rule also proposes the addition to Model Rule 5.5 of a safe harbor, in circumstances in which litigation is not pending before a tribunal, for services in a jurisdiction in which he or she is not admitted by a lawyer admitted in another jurisdiction in connection with factual investigation or other work in preparation for or anticipation of litigation, arbitration, mediation, or other dispute resolution process, regardless of where it is anticipated such litigation or other dispute resolution process may be initiated and regardless of whether it is ever in fact initiated;

7. Adoption of this rule also proposes the addition to Model Rule 5.5 of a safe harbor for services in a jurisdiction by a lawyer admitted in another jurisdiction in connection with arbitration, mediation, or other dispute resolution process.

8. This addition to the rules would not give greater rights to non-Washington State lawyers than to Washington State lawyers, while practicing in Washington.

The Study Group recommends the following changes to existing RPC's.

Rule 5.5: Unauthorized Practice Of Law

(a) A lawyer shall not~~: (a)~~ practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction~~; or~~.

(b) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction when:

(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or

(2) other than engaging in conduct governed by paragraph (1):

(i) a lawyer who is an employee of a client acts on the client's behalf or, in connection with the client's matters, on behalf of the client's commonly owned organizational affiliates;

(ii) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice; or

(iii) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation.

~~(b)~~ (c) A lawyer shall not assist ~~a~~ another person ~~who is not a member of the bar~~ in ~~the performance of activity that constitutes~~ the unauthorized practice of law.

Rule 8.5: Disciplinary Authority; Choice Of Law

(a) *Disciplinary Authority.* A lawyer ~~licensed or~~ admitted to practice in this jurisdiction ~~for any purpose to practice in this jurisdiction~~ is subject to the disciplinary authority of this jurisdiction ~~although engaged in practice elsewhere~~, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer renders or offers to render any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

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APPENDICES

A. Bibliography

B. State Survey

C. Practice of Law Definition

D. Pro-MDP Model

E. Ethics 2000 Recommendations

Appendix A

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MDP Resources On-line:

ABA Commission on Multidisciplinary Practice:
http://www.abanet.org/cpr/multicom.html

> *Various reports and comments to the ABA Commission on Multidisciplinary Practice may be accessed through this web site*

State Bar of Arizona:
http://www.azbar.org/AttorneyResources/mdp_recommends.cfm

Colorado Bar Association MDP Task Force:
http://www.cobar.org/mdp/resolution.htm

Connecticut Bar Assn. Report of MDP Committee:
http://www.ctbar.org/mdpreport.doc

Florida Bar MDP:
http://www.flabar.org/newflabar/organization/committees/scanc.html

Illinois State Bar: http://www.illinoisbar.org/mdp.html

Maine State Bar MDP Task Force: http://www.mainebar.org/

Massachusetts Bar Association: http://161.58.222.91/mdp/

State Bar of Michigan: http://www.michbar.org/

Missouri Bar: http://www.mobar.net/news/mdp.htm

Nebraska State Bar Association: http://www.nebar.com/mdpfinal.PDF

New York State Bar Assn:
http://www.nysba.org/media/newsreleases/2000/mdp.html

Pennsylvania Bar Assn: http://www.pabar.org/cgi-bin/search.cgi

South Carolina MDP Task Force: http://www.scbar.org/pdf/mdp_core.pdf

State Bar of Texas MDP Report:
http://www.texasbar.com/attyinfo/aba/mdprpt.pdf

State Bar of Wisconsin: http://www.wisbar.org/mdp/

Multijurisdictional Practice:

ABA Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000) (November 2000).

ABA Section of Business Law, Drafting Group of Ad Hoc Committee on Ethics 2000, Letter to Ethics 2000 Commission (ABA) re: Proposed Rules 5.5 and 8.5(a) (May 17, 2000).

ABA Young Lawyer Division, "Summary of MJP Survey Results," May 2001.

Association of Professional Responsibility Lawyers, "Proposal to the American Bar Association Task Force on Multijurisdictional Practice" (February 2001).

Corneille, Peg, "MDP, Multi-jurisdictional Practice and Bar Admission" (September 6, 2000).

Davis, Anthony E., "Multijurisdictional Practice by Transactional Lawyers – Why the Sky *Really Is* Falling," 11 *Professional Lawyer* 1(2000).

Ehrenhaft, Peter D., "Thoughts of a Member of the ABA Commission on Multijurisdictional Practice" (May 2001).

Green, Bruce A., "Assisting Clients with Multi-State and Interstate Legal Problems: The Need to Bring the Professional Regulation of Lawyers into the 21st Century," June 2000.

Jarvis, Peter R., "Where You Stand Depends on Where You Sit: One Litigator's View of Multijurisdictional Practice Issues and related Policy Questions" (undated).

Krivosha, Norman N., "The case for Multijurisdictional Practice of Law in the United States (May 2001).

Nebraska State Bar Association, “Memorandum, Special Committee on Multiple Jurisdiction Practice,” May 11, 2001.

New Jersey State Bar Association Committee on Multijurisdictional Practice, “Preliminary Report and Recommendations,” June 25, 2001.

New York County Lawyers’ Association, “Report by the Ad Hoc Committee on Multi-Jurisdictional Practice,” January 29, 2001.

Reimer, George A., “Essential Steps on the Path to Improving the Rules Governing the Multijurisdictional Practice of Law in the United States (May 2001)

Silver, Carole, “Globalization and the U. S. Market in Legal Services – Shifting Identities,” 31 *Law and Policy in International Business* 1093 (2000).

MJP RESOURCES Online:

ABA Commission on Multijurisdictional Practice: http://www.abanet.org/cpr/mjp-home.html

> *Various reports and comments to the ABA Commission on Multijurisdictional Practice may be accessed through this web site*

ABA Ethics 2000 Commission: http://www.abanet.org/cpr/ethics2k.html

> *Various reports and comments to the ABA Ethics 2000 Commission may be accessed through this web site*

Information and commentary on the multijurisdictional practice of law: CrossingtheBar.Com

Delaware State Bar Association: http://www.dsba.org/MJPReport.pdf

Nebraska State Bar Association: http://www.nebar.com/

New York County Lawyers' Association: http://www.nycla.org/publications/MJP-REPORT.PDF

Appendix B: STATE BY STATE MDP ACTION

(An informal survey conducted mostly by telephone in the spring of 2001)

STATE	***STUDY GROUP/ COMMITTEE***	***CHAIR/CO-CHAIR***	***PRO/CON REPORT (S)***	***BOARD OF GOVERNORS ACTION***	***SUPREME COURT OR OTHER STATE ACTION***	***NOTES***
ALA	Alabama State Bar's MDP Task Force -"Pro" Subcommittee -"Con" Subcommittee	Pro: **John K. Molen** (205) 521-8000 Con: **Robert T. Meadows III** (334) 745-6466	**Pro & Con** reports (June 2000) to Board of Bar Commissioners	No Action taken by the Board		No formal position on issue. Has shifted attention to **Multijurisdictional Committee.**
AL	No Committee, Study Group Or Task Force					
AR	'Task Force on the Future of the Profession'	**Charles W. Wirken**, an attorney @ Gust Rosenfeld (602)257-7959	**Pro report** (May 2000) List of recommendations to Board of Governors	Board **approved** of recommendations in May 2000		Drafting in progress to amend rule 5.4 to allow non-lawyer owners. ***See Notes***
ARK	No current committee/study group but in year 2000 had MDP Study Committee	**Jack McNulty** (870) 534-5532	**Pro** MDP proposal to the Arkansas House of Delegates	House of Delegates overwhelmingly voted **against** the MDP proposal		
CA	Multidisciplinary Practice Task Force (as of 5/24/00) (Also a Multijurisdictional Task Force)	**Kevin Culhane** (916) 444-2550 Kculhane@hbcw.com	Bar Staff drafting tentative recommendations to give to Committee for approval	Recommendations expected to Board around June/July of 2001		Committee plans to submit 1st, 2nd, and 3rd preferences of MDP models to the Board by end of summer ***See Notes***
CO	CBA/DBA (Denver Bar Assoc.) Joint Task Force on Multidisciplinary Practice	**Neil Peck** (303) 634-2000 npeck@swlaw.com **Doug Foote** doug@swlaw.com	**Pro** Report to Board of Governors to accommodate MDP's (May, 2000)	CBA Board of Governors and the DBA Board of Trustees **adopted Resolutions** to accept the report	No action outside bar associations	Task force continues to meet to draft proposed rules that would allow MDP's. Also looking at

STATE	***STUDY GROUP/ COMMITTEE***	***CHAIR/CO-CHAIR***	***PRO/CON REPORT (S)***	***BOARD OF GOVERNORS ACTION***	***SUPREME COURT OR OTHER STATE ACTION***	***NOTES***
				(Both in May, 2000)		multijurisdictional issues.
CONN	Multidisciplinary Practice Study Committee	Hon. Raymond. B. Green (860) 275-0205	No reply			
DE	Multi-disciplinary Practice Committee	**Ben Strauss** (302) 777-6564 Straussb@pepperlaw.com	***Report submitted to Board that reflected ABA House of Delegate's Con stance on MDPs***	Approved recommendations of **no rule change**		No work pending: chair says almost unanimity by Committee and Board against MDPs
D.C.	Special Committee on Multidisciplinary Practice	**Charles E. Buffon** (202) 662-5542 Cbuffon@cov.com	Preliminary Report and Request for Comments dated 2/23/01. **Unanimously pro MDP**	Adopted rule changes permitting lawyer controlled, limited MDP's, and modification of 5.4	Approved limited MDP to rule 5.4	In preliminary report, recommends fully integrated MDP with final report to Board in July or September of 2001
FLA	Special Commission on MDP and Ancillary Business (successor of) Special Committee on MDP and Ancillary Business (concluded June 2000)	**John Hume** (954) 755-9880 jhume@humejohnson. com **William Kalish** (813) 222-8700 wkalish@kwlaw.com	**Pro and Con** Position papers submitted to Board of Governors (from Special Committee)	Board of Governors adopted a **Resolution** opposing any changes to the Rules of Professional Conduct to allow MDP's	Board of Governors also made a **Report and Recommendation** to the ABA recommending that the ABA adopt the same position	Florida Bar also has new committee to investigate MDP complaints
GA	Multidisciplinary Practice Committee	**Linda A. Klein** (404) 577-6000 Lklein@gambrell.co	***Completed report sent to Board (2001)***	Board has taken no action of yet--- no "official"		

STATE	***STUDY GROUP/ COMMITTEE***	***CHAIR/CO-CHAIR***	***PRO/CON REPORT (S)***	***BOARD OF GOVERNORS ACTION***	***SUPREME COURT OR OTHER STATE ACTION***	***NOTES***
		m		position		
HA	No Committee, Study Group Or Task Force					
ID	Ad Hoc Committee on Multidisciplinary Practice	**Diane Minnick**, Executive Director of the ISB is the liaison for the committee (208) 334-4500				Committee has met several times but does not have any formal positions on the issue
IL	Task Force on Multidisciplinary Practice	**Gary T. Johnson** (312) 782-3939	**Pro and Con reports** to the Assembly (Dec. 1999).	Assembly voted to support resolution before ABA to make no change to model rules (6/24/00)		Part of a 3-State Joint Resolution, in which 10-point statement of principles against threats to the core values of the profession were presented to ABA House of Delegates
IN	Multidisciplinary Practice Committee	**James W. Riley Jr.** (317) 636-8027	Still studying the issue---no report			
IA	Multidisciplinary Practice Committee	**Philip Wilson** (712) 322-6000	**Report** to Board of Governors says they are studying the issue (January, 19, 2001)			
KA	No Committee, Study Group Or Task Force			Board voted to oppose MDPs		
KY	Committee on Multidisciplinary Practice	**Hoe C. Savage** (859) 254-9351	**Con report** (June 13, 2000)	Any action by Board unknown		Committee's recommendations **opposed** any rule changes designed to allow MDPs ***See***

STATE	***STUDY GROUP/ COMMITTEE***	***CHAIR/CO-CHAIR***	***PRO/CON REPORT (S)***	***BOARD OF GOVERNORS ACTION***	***SUPREME COURT OR OTHER STATE ACTION***	***NOTES***
						Notes
LA	No Committee, Study Group Or Task Force					
ME	Task Force on the Future of Practice of Law	**John F. Logan** (207) 784-4531	**Pro Preliminary Repor**t that recommends review of rules to permit MDP if lawyers are in control of MDP.		Meetings to draft rule changes to begin in **May 2001**	Once rule changes are completed and circulated for comment, then the Board will consider the Associations position.
MD	Task Force on Multidisciplinary Practice	**Paul D. Bekman** (410) 539-6633	**Pro Report** (June 2000) supporting MDP under specific conditions.	Board voted against (by a solid majority) any rule changes regarding MDPs in September 2000		Report supported fee sharing between lawyers and nonlawyers. Also specified that non- lawyers not be permitted to practice law or delivery of legal services.
MASS	Multi-disciplinary Task Force (Boston Bar Association). Mass. State Bar does not have a committee	**Joseph L. Kociubes** (617) 951-8000	Report (March 28, 2001) proposing limited version of MDP	No action of yet		Task Force determined that Rule 5.4 should be revised to allow lawyers to practice law in an entity in which a non-lawyer has a financial interest (but not control).
MICH	Multidisciplinary Practice Committee	**Richard E. Rassel** (313) 225-7000	**Pro** Report and Recommendation s (July 2000)	Recommendation s under consideration		The Committee proposes amendments that

STATE	***STUDY GROUP/ COMMITTEE***	***CHAIR/CO-CHAIR***	***PRO/CON REPORT (S)***	***BOARD OF GOVERNORS ACTION***	***SUPREME COURT OR OTHER STATE ACTION***	***NOTES***
				(Postponed February 10, 2001)		would clarify the obligations of a lawyer when offering law and nonlaw services to a client, either through an ancillary service or jointly with other nonlaw service professionals. **See Notes**
MINN	Multidisciplinary Practice Task Force	**Arthur J. Boylan** (651) 848-1210 **Rebecca Egge Moos** (612) 333-3000	**Pro** MDP Report and Recommendations	June 2000, General Assembly adopted the report and recommendations		**See Notes**
MISS	Multidisciplinary Practice Task Force Ad Hoc Committee	**Margaret H. Williams** (601) 968-5528	Studying issue but has been relatively inactive			
MO	Special Committee on the Multidisciplinary Practice of Law	**Jennifer G. Bacon** (816) 421-3355	Recommendations to Board on March 26, 2000. Report to Board on June 30, 2000. **Neutral opinion.**	Drafted report with comments and recommendations. In it, they approved the committee's report	None (they are waiting for Missouri Bar or ABA to do something)	Committee did not feel that the ABA Commission's recommendations were acceptable, however, they were not opposed to MDP, as long as certain considerations were examined. **See Notes**

STATE	***STUDY GROUP/ COMMITTEE***	***CHAIR/CO-CHAIR***	***PRO/CON REPORT (S)***	***BOARD OF GOVERNORS ACTION***	***SUPREME COURT OR OTHER STATE ACTION***	***NOTES***
MT	A committee was formed two years ago but nothing has happened and no recommendations made					
NEB	No information gained					
NV	No information gained					
NH	No information gained					
NJ	They were members of the original dissenting opinion to the ABA Commission's report and their position has not changed					
NM	No information gained					
NY	They were members of the original dissenting opinion to the ABA Commission's report and their position has not changed					
NC	No information gained					
ND	No Committee, Study Group Or Task Force					No current study group or committee named, however, new president is planning on putting

STATE	***STUDY GROUP/ COMMITTEE***	***CHAIR/CO-CHAIR***	***PRO/CON REPORT (S)***	***BOARD OF GOVERNORS ACTION***	***SUPREME COURT OR OTHER STATE ACTION***	***NOTES***
						one together **See Notes**
OH	They were members of the original dissenting opinion to the ABA Commission's report and their position has not changed					
OKLA	No information gained					
OR	No Committee, Study Group Or Task Force					
PA	No information gained					
R.I.	Ad Hoc Committee on Multidisciplinary Practice	**Michael St. Pierre** (401) 822-2900	**Con MDP** (Report completed September 2000)	**Con,** approved report (October 30, 2000)		**See Notes**
S.C.	The Task Force on Multidisciplinary Practice	**Steven Morrison** (803) 799-2000	**Pro report** submitted to the House of Delegates January, 2001	Rejected Task Force Report		***See Notes*** *for more specifics on pro report.*
S.D.	Multidisciplinary Practice Committee	**Robert Riter** (605) 224-5826	**Con report** (Spring 2000*) report being sent*	**Con MDP**		Have not really done anything since Spring 2000 ***See Notes***
TENN	No information gained					
TX	Unauthorized Practice of Law Task Force (since 1999)	**Brent Clifton** (214) 740-8000	**Neutral-**study needs to be broadened with more expertise,	**Neutral,** approved the Task Force Report (September 99)		Nothing has happened since report, and does not appear likely

STATE	***STUDY GROUP/ COMMITTEE***	***CHAIR/CO-CHAIR***	***PRO/CON REPORT (S)***	***BOARD OF GOVERNORS ACTION***	***SUPREME COURT OR OTHER STATE ACTION***	***NOTES***
			empirical data, and debate			
UT	Multidisciplinary Task Force	**Michael D. Balckburn** (Co-Chair) (801) 521-7200	Pro report supports fully integrated MDP	**Pro**, approved report on January 26, 2001 and forwarded it to the Supreme Court	None to date, has referred report to its Rules Committee (submit Oct. 1, 2001)	Task Force Report included specific rule changes. ***See Notes.***
VT	*No Committee, Study Group Or Task Force*					
VA	Joint Virginia State Bar/Virginia Bar Association Commission to Study MDPs	**John A. C. Keith** (703) 691-1235	Working on report *(see Notes for more information)*			No deadline for the report but expect to have preliminary draft by June
WI	*Committee on Multidisciplinary Practice*	**Thomas L. Shriner, Jr.** (414) 271-2400	**Pro MDP** *Report to be presented to the Board in May 2001*			Chair doubtful any action will be taken this year. ***See Notes***
WV	No information gained					

Notes: As stated above, this survey was an informal survey, primarily by telephone, in the spring of 2001.

(1) Arizona: Chair advises there is an informal alliance of Arizona, Michigan, Maine, and Colorado to work on MDP.

(2) California: Chair says committee is approaching issue by creating models of what MDP's would look like. Says their approach is concentrated on advancing core values of practices rather than sacrificing to the primary practice ("looking at it in a context of mutual respect").

(3) Kentucky: Recommendations also included language to strengthen and broaden Kentucky Bar Association enforcement of rules prohibiting the unauthorized practice of law and the sharing of fees with non-lawyers.

(4) Michigan: The proposed amendments would permit lawyers to exchange referrals with nonlawyers without compensation, and would permit lawyers serving a client under a joint agreement to share fees with nonlawyers outside the firm, if the client is advised of and does not object to the participation of the lawyers and nonlawyers. The proposal does not permit lay ownership of law firms, "fully integrated" multidisciplinary services [MDPs], delivery of legal services from nonlaw entities, nor indiscriminate sharing of legal fees with nonlawyers. The Committee recommends continued study of those concepts.

(5) Minnesota: According Mary Grau from the MSBA, the task force is drafting propose amendments to the Minnesota Rules of Professional Conduct implementing the June 2000 report. Then it goes back to the General Assembly and if adopted, to the Minnesota Supreme Court.

(6) Missouri: Points of consideration detailed in June report: a) 51% ownership by lawyers-no passive investment allowed, b) Courts continue to maintain control over the profession, c) Any rule changes should be comprehensive-not just dealing with fee-splitting, d) Independent judgment of lawyers must be maintained, e) May want to exclude litigation services from MDPs to maintain confidentiality, f) Protection of clients' interests should be paramount, g) Clear definition of 'practice of law', h) A list of detailed criteria describing the professions who can participate with lawyers in MDPs, i) Conflict of interest standard apply to all members of MDPs.

(7) North Dakota: At their annual meeting in 2000, the membership approved a resolution to not support the ABA plan, but to authorize the Board of Governors to study the issue and continue to monitor developments.

(8) In Oregon, the Bar last year asked each Bar Committee to kick around the idea of MDP with no results, although Ethics Committee did discuss MDP and did not like the concept. Last September at House of Delegates meeting a proposal was made asking to study the issue but it was rejected.

(9) In Rhode Island, The basic position of the Ad Hoc Committee was that it was in the public interest to preserve the lawyer's duty of undivided loyalty to clients and that there was no credible evidence or persuasive argument that it was in the public interest to amend the rules of professional responsibility to allow the formation of MDP's.

(10) South Carolina: Pro report contained limitations on civil and criminal litigation; in transactional setting limited to a certain specified licensed and regulated professions such as CPA's, physicians, engineers, investment advisors, etc. and required to petition Supreme Court to form MDP.

(11) South Dakota: Major function of Committee has been to define the practice of law. Legislation was submitted this year but withdrawn through a compromise whereby statutory penalties for unauthorized practice of law were increased. Committee probably going back to Supreme Court to produce rules revisions to arrive at a definition of the practice of law.

(12) Utah: Co-Chair Blackburn, along with several members of the task force, have met with the Supreme Court justices and fully expect adoption of rule changes. Broad support was found in the state following issuance of the Report from all sectors, including trial lawyers and plaintiff's bar. Blackburn says he has been astounded, based upon comments received follow speeches he's given, at how many lawyers are actually practicing in the MDP setting already.

(13) Virginia: Beginning to draft the report which is being done by sub-committees focusing on four areas: logistics, small practices, other states and rule changes. Chair says it would appear the sentiment is that MDP is here to stay and the best option is to try and regulate MDP.

(14) Washington D.C.: New recommendation will probably recommended fully integrated MDP without lawyer control. Lawyer ethical rules will apply to lawyers only, and the other MDP members have to be professionals. They are currently working on the definition of "professional."

(15) Wisconsin: Resolution that will be submitted to the Board of Governors requests the Board to create a State Bar of Wisconsin Commission on MDP with the members to be appointed by the President and President-Elect and to include public members, representatives of other professions, a broad representation of State Bar Divisions, and other constituencies in diverse viewpoints on MDP. The goal of the commission is to draft a specific proposal for consideration by the Board of Governors.

Appendix C

GR 24: DEFINITION OF THE PRACTICE OF LAW

(eff. September 1, 2001)

(a) General Definition: The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law. This includes but is not limited to:

(1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.

(2) Selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).

(3) Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

(4) Negotiation of legal rights or responsibilities on behalf of another entity or person(s).

(b) Exceptions and Exclusions: Whether or not they constitute the practice of law, the following are permitted:

(1) Practicing law authorized by a limited license to practice pursuant to Admission to Practice Rules 8 (special admission for: a particular purpose or action; indigent representation; educational purposes; emeritus membership; house counsel), 9 (legal interns), 12 (limited practice for closing officers), or 14 (limited practice for foreign law consultants).

(2) Serving as a court house facilitator pursuant to court rule.

(3) Acting as a lay representative authorized by administrative agencies or tribunals.

(4) Serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator.

(5) Participation in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements.

(6) Providing assistance to another to complete a form provided by a court for protection under RCW chapters 10.14 (harassment) or 26.50 (domestic violence prevention) when no fee is charged to do so.

(7) Acting as a legislative lobbyist.

(8) Sale of legal forms in any format.

(9) Activities which are preempted by Federal law.

(10) Such other activities that the Supreme Court has determined by published opinion do not constitute the unlicensed or unauthorized practice of law or that have been permitted under a regulatory system established by the Supreme Court.

(c) Nonlawyer Assistants: Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with Rule 5.3 of the Rules of Professional Conduct.

(d) General Information: Nothing in this rule shall affect the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public.

(e) Governmental agencies: Nothing in this rule shall affect the ability of a governmental agency to carry out responsibilities provided by law.

(f) Professional Standards: Nothing in this rule shall be taken to define or affect standards for civil liability or professional responsibility.

Appendix D

PRO-MDP SUBGROUP RECOMMENDED MODEL:

The model most favored by the proponent subgroup within the Study Group is as follows:

- Lawyers in MDP firms shall be permitted to share/split fees with the non-lawyers employed by or who are members of the MDP firm.

- Lawyers in MDP firms shall be permitted to provide legal services in MDP firms in which non-lawyers have ownership interests and/or managerial authority (as limited below).

- The non-lawyers in the MDP shall not deliver legal services.

- The MDP firm members should be required contractually to agree that there will be no interference with the lawyers' independence of professional judgment or with any client-lawyer relationship or with any of the lawyer's other obligations under the Rules of Professional Conduct and/or the MDP firm shall be required to provide the Washington Supreme Court with a written undertaking to the same effect.

- Conflict of interest rules applicable to lawyers, including the imputed conflict rules, shall apply to all clients of the MDP firm, regardless of whether the client is receiving legal services.

- Lawyers practicing in an MDP firm shall be bound by the RPC's in all respects.

- Lawyers will provide written disclosures to the MDP firm clients of:

  - different ethical rules that may be applicable among the MDP firm professionals regarding client confidences

  - fee sharing / splitting arrangements among MDP firm professionals

  - client's prerogative to use non-lawyer professionals who are not members of the MDP firm for non-legal services.

  - any potential conflict of interest that might be created as a result of the firm providing both legal and nonlegal services to the client. Where such a potential conflict is present, the lawyer must be satisfied that representation of the client is consistent with the lawyer's ethical responsibilities.

- Where a consultation between the lawyer and the non-lawyers in the MDP may or is to occur which is not subject to the lawyer's duty of confidentiality or protected by the attorney-client privilege, a written explanation of the implications for the client shall be provided and informed client consent must be procured before such consultation occurs.

- The MDP firm (and the lawyers working there) will be expected to provide pro bono legal services to the same extent as other lawyers licensed in the state.

Non-lawyers shall NOT be permitted to have passive investment in an MDP firm.

Appendix E: Ethics 2000 Recomendations

The Ethics 2000 Commission recommends that Model RPC 5.5 be amended as follows (deleted language ~~struck out~~; new language underlined):

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW
(Revised Final Draft—May 1, 2001)

(a) A lawyer shall not~~: (a)~~ practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction~~; or~~.

(b) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction when:

(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or

(2) other than engaging in conduct governed by paragraph (1):

(i) a lawyer who is an employee of a client acts on the client's behalf or, in connection with the client's matters, on behalf of the client's commonly owned organizational affiliates;

(ii) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice; or

(iii) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation.

~~(b)~~ (c) A lawyer shall not assist ~~a~~ another person ~~who is not a member of the bar~~ in ~~the performance of activity that constitutes~~ the unauthorized practice of law.

The Ethics 2000 Commission also recommends the following amendments to Model RPC 8.5:

RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW

(c) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer renders or offers to render any legal services in this jurisdiction. A lawyer may be subject to the disciplinary

authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a ~~proceeding in a court before which a lawyer has been admitted to practice (either generally or for the purposes of that proceeding)~~ matter pending before a tribunal, the rules ~~to be applied shall be the rules~~ of the jurisdiction in which the ~~court~~ tribunal sits, unless the rules of the ~~court~~ tribunal provide otherwise; and

(2) for any other conduct, ~~(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and (ii)~~ the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.