



PennState
Dickinson Law

Penn State Dickinson Law
Dickinson Law IDEAS

Faculty Scholarly Works

Faculty Scholarship

1999

Multidisciplinary Practice: Examining the Issues

Laurel S. Terry
lterry@psu.edu

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/fac-works>

Recommended Citation

Laurel S. Terry, *Multidisciplinary Practice: Examining the Issues*, 1999 *Prof. Law. Symp. Issues* 1 (1999).

This Article is brought to you for free and open access by the Faculty Scholarship at Dickinson Law IDEAS. It has been accepted for inclusion in Faculty Scholarly Works by an authorized administrator of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

Multidisciplinary Practice: Examining the Issues

Professor Laurel S. Terry*

Did you know . . .

- that if the Big 5 accounting firms were included in the rankings of the largest law firms, they would occupy the third and fourth spots, after Baker & McKenzie and Clifford Chance and that they would also occupy four of the top fifteen spots (and these statistics don't even include Big 5 lawyers who exclusively practice tax law)?¹
- that the Big 5 accounting firms increasingly have been recruiting lawyers and law graduates and that these lawyers appear to be doing not just the traditional tax work, but also things that if done in a law firm setting would be considered to be the practice of law?²
- that there is an ABA commission studying the topic of Multidisciplinary Practice and this commission has a mandate to produce a report by the August 1999 ABA Annual Meeting?³
- that Larry Fox, a leading legal ethics commentator and MDP critic, has asked, perhaps not completely rhetorically, why the ABA Ethics 2000

* Professor of Law, Penn State Dickinson School of Law. Undergraduate degree, University of California—San Diego, *magna cum laude*; J.D. UCLA School of Law. 1998-99 Fulbright research grant to study Germany's regulation of multidisciplinary practices between lawyers and accountants. Professor Terry was one of five designated ABA observers at the *Paris Forum on Transnational Practice for the Legal Profession*. From 1993-98, she was vice-chair of the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility and is a former member of the Executive Committee of the Professional Responsibility Section of the Association of American Law Schools.

1. See, e.g., *The Global 50*, AM. LAW. 45, 46-47 (Nov. 1998); see also Laurel S. Terry and Clasina Houtman Mahoney, *What If?... The Consequences of Court Invalidation of Lawyer-Accountant Multidisciplinary Partnership Bans*, Ch. 9, PRIVATE INVESTMENTS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1998 (Matthew Bender 1999) at nn. 13-14 and accompanying text [hereafter Terry, *What If?*]

2. See, e.g., Testimony of Abbie F. Willard, Assistant Dean of Career Services, Georgetown University Law Center, before the ABA Commission on Multidisciplinary Practice, <http://www.abanet.org/cpr/willard1.html> (visited April 23, 1999) (discussing Big 5 recruiting practices at Georgetown and other U.S. law schools); Appendices B1-7 to Testimony of Professor Laurel S. Terry before the ABA Commission on Multidisciplinary Practice, at Threshold Issues, Item G, <http://www.abanet.org/cpr/multicomshed399.html> (summarizing testimony before the ABA MDP Commission on the activities of lawyers practicing in Big 5 firms); Terry, *What If?*, *supra* note 1, at n. 5 and accompanying text.

3. This Commission has an excellent webpage that includes background information about the Commission, its mandate and its members, a bibliography, a *Background Paper on Multidisciplinary Practice: Issues and Developments; Hypotheticals and Models*; and copies of the

Commission exists since he thinks the ABA Commission on Multidisciplinary Practice is poised to radically revise various Model Rules of Professional Conduct?⁴

- that entities as diverse as the American Corporate Counsel Association (ACCA) and the ABA General Practice, Solo and Small Firm Section have endorsed the concept of revising ABA Model Rule 5.4's fee sharing ban?⁵
- that the new chairperson of Pillsbury, Madison & Sutro reportedly is leading an effort to push the ABA to allow law firms to provide wider professional services and is quoted as saying "I think forward-looking firms will push for [a relaxation of the rules prohibiting MDPs]. It is so obvious that the market wants this."⁶
- that MDPs are the subject of intense interest around the world, with studies or new legislation either pending or recently completed in Australia, Canada, England, France, the Netherlands, and by the CCBE (the European Union Bar Association), the International Bar Association, and the Union d' Avocat Internationale?⁷
- that the U.S. dialogue about MDPs has occurred, for the most part, without significant input from the professional responsibility community represented at this conference?⁸

* * *

Numerous individuals have called Multidisciplinary Practice one of the most important issues facing the legal profession, a conclusion with which I agree.⁹ This

written remarks and summaries of the oral testimony of the witnesses at the three sets of public hearings. See <http://www.abanet.org/cpr/multicom.html>. This webpage is linked to the ABA homepage and the ABA Center for Professional Responsibility homepage. See <http://www.abanet.org/home/html> and <http://www.abanet.org/cpr/home.html>.

4. See Oral Testimony of Lawrence J. Fox before the ABA Commission on Multidisciplinary Practice, <http://www.abanet.org/cpr/fox3.html>; see also Written Comments of Lawrence J. Fox, <http://www.abanet.org/cpr/fox2.html> (attaching the latest version of the ABA Ethics 2000 Commission's work, and comparing the Commission's conclusions to the comments of Ernst & Young, Deloitte & Touche and PricewaterhouseCoopers representatives).

5. See Oral Remarks of Larry Ramirez before the ABA Commission on Multidisciplinary practice <http://www.abanet.org/cpr/ramirez1.html> (Chair, ABA General Practice, Solo and Small Firm Section); ACCA Supports Multidisciplinary Practice (Feb. 19, 1999) and ACCA Policy Statement on Multidisciplinary Practice, adopted by ACCA's Board of Directors on February 6, 1999 (on file with author) and reported at <http://www.lawmoney.com/public/news/hotnews/news9902.2.html>.

6. See *Inside: New Pillsbury Madison Chair Aims for MDP*, INT. FIN. L. REV. 4 (Feb. 1999).

7. See Appendix B1 to Testimony of Professor Laurel S. Terry before the ABA Commission on Multidisciplinary Practice, <http://www.abanet.org/cpr/multicomshed399.html> (summarizing testimony before the ABA MDP Commission concerning all of these entities). This testimony is linked to the webpages for each of the three sets of ABA Commission on Multidisciplinary Practice hearings. These schedules can be reached from the Commission homepage. See <http://abanet.org/cpr/multicom.html>.

8. Five academics testified before the ABA Commission. These included Professor Linda Galler, Hofstra (November hearings), Professor Harold Levinson, Vanderbilt (November hear-

topic potentially has very broad-reaching effects on the law of lawyering. By way of brief example, the panel sessions at this conference on continuing legal education, *Birbrower*, unauthorized practice of law, mandatory malpractice, standards for lawyer sanctions, conflicts & imputation, and the erosion of confidentiality have the potential to be profoundly affected by the MDP phenomenon. Despite the importance and potentially broad impact of these issues, the Multidisciplinary Practice debate, for the most part, has occurred without the benefit of extensive discussion and debate by the professional responsibility community represented at this conference. Indeed, to my knowledge, I am the only academic, who was not a Commission member, who attended all of the Commission's hearings.

Undoubtedly, there are several explanations for the lack of extensive participation and debate on this topic. *First*, there is the issue of inertia since most people have been actively involved in other issues for years and may find it difficult to suddenly shift gears and focus on this issue. *Second*, the ABA Commission on Multidisciplinary Practice hearings have not been scheduled so as to make them particularly accessible. Because of the timing of the Commission's creation and

ings), Professor John Dzienkowski, Texas (February hearings), Professor Bernard Wolfman, Harvard (March hearings), and Professor Laurel Terry, Dickinson (March hearings). See ABA Commission on Multidisciplinary Practice webpage, <http://www.abanet.org/cpr/multicom-sched.html>, <http://www.abanet.org/cpr/multicom-sched299.html> and <http://www.abanet.org/cpr/multicom-sched399.html> [hereafter *Hotlinks to Witness Testimony*].

Although there has been discussion of ABA Model Rule 5.4 by legal academics for a number of years, in my view the academic discussion has not kept pace with current events. Despite having been somewhat slow to notice and respond to the MDP phenomenon, U.S. lawyers, once they noticed, have focused rather intensively on this issue, devoting many resources and conference panels to this issue. In contrast, the professional responsibility academic community has not particularly focused on the Multidisciplinary Practice issue. (This is in contrast, for example, to the interest given to the ABA Ethics 2000 Commission.) See generally ABA Commission on Multidisciplinary Practice Bibliography, <http://abanet.org/cpr/multicom-biblio.html>; Terry, *What If?*, *supra* note 1, at n.7 (listing various conferences addressing the MDP topic).

In addition to these academics, the ABA Commission also heard testimony from various discipline and ethics committee members and from lawyers who defend lawyers. For example, Lynda Shely, of the Arizona State Bar Ethics Committee, testified about the number of requests she has received from Arizona lawyers who would like to form an MDP. Susan Gilbert, from the D.C. Bar, testified about the operation of D.C.'s ancillary business rule and the lack of compliants. M. Peter Moser, from the ABA Standing Committee on Ethics and Professional Responsibility, provided background information. William Freivogel, of ALAS (Attorney Liability Assurance Society) and Joseph F. McMonigle, Chair of the ABA Standing Committee on Lawyers Professional Liability, both testified concerning malpractice issues that would be raised if the ethics rules banning MDPs were modified. See, e.g., Appendix B4 and B7 to Terry Testimony, *supra* note 2 and *Hotlinks to Witness Testimony, supra*.

The New York State Bar also has been actively interested in these issues. It has issued a report, which can be accessed as a link from the ABA Commission Homepage. See <http://www.abanet.org/cpr/home/html>.

9. See generally Terry Testimony Appendices B1-B7, *supra* note 2 and *Hotlinks to Witness Testimony, supra* note 8.

appointment (August 1998) and the requirement that it submit a report to the ABA House of Delegates in August 1999 (requiring an almost finished product by June 1999 in order to circulate it to the ABA House of Delegates), the ABA Commission on Multidisciplinary Practice was not able to hold its hearings either in conjunction with this Conference or with the ABA Annual Meeting. (This is in contrast, for example, to the ABA Ethics 2000 Commission hearings.) In addition to the difficulties that are always inherent in attending multiple sets of multi-day hearings (and for the professors in the audience, especially when held during the semester), the ABA Commission on Multidisciplinary Practice hearings held in February 1999 had the added problem that they were scheduled in a time-slot that competed with the ABA Ethics 2000 Commission hearings. *Third*, there is no simple mechanism for exchanging views on issues related to MDPs. In my view, the ABA Commission on Multidisciplinary Practice's webpage does an excellent job in making the substance of its hearings accessible after the fact. I also think that after the ABA Commission began posting on its webpage the written submissions it receives, the quantity of such submissions increased noticeably. (All submissions to date are from non-academics.)¹⁰ Unlike the ABA Ethics 2000 Commission, however, the ABA Commission on Multidisciplinary Practice does not have a listserv that can be used to facilitate discussion on the difficult issues related to multidisciplinary practice.¹¹

In my view, it is critical that such a discussion occur. I know that my own thinking about MDPs has evolved significantly since I wrote my *What If?* article last June. One of the most useful aspects of attending the Commission's hearings was the opportunity to hear thirteen very bright, very different people ask challenging questions of the witnesses testifying before the Commission. In my view, my own thinking became much more sophisticated. Moreover, I believe I am not unique in this evolutionary process. Professor John Dzienkowski, for example, testified in February 1999 that he would recommend placing limitations on the individuals with whom a lawyer could join in an MDP. He was questioned extensively on this proposition and in his April 8, 1999 written remarks, he indicated that in view of the questions he received, he had reconsidered his views and now believes that lawyers should be able to form

10. See Written Comments to the ABA Commission on Multidisciplinary Practice, <http://www.abanet.org/cpr/multicomcomments.html>.

11. I am a member of a listserv intended to focus on MDPs that is hosted by Lex Mundi, but there has been no discussion whatsoever on this list. (One can sign up for the list from Lex Mundi's webpage. See <http://hg.org/multi.html>. At one point, I signed up again just to make sure I was registered. I received an e-mail message back that I was already a member of the list, but there was no traffic. See October 14, 1998 E-mail Message from Majordomo@hg.org to Lterry@psu.edu (on file with author). Although I "unsubscribed" from the legal ethics listserv before I left for my 1998-99 sabbatical, there had been no substantial discussion of MDPs on this list before my departure, and I have been told there has been very little discussion of this topic during academic year 1998-99.

MDPs with anyone they wanted.¹² I also believe that the thinking and questioning of the Commission members themselves became more sophisticated as the hearings progressed. Indeed, the depth and breadth of the witnesses' testimony also seemed to increase, no doubt reflecting the fact that they were able to benefit from the education process that occurred during the prior hearings.¹³

I certainly have opinions on many of the issues related to MDPs. (All of my recommendations are listed in Appendix B-2, on the Commission's website, and on file at the ABA's office.) But I believe that all of us will be living with the MDP phenomenon for many years in the future and that it is exceedingly important for this community to exchange ideas and opinions so that all of our thinking becomes more sophisticated concerning these issues. It is against this background that I make my remarks today and submit the rather lengthy materials included in the conference supplemental coursebook. It's my hope that these materials will help facilitate discussion within the professional responsibility community so that we all become much more knowledgeable in our thinking about the myriad of issues related to, and raised by, the MDP phenomenon.

In addition to this brief introduction, my materials in your Conference book consist of the items I submitted to the ABA Commission on Multidisciplinary Practice.¹⁴ The *first item* is my *Testimony* before the ABA Commission on Multidisciplinary Practice. This testimony does *not* attempt to present a comprehensive analysis of the issues related to MDPs. Instead, this testimony introduces the other material and makes ten observations that I found most significant when preparing this material. The *second item* is an *Issue Checklist* that was Appendix A to my *Testimony*. This *Checklist* identifies approximately forty issues related to MDPs, grouped into three categories.

12. See April 8, 1999 Statement of Professor John Dzienkowski University of Texas School of Law to ABA Commission on Multidisciplinary Practice, <http://www.abanet.org/cpr/dzienkowski2.html>.

13. I hope that this is the explanation why my charts in Appendices B1-B7 got increasingly longer and that I did not simply become more long-winded.

14. I presented three types of items to the ABA Commission on Multidisciplinary Practice at its March 1999 hearings (all of which are posted on the Commission website): 1) Written Testimony; 2) Appendix A, which is an Issue Checklist; and 3) Appendices B1-B5, which are charts summarizing the testimony from the November 1998 and February 1999 hearings. Appendix Items B6 & B7, which summarize the testimony from the March 1999 hearings, were prepared for this Conference and submitted to the Commission on April 26, 1999. My Written Testimony found on the Commission's website is slightly different than the Testimony I presented to the Commission in Washington, D.C. on March 12, 1999. In late March, when I had full access to those research materials available to me in Germany, I submitted a corrected copy of my Testimony, which revised the discussion of *Jefri v. KPMG* and the British limited liability proposal. The Commission website version and this Conference version of Chart 4 also differ slightly from the version of Chart 4 that I presented to the Commission at its March hearings; I modified three entries in order to conform them to the Summary of Oral testimony I received. It should be noted that given the deadline for this Conference, I did not modify Professor Dzienkowski's entries in order to reflect his April 8, 1999 Written Statement.

Under each issue, I have listed alternative answers, including my recommended answer. The *third set of items* are Appendices B1-B7 to my *Testimony*. These charts attempt to synthesize and organize the witnesses' testimony according to the forty issues that I identified. These charts should enable those who did not attend the ABA Commission hearings to nevertheless obtain a "snapshot" of what all the witnesses said about particular issues. As footnote 1 to Appendix B-1 observes, these charts undoubtedly contain many errors since many witnesses did not submit written statements, since the charts are based on my handwritten notes from seven full days of hearings, including both witness statements and the question-and-answer sessions (and I don't know shorthand), and since at the time I prepared these charts, I only had access to the Summaries of Oral Testimony from the November 1998 hearings. Despite their inherent weaknesses, I hope these charts will permit those who did not attend the Commission's hearings to feel that they can get "up to speed" on the issues raised by MDPs and participate in the forthcoming debate on these issues.

As the *Issue Checklist* and *Charts B1 - B7* show, I have grouped the issues into three categories:

- *Threshold Issues;*
- *Functional Issues; and*
- *Substantive Ethics Issues.*

In my view, the *Threshold Issues* stage is the point at which one determines whether he or she is willing to consider modifying ABA Model Rule 5.4's ban on fee sharing and partnerships with nonlawyers. The seven threshold issues include questions such as the standards to use when evaluating the MDP issue, core values of the legal profession to protect, whether the same MDP rules should apply to both *Main Street* and *Wall Street* clients and lawyers, and the relevance of the MDP issue to both groups, the extent of client demand for MDPs, problems caused by MDPs, the extent to which MDP lawyers and non-lawyers are offering services that would be called legal services if provided in a law firm context, and the issue of who has the *burden of proof* on these issues.

I subdivided the *Functional Issues* into three subgroups.¹⁵ I describe the first of these subgroups as *Forms of Association* issues. These issues include questions such as who may join the MDP, whether the MDP should be limited to providing legal services, as in Washington D.C.,¹⁶ the MDP name, passive investment, transparency requirements (*i.e.*, disclosure), and any ownership or control requirements (*e.g.*, whether *ABA Commission Model 4 or 5* is permit-

15. This organization follows the organization I have used when discussing cross-border legal practice schemes such as the European Union's Directives, GATS, NAFTA, and the ABA and IBA Foreign Legal Consultant rules. See Laurel S. Terry, *A Case of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 *FORDHAM INT'L L. J.* 1382 (1998).

16. See Washington D.C. Rules of Professional Conduct, Rule 5.4.

ted.) The second subgroup is *Scope of Practice Issues*, including whether there should be any limitations on an MDP lawyers' scope of practice and whether it is realistic to expect UPL provisions to be used against lawyers and nonlawyers working in MDPs. Witnesses Terry, Verhoeven and others, for example, recommend that an MDP not be permitted to provide audit and legal services for the same client. Witness Dzienkowski suggested that MDP lawyers not be permitted to provide litigation services. The third subgroup was *Functional Ethics Issues*, including whether an MDP lawyer must obey legal ethics rules, whether an MDP *nonlawyer* must obey legal ethics rules, what to do when different professions' ethics rules clash, malpractice implications, and whether a new mega-regulator for the MDP is necessary or desirable.

I labeled the third major set of issues *Substantive Ethics Issues*. These issues in turn are divided into two subgroups: one attempts to identify various underlying premises that would affect the MDP analysis and the other focuses on specific ABA Model Rules of Professional Conduct. The charts conclude with a *Miscellaneous* section and a section containing the witnesses' *Bottom Line Advice to the ABA Commission*.

In my view, the points listed below were incontrovertibly established during the ABA Commission's hearings. Thus, the debate about whether and how to amend ABA Model Rule 5.4 should be made against the backdrop of these facts:

- there is virtually unanimous agreement that the only legitimate grounds for regulation are client protection and public interest (although the witnesses disagree about what those terms encompass);
- there is at least *some* client and lawyer demand for MDPs (with some witnesses saying the need is overwhelming and some saying the demand is minimal, and is being driven mostly by the suppliers);
- the *MDP phenomenon* is occurring in the U.S. (by *MDP phenomenon* I mean that there are now a significant number of lawyers working in entities that have nonlawyer principals and who are offering services that if offered in a traditional law firm would be called legal services);
- lawyers participating in the *MDP phenomenon*, for the most part, have been pulled out of the legal profession's regulatory and discipline system because they are in a posture where they have to say they are not practicing law or else they could be charged with MRPC 5.4 violations; and
- there are lots of uncertainties about MDP issues, how lawyer-MDPs will work and what pressures they would create. Even in Europe and Australia, which have had MDPs much longer than in the U.S., these issues are very much in flux and not resolved.

In other words, the world is changing before our eyes and we don't know what is going to happen and whether it is going to be good or bad. The only certain thing is that debate is healthy. I encourage you to engage in a vigorous debate on these issues.