FACING THE INEVITABILITY,

RAPIDITY AND DYNAMICS OF CHANGE

(A Report Favoring Adoption of MDP Model And Other Actions)

Report to the Board of Governors of The Florida Bar

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TABLE OF CONTENTS

INTRODUCTION **1**

EXECUTIVE SUMMARY **4**

RECOMMENDATIONS TO BOARD OF GOVERNORS **4**

THE WRITING ON THE WALL **6**

FROM THE WRITING ON THE WALL TO A FLASHING NEON BILLBOARD **7**

· *"Seize the Future"* 7
· *"Seize the Future II"* 8
· *Changes in the Marketplace As of 2000* 9
· *Global Trends to Watch* 9
· The End of Borders 10
· "Globalization" 10
· The Death of "Legacy Businesses" 10
· The First White Collar Revolution in History 10

THE NEW PARADIGM OF THE PRACTICE OF LAW **11**

· *The Old Reality: Law Practice is a "Profession," Not a "Business"* 12
· *The New Reality: Principles Applicable to the New Paradigm* 12
· The mission of the enterprise defines its strategy 13
· The strategy of the organization dictates its structure 13
· There is no "right" organization 13
· Technologies and end-users are not given 13
· The scope of the enterprise should not be limited by its legal definition 14
· The ecology of the enterprise is not defined by political boundaries 15

CHANGES WITHIN THE PROFESSION **15**

· *Does the Consumer Prefer "One-Stop Shopping"?* 16
· *The ABA's Ancillary Business and MDP Proposals* 17

IMPLEMENTING MDP AND OTHER CHANGES IN FLORIDA **18**

· *Are MDPs Right for You?— Options for the Practitioner, Large and Small* 18
· *Professor Terry's Checklist for Change* 19
· Initial Questions — Standards, Care Values and Rules 19
· How MDPs Should be Structured 19
· Changing the Rules 20
· *From Re-Engineering to Re-Invention of the Practice of Law* 20
· Law firms must become "client-driven" 21
· Law firms must make continuous improvements in their clients' perceptions of the quality of their legal services 21
· Law firms must redesign and "re-engineer" the process of the delivery of legal services 21

· Law firms must redefine their relationships with their clients as partners 21
· Law firms must institutionalize the goal of quality performance 21
· *Re-Invention of The Florida Bar As an Organization* 22

APPENDICES

1. "The Territory Ahead: 25 Trends to Watch in the Business of Practicing Law (25 Trends)," *Law Practice Management Magazine*, July/August 1999 26
2. "Stampede to Extinction" 31
3. "What in the World is the Future of the Legal Profession?" 34
4. Letter Presented to the Uniform Mediation Act Authors on Behalf of the International Academy of Mediators 37
5. "Updated Background and Informational Report and Request for Comments," the ABA Commission on Multidisciplinary Practice's supplement to its August 1999 report. 39

Introduction

This report was prepared in accordance with the mandate of the Florida Bar Special Committee on Multidisciplinary Practice [the "Full Committee"]. The Full Committee is charged by the President of the Florida Bar with the responsibility of reviewing the Report of the American Bar Association's Commission on Multidisciplinary Practice,[1] published by posting on the Commission's Website, on June 8, 1999 [the "MDP Report"], as amended, and recommending to the Board of Governors of The Florida Bar ["TFB"] the position TFB should take as a unified bar, and suggesting what position its representative members of the House of Delegates should take, on the ABA Commission's recommendations for change to the Model Rules of Professional Conduct.

Believing that the truth is frequently best illuminated if strong advocates of differing sides present the best arguments for their respective positions, the Full Committee directed the Pro-MDP Subcommittee to prepare and defend a report advocating the adoption of some form of MDP in Florida, and the Con-MDP Subcommittee to advocate in a similar manner the rejection of the MDP practice concept.

On the surface, the positions of the two subcommittees are mutually exclusive. But as polarized as the two subcommittees' views may at first appear to be, the essence of the competing reports are facts and assumptions on which both subcommittees appear to agree. Not unlike the two sages attempting to describe an elephant, with each focusing on a separate limb of the animal, the two subcommittees have described the novel, complex, and illusive changes that have occurred in the marketplace for legal services from different points of view.

The Con-MDP Subcommittee submitted its report – *Facing the Tide of Change* – in December of 1999. We commend the Con Subcommittee on a thoughtful and sincere report. Moreover, it should be emphasized at the outset that we agree with much of the Con-Subcommittee's Report.

We agree with those parts of the Con Report that speak to the historical evolution and contemporary significance of the so-called "core values" of the legal profession. We agree with the Con Report on —

- the origin and importance of fee splitting prohibitions,
- the policies designed to preserve the independent judgment of a lawyer,

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[1] "Report to the ABA House of Delegates," the final report of the Commission on Multidisciplinary Practice, posted, at Website: www.abanet.org/cpr/multicom.html, on June 8, 1999. *See* also "Updated Background and Informational Report and Request for Comments," a supplemental report of the Commission, posted at the same Website on December 15, 1999.

- the importance of the lawyer's duty of confidentiality,
- the need to preserve the attorney-client evidentiary privilege,
- the importance of the lawyer's duty of competence,
- the significance of a lawyer's duty of loyalty to his or her client,
- the importance of professionalism to the practitioner and to the profession,
- the enforcing authority's duty (if not advisability) to enforce unauthorized practice of law and ethical proscriptions against those "lawyers in MDPs." who are engaging in "civil disobedience."

We share the desire of the Con-MDP Subcommittee for continuity — for the preservation of ethical values and traditions deeply rooted in the psyche of our profession.

Our disagreement is not based on opposite views, but rather on views that are the poles of the same argument. They see the practice of law from the perspective of the profession that it once was. We see the practice of law primarily through the prism of a modern day business —

- a business that is susceptible to the same market-driven forces as any other service business in the post-industrial, information-based global economy,
- a business that is subject to the same management principles and practices that are applicable to any other business of similar type or character,
- a business that is so impacted by the increasingly pervasive and rapid waves of change in technology and communication as to be almost overcome by the challenges and opportunities presented by such change.

Our view is that the Con Report fails to "face the tide of change," because it fails to understand the significance or implications of the dramatic and pervasive change in the marketplace on the practice of law as we have known it. Times have changed, and so has the delivery of legal services.

The Con Report favors the maintenance of the status quo, and argues that changes in the Model Code of Professional Conduct [the "Model Code"], as recommended by the ABA Commission, should not be made unless there is presented "creditable evidence" or "persuasive argument" that such changes are in the public interest. The Con Report examines the reality of the current marketplace and "finds" no such creditable evidence or persuasive argument.

We believe the current marketplace is replete with creditable evidence and compelling argument supporting the ABA Commission's recommendations and the related recommendations we have made in this report. Consider, for example, the following:

- The free market is the best (indeed, the only) testing ground for a new product or service. As Peter F. Drucker teaches,[2] "The customer never buys what the supplier sells."[3] Quality and value are in the mind of the consumer; the supplier's perception of those matters is never the same as the consumer's. In a society where people have choices about goods and services, therefore, there is no sure way of accurately estimating whether the market will favor a new type of service until that service is actually available. The supplier's perception, let alone the perception of the governmental regulators of the legal profession, counts for little at this point. The jury is out until the consumer has a chance to vote with his or her pocketbook.
- Some suggest that the market for legal services has not yet sufficiently demonstrated a "need" for a MDP-type of service delivery system; therefore, there is no reason to sanction any form of MDPs. But while the scarcity of empirical evidence[4] of a demonstrated market need is candidly acknowledged, it must be understood that the development of such empirical evidence has been severely hampered by the fact that MDP-type delivery systems

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[2] Drucker, Peter F., Management Challenges for the 21st Century, *Harper Business, New York (1999), p.9 [hereinafter* Drucker Challenges.] *See* Drucker's position discussed on pages 19 through 24 of this Report.

[3] *Id.*

[4] Although it should be noted that this Report includes the finding of the recent customer survey conducted by the National Association of Realtors regarding the concept of single stop shopping. See p. 24, *infra*.

are presently inhibited (if not prohibited) under the current Model Rules of Professional Conduct. No true measure of market need can be creditably done until the "taint of illegality"[5] has been removed and the market left "free to choose.[6]"

- If the market for legal services chooses not to purchase bundled services, or utilize the "one stop shopping" options made available by an approved MDP delivery system, then we will know "that the market, and not the legal profession acting as a regulatory gatekeeper, has found this delivery option wanting."[7]
- The present number and scope of MDP-type practices throughout America (in Western Europe, in Canada, and in Australia) even in spite of the questionable legal and ethical footing on which such practice forms are currently based ("in the shadow of the law"[8]), demonstrates not only a need but a rapidly growing one at that.
- The positive support of the MDP delivery system[9] from such organizations as the American Corporate Counsels Association, consumer groups, two ABA Sections and other groups who appeared before the ABA Commission, and the support (possibly the endorsement) of four or more Sections of The Florida Bar, must be seen by the skeptics as persuasive evidence of support for the MDP delivery system.
- The uncontradicted opinion testimony of acknowledged experts in the disciplines of management, economics, strategic planning, and marketing, collectively demonstrate that the delivery of legal services is a client-driven enterprise. The governmental regulators of the legal delivery system no longer control (if they ever did) the design, price, or efficacy of a legal product or service. The de facto emergence of MDP-type delivery systems — on the scale that presently exists in America — demonstrates that those regulators have but limited control over the structure of the delivery systems through which those products and services are presented to the market.

We view the opinion testimony of experts and the other supporters of the MDP concept, coupled with the number and scope of existing MDP "practices" already in the marketplace, as ample and persuasive argument in favor of our recommendations.

More importantly, however, we believe the debate over authorizing MDPs is a metaphor — in a sense concealing, but in reality, describing a more pervasive and urgent need for the profession to transform itself, or to use the proper management term, to "reinvent" itself — to reinvent the practice of law as an economic endeavor *and* the governmental system designed to regulate the practice of law in the public interest.

We believe that complete, systemic reinvention is required — if the profession and its surrogate in Florida, The Florida Bar — are to be capable of leading the public and the profession into the uncharted waters of the postindustrial, information-based, global economy.

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[5] ABA Commission on Multidisciplinary Practice, "*Updated Background and Informational Report and Request for Comments*, dated December 15, 1999, by posting on the Commission's Website: www.abanet.org\\cpr\febmdp.html, p. 6. [hereinafter the "ABA Commission's Update"].

[6] From the point of view of this Report, these words are not without deeper meaning. See generally, Friedman, Milton and Rose, *Free to Choose*, Harcourt Brace Jovanovich, New York and London, 1980; and Thurow, Lester C., *The Future of Capitalism, How Today's Economic Forces Shape Tomorrow's World,* William Morrow and Company, Inc., New York, 1996.

[7] Drucker Challenges, p. 6.

[8] As described by the ABA Commission's Update, p.5.

[9] An MDP like delivery system includes one that offers:

> a broader range of choice for clients to select from providers capable of formulating comprehensive solutions which address not only the legal aspect of their problems, but various other facets as well. Subject to resolving important issues of ethics and professionalism in the best interest of the client and the public, such a broader range of choice could include multidisciplinary practices, wherein lawyers are affiliated with non-lawyers.

Resolution supporting MDPs, adopted by the American Corporate Counsels Association.

Executive Summary

The Pro-MDP Subcommittee was charged with developing a report to advocate for the adoption of some form of MDP in Florida. Our review of the ABA MDP Commission's report and research into the many changes taking place both within and outside the practice of law convince us that MDP is not only needed, but is inevitable. Indeed, MDP is already a reality. The question is: How will the lawyers of Florida respond to the dynamic new marketplace for legal services? How will The Florida Bar, as an institution directly implicated by the ABA Commission's recommendations, deal with the leadership opportunity presented to it and its officers and governing board?

We believe that The Florida Bar should focus on strategies that will enlarge the scope of law practice, as opposed to unnecessarily depleting the bar's resources and energies by fighting over smaller and smaller segmented areas of practice. We must recognize that lawyers are in competition with those from other professions who recognize the need to change. More and more, consumers of professional services present lawyers with problems that are multifaceted and multidisciplinary in nature. Such problems require competent, efficient and cost-effective one-stop solutions. The marketplace is replete with examples of cooperating professionals using their skills and knowledge to best serve their clients. These combinations of cooperating professionals—ad hoc as they may be under current law—have discovered that strategic decision-making, coordination and teamwork are often fostered when professionals from different disciplines work cooperatively within a single service organization for the same clients. To that end, the Pro-MDP Subcommittee makes the following recommendations to The Florida Bar.

Recommendations to the Board of Governors

The Subcommittee believes that the Special Committee on Multidisciplinary Practice should make the following recommendations to the Board of Governors of The Florida Bar for action on or before June 1, 2000.

1. The Florida Bar ["TFB"], through its delegates to the American Bar Association's House of Delegates, should actively support the amendment of the Model Rules of Professional Conduct so as to permit a lawyer and a nonlawyer to form a partnership or other business entity for the provision of legal services to the public, subject to certain restrictions and limitations.
   These restrictions and limitations should include:
   - The Model Rules should acknowledge the diversity in the marketplace for legal services and the right of each jurisdiction to protect the public interest and to preserve the continuity of the "core values" of the legal profession (including lawyer competence) that are implicated by the MDP amendment, in ways consistent with the realities in the marketplace and the state's traditions and sound judgment.
   - The Model Rules should select and adopt recommended models of MDP so that the structure of MDP in the United States will be as uniform and consistent from one jurisdiction to another as practicable.
   - During a transition period of at least five years from the final approval of the MDP rule, the Model Rules should continue to prohibit strictly passive investment by nonlawyers in the equity of law firms.
   - The Model Rules should include two functional definitions of the practice of law, one designed to guide the implementation of the Model Rules permitting nonlawyers to work in MDP settings, and the other designed to protect the public from incompetent and potentially injurious conduct. The definitions must acknowledge the trans-jurisdictional nature of some legal services.

2. TFB should recognize that the MDP issue has broader significant implications, that the MDP issue is a metaphor for the dramatic, pervasive, and rapid change that has bewildered the marketplace for legal services in recent years. TFB should take the following actions —

- As the profession's legal representative and as the principal advisor to the courts on matters involving the Code of Professional Responsibility and the profession, TFB should become a "change leader," and—by its example and the implementation of new polices and norms—prepare for, accept, and assist lawyers and the public in understanding and dealing with change — in the paradigm of practice and in the marketplace generally.
- On a national level, TFB should recommend to the ABA and to other state bar associations the creation of, and be the sponsoring organization for, a Pound-type Commission, having as its sole purpose the re-inventing of the practice of law for the 21st century.
- On the state level, in concert with the Florida Supreme Court, TFB should create a state-level study commission the purpose of which is to describe the current paradigm of the practice of law, to articulate the assumptions upon which the paradigm is based, to identify the "core values" of the profession that are implicated by the new paradigm, and to suggest actions which should be taken to accommodate such changes, including without limitation, changes in the role and scope of TFB itself.
- Subject to antitrust constraints, TFB should adopt a leadership role in working for a coordinated and inter-disciplinary resolution of the problems of overlapping professional jurisdiction. This could best be done with a study commission appointed by the Florida Supreme Court and containing representatives of the stakeholders.

3. Independent of the consideration of MDP rules, TFB should conduct a comprehensive "sunset-type" review (with substantial participation by nonlawyers) of the Rules of Professional Conduct to determine, in light of the changed and changing paradigm of the practice of law. These rules should be immediately amended or repealed, in order to —
    - Eliminate regulations that are unnecessary for the protection of the public.
    - Permit lawyers to compete more effectively in the marketplace.
    - Reduce the cost of legal services to the public.
    - Enhance access to legal services to those currently unserved or underserved citizens.

Amendments, which should be considered as cost-effective alternatives or improvements on the existing rules, include —

- Requiring mandatory malpractice insurance for all Florida lawyers in the active private practice of law.
- Requiring all Florida lawyers with trust accounts to be bonded.
- Requiring all retention agreements be in writing in order to be enforceable.

4. Contemporaneous with the study to "re-invent" the practice of law, TFB as a public agency should appoint a study commission having the purpose of re-inventing TFB as a public agency/non-profit member-service organization[10] —

- Reinventing TFB as an organization that is mission-driven, that defines its clients as "customers," that empowers its members, and that pushes control out of the bureaucracy into the community.
- Reinventing TFB as an organization that measures performance based on outcomes rather than inputs and that implements "performance-based budgeting."
- Reinventing TFB as an organization that applies the best management principles and practices with respect to all of its functions and roles.

[10] See, generally, *Osborne, David and Gaebler, Ted,* Reinventing Government (How the Entrepreneurial Spirit is Transforming the Public Sector), Penguin Group, New York (1992).

- Reinventing TFB as an organization with an effective and accountable governance system that institutionalizes a policy of "systematic innovation," by which the entire organization sees change as an opportunity.

"The Writing on the Wall"

In August 1994, the Board of Governors of The Florida Bar met at the foot of Stone Mountain in Georgia, with the Board of Governors of the State Bar of Texas. The meeting was a planning retreat, a "learning experience." The introduction of American Bar Association President-elect Roberta Ramo and her remarks were punctuated by a 40-minute presentation by Ward C. Bower, president of Altman Weil Pensa and a nationally recognized management/marketing consultant and futurist, specializing in the "legal industry." At the time Bower was the ABA's principal advisor on the future of the profession. Bower's remarks, "Economic, Demographic and Marketplace Trends and Their Implications on Bar Associations," were poignant but foreboding. In substance, he warned the assembled leaders—

- Bar leaders cannot continue to view the practice of law principally through the historical prism of a regulated "profession."
- The practice of law has become a business; indeed law practice has evolved as the delivery system for a global legal services industry.
- On a local level or in a global setting, legal services are no longer designed, priced and offered to the public based on what the profession deems suitable or appropriate.
- Now, consistent with the classical business model, such decisions are based predominately on market-driven forces, that is, on what the consumer of legal services wants and is willing to pay for.
- Market conditions now dictate a new paradigm for the practice of law has emerged, a paradigm in which the client drives the price, delivery and efficiency of legal services.

The transformed functional model of the practice of law was for Bower the "window" through which he and others performed accurate and relevant analyses of the practice. In this context, viewing the delivery of legal services in the context of accepted management principles and practices applicable to any other organization. Conclusions drawn from these analyses demonstrate that the legal industry in the United States is a "mature industry," essentially, one in which the supply of legal services has outgrown the demand, in much the same way as the "smokestack" industries matured ("topped out") at the turn of the last century.

According to Ward Bower and other commentators, the legal services industry at the end of the 20th century was experiencing and could in the future expect to experience slower growth in fee revenues, diminished profitability per lawyer, and declines in profit margins. In Bower's opinion, the industry displayed characteristics of "maturity," including:

- Fierce competition based on price;
- Diminished importance of the quality of services;
- Marginalization of ethical and professional standards associated with those services and with the profession generally;
- Greatly enhanced level of consumer (client) sophistication in all aspects of practice;
- Large numbers of supplier (law firm) consolidations and contractions;
- Evolution of trade or "brand names";
- Increased market segmentation into distinct practice areas;
- Supplier (law firm) differentiation and specialization;
- Geographic expansion to find so-called "new" or underserved markets; and
- Decreased legal and financial barriers to entry into the profession.

Many of these characteristics have alarming and unfortunate repercussions beyond the economics of law practice. Some are the driving force behind lawyers "cutting of corners," with the resulting increase in disciplinary problems, diminished civility and common courtesy in the day-to-day practice, diminished respect for the court and its ministers, and diminished participation in pro bono politico service, public service and other uncompensated services to others.

Bower concluded his presentation to the combined boards of governors with an alarming prediction: If the leaders of the legal profession do not get their collective heads out of the sand, move beyond their present state of denial, and accommodate and deal with these market-driven forces—in the interest of the public and the profession—the inevitable result will be that the practice of law will be consumed by the so-called Big-Five accounting firms as yet another "consulting service."

The combined boards of governors warmly and politely received Bower's remarks. The remarks even made for interesting and provocative discussion during coffee breaks and dinner. But Bower's message fell on deaf ears. Few in the profession had the foresight to fully appreciate the gravity and urgency of the challenge facing the profession. Fewer still sounded the church bells and rode off into the night toward Lexington and Concord.[11]

There are some "generic" reasons if not excuses for the profession's inaction. Lawyers are not "constitutionally" inclined to act on a report of a futurist like Ward Bower or act in response to conferences like *Seize the Future*. Among lawyers and judges, cows rule. From their days in law school, lawyers are rewarded with success if (and infrequently when) they can find that elusive case that is on "all fours" with the case at hand. (A case on all fours—having the "same" facts, controlling law, rationale and holding—is a "cow case.") Lawyers and judges make their living day in and day out, looking back in history to find precedent, to find the experience-based rule that will control the adjudication in the case at hand. By training and experience, therefore, lawyers and judges do not find the inferential decision-making process, which is based on future trends and predictions of a futurist, to be either competent or comfortable.

Consistent with the images of the current MDP debate, *lawyers appear to be driving down the Information Super Highway into the 21st Century at flank speed, but with their eyes transfixed on the rear view mirror.*

We take exception to the Con Report (without intending any criticism of our esteemed colleagues who wrote it) on this very point. The whole focus of the Con report is retrospective. Without a word about the dynamics of change facing the practitioner at the dawn of the 21st century, the Con Report proposes the solutions to problems of the past as the solutions to the problems of a dynamic future.

From the "Writing on the Wall" to a "Flashing Neon Billboard"

If Ward Bower's 1996 admonition was the "writing on the wall," the dramatic transformation of the professional services industry over the ensuing six years has become a flashing neon billboard, proclaiming the emergence of a new economic era.

"Seize the Future"

In November 1997, the American Bar Association and Lotus Development Corporation sponsored a watershed conference entitled, *Seize the Future*. The conference was by invitation only to the top 150 most influential leaders in the in the legal profession.

- John Naisbitt, author of *Megatrend*s and a number of other books about the future, challenged the profession to be entrepreneurial, to see the "Global Paradox," which tells us that the bigger the economy, the smaller the unit of service.
- Antonio Garrigues spoke about his experience and analysis in deciding to merge his 300-plus lawyer firm into Andersen Consulting and his experience in the MDP setting.
- Joel Barker's book *Paradigms* is still the leading resource for understanding how our rules change, particularly in our fast-paced society at the end of the 20th century. Barker facilitated the attendees' discussion of the implications of MDPs to the profession. In less than 45 minutes over 400 implications were fleshed out (see the Seize the Future Website, www.futurelaw.com). There was attendee consensus that MDPs will be a major player in the future delivery of legal services.

[11] We should not be too critical of our leadership, however—at least up to this point—because there were only a handful of activists within the whole of the organized bar who recognized the gravity and urgency of Bower's challenge.

- Jennifer James, author of *Thinking in the Future Tense* talked about "lodge cultures" in the professionals marketplace. She argued that "the lodge" is not capable of dealing with change—the more dramatic the change, the more resistance from nostalgic past-worshippers. Visionaries are not welcome in the lodge.

Seize the Future attendees have reported that lessons learned at that 1997 conference have followed them ever since. They find it impossible to engage in such insignificant debates as MDP pro and con. Reinvention of the law practice to provide relevant 21st century services has become the issue in the marketplace and must become the issue for bar leaders as well. Nostalgia and protectionism have no place have no place in a strategic vision of the future, or in the decision to enforce the ethics and UPL rules against the lawyers "practicing" in accounting and consulting settings.

All discussion about public harm from a MDP-type delivery system is theoretical. There have been no complaints reported to TFB, either under the ethics rules or under the unlicensed practice of law regulations, from any person in Florida who claims to have been injured by a violation of the Rules of Professional Conduct by a lawyer delivering legal services in an accounting or consulting firm. The Con Report seems to encourage TFB to do what no other state bar has done, to embark on a massive, costly enforcement effort against the lawyers who are practicing law under the guise of offering consulting services in accounting and consulting firms in this state. The Con Report suggests that if an aggressive ethics enforcement program does not deter the violations, then the improper practices should be enjoined under the banner of the unauthorized practice of law. All this in the absence of demonstrable harm to the public or even an actionable complaint from an aggrieved person.

"Seize the Future II"

A second conference entitled *Seize the Future II* was held in November of 1999, and was again sponsored by the ABA's Law Practice Management Section and Lotus. This conference had a much deeper sense of the urgency, a broadly shared view that our profession must to wake up to change, not incrementally but totally. Tom Peters and Gary Hamel were two of the keynote speakers. Peters is still the most quoted and most recognized writer and lecturer on management and future issues. His theme was the need for an innovation revolution for everyone in business, particularly professional service industries. Gary Hamel is a professor at the London School of Economics and Harvard Business School. He is the managing principal in Strategos, a consulting firm devoted to strategy for the future. His book, *Competing for the Future*[12], is listed as one of the top three business books on the market today. Hamel deeply respects the legal profession and believes the rule of law is the greatest single contribution to our society's success. He sees great danger for the profession in the changing business environment and classifies law as one of many vulnerable "legacy businesses."

These are crazy times. We are living at the end of the industrial revolution in a new information-based economy of global scope. Gary Hamel predicted that the industrial revolution would come to an "official" end on December 31, 1999. Books have titles with a new sense of urgency, such as *Blur, The Death of Distance, Business @ the Speed of Thought, Faster,* and *As We Work Closer and Closer to Real Time.* It is impossible to predict the future with great accuracy, but it is safe to predict that it will be radically different from today's world.

[12] Hamel, Gary and Prahalad, C. K., *Competing for the Future (Breakthrough Strategies for Seizing Control of Your Industry and Creating the Markets of Tomorrow*), Harvard Business School Press, Boston, MA (1994).

Changes in the Marketplace As of 2000

Business leaders and strategists recognize the dynamics of change currently affecting the marketplace, and advise companies to create, manage and master such changes. The players, rules and requirements for survival in the merging digital economy are all changing, and protectionist tactics to stave off change and to preserve power will only lead to failure.

- "We are in the midst of the most profound change since the beginning of the Industrial Revolution, over two centuries ago ... perhaps the most profound change since the Chinese more or less invented hierarchy thousands of years ago." — Tom Peters*, Fast Company*
- "It's not that the business environment is changing. Change is the business environment. And it's not that every company is undergoing change. Change has overtaken every company. Creating change, managing it, mastering it, and surviving it is the agenda for anyone in business who aims to make a difference." — *Wired Magazine* (January 1998)
- "Time is the only truly scarce commodity. Networks tend to leach power out of traditional institutions, including politics and the state. Guardians of the old order are trying their best to hold back change and preserve their power." — Dee Hock*, Founder of Visa*
- "We are at that very point in time when a 400-year-old age is dying and another is struggling to be born—a shifting of culture, science, society and institutions enormously greater than the world has ever experienced." *— Dee Hock*

"Why do great companies fail?

- Inability to escape the past.
- Inability to create the future."

—Hamel and Prahalad*, Competing for the Future*

- "The information technology revolution. The Internet is changing the way everyone does business in dramatic ways." — Don Tapscott*, The Digital Economy*
- "Today we are witnessing the early, turbulent days of a revolution as significant as any other in human history. A new medium of human communications is emerging, one that may prove to surpass all previous revolutions—the printing press, the telephone, the television, the computer—in its impact on our economic and social life. Interactive multimedia on the so-called information highway, and its exemplar, the Internet, are enabling a new economy based on the networking of human intelligence. In this digital economy, individuals and enterprises create wealth by applying knowledge, networked human intelligence and effort to manufacturing, agriculture and services. In the digital frontier of this economy, the players, dynamics, rules and requirements for survival and success are all changing. Such a shift in the economic and social relationships has occurred only a handful of times before on this planet. It is causing every company to think far beyond the likes of 're-engineering' to 'transform itself.' A new enterprise is emerging—the internetwork business—which is as different from the corporations of the 20th century as the latter was from the feudal craft shop." —William Knoke*, Bold New World*

Global Trends to Watch

Our profession must recognize several trends as we debate the MDP issues:

- The change from a producer-driven economy to a consumer-driven economy. Evidence of this trend is overwhelming.
- The move from producer-at-center orbited by consumer to consumer-at-center orbited by producers.
- The old model was based on order, logic and conformity, appropriate to a system where change came slowly. The new model is moving at Internet speed.
- We are going through a seismic shift to intellectual capital from capital investment.

If clients want one-stop shopping, we must provide one-stop shopping or risk the future. There are business, societal and market forces that are shaping our future.

The End of Borders

- 20th century job skills are increasingly irrelevant.
- Established economic theories no longer apply.
- Even nations are becoming obsolete.
- Online securities' trading is expected to move from its current 37 percent of all trades to 50 percent by this time next year.
- Sixty percent of Americans were on the Internet as of December 31, 1999.

Fifteen months ago, the CEO of a large insurance company remarked, "Insurance is too complex. I think people will always need agents." Today, insurance companies are moving to the Internet at flank speed in an effort to survive. Too many bar leaders are still saying, "Law is too complex. People will always need lawyers." If the Con Report prevails in the MDP debate, those statements will serve as the bar's epitaph. Gary Hamel says that we are "on another planet if we believe we have a vested right to continue business as usual." *— Gary Hamel, in a speech on November 6, 1999.*

"Globalization"

- The most remote part of the world is now one-half second away on the Internet. This globalization is the first trend identified by Simon Chester and Merrilyn Tarlton in their article, "The Territory Ahead: 25 Trends to Watch in the Business of Practicing Law (25 Trends)," *Law Practice Management Magazine*, July/August 1999. A copy of this article is attached as Appendix 1.

The Death of Legacy Businesses

- Gary Hamel believes that never in history has incumbency been worth less. Sears invented the catalog sales business and can't compete in today's growing catalog sales businesses. The problem with legacy businesses (stare decisis driven) is not how to get new innovative thoughts into our minds; it is how to get the old ones out. As firms look for talent, one of the survival skills is to disavow history and incumbency. Jennifer James refers to the legal profession, among others, as a "lodge culture." A lodge is "¼ a cooperative alliance of almost any kind in which the members bond together for power or protection or both. Traditional lodges don't do well during periods of rapid change because they are rarely visionary." —*Thinking in the Future Tense*, 1996.

The First White Collar Revolution in History

- We have always tried to increase productivity by replacing blue-collar workers with machines or by requiring twice as much work from fewer blue-collar employees. Tom Peters believes we are in the most profound revolution in over 500 years and that this revolution places over 90 percent of the white-collar workers' jobs in jeopardy over the next decade.
- What color collars do lawyers wear?
- Is there some kind of a lawyer exception to this white-collar revolution?
- Is there a "lawyer exception" for change?
- Peters believes that the 10 percent who survive will make it because they have reinvented their work to be full of passion, excitement, emotion and dreams (and a few noble fiascoes here and there). Is it "unprofessional" to believe that the legal profession must change in the same way as the rest of the world must change?

The New Paradigm of the Practice of Law

If the legal services industry is to deal with the realities of the postindustrial, knowledge-based, global economy — which has washed away with hurricane force the old order, "yielding place to new,"[13] a new paradigm — then the legal services industry must re-invent itself. It must reinvent itself so that it can avail itself of the new vistas of opportunity and challenge presented by the new economic conditions.

Market conditions now dictate a ***new paradigm*** *in which the client drives the design, the price, the delivery system, and, indeed, the efficiency of legal services.*

But what is this "new paradigm" and what does it mean to the practicing attorney, to the organized bar, to the public? To find answers to these questions, one must start with an understanding that the enterprise known as the practice of law (the legal services industry, if you will), including all its forms (sole practitioners, small firms and large firms) is an *organization*.

Each of the governmental agencies or the not-for-profit entities that regulate the practice of law is also an *organization.* "Management is the specific and distinguishing organ of any and all organizations."[14] These organizations—whether business or non-business in purpose—are influenced and controlled by the same general principles and practices of the discipline of management that are applicable to other businesses, and to governments, armies, churches, women's soccer teams, and so on.[15] What, then, are the general management principles and practices influencing the organizations for the delivery of legal services and the organizations regulating the delivery of those services?

The first principle has to do with the organization's paradigm—its philosophical and theoretical framework within which its theories of mission and purpose, rules of conduct and other generalizations are formulated. A "paradigm" is a set of basic assumptions that the discipline makes about reality. These assumptions are usually held subconsciously by the scholars, writers, teachers and practitioners of the discipline.[16] "Yet," as Peter F. Drucker argues, "Those assumptions largely determine what the discipline—scholars, writers, teachers and practitioners—assumes to be REALITY."[17] A discipline's assumptions about reality become the reality. The assumptions become what the discipline focuses on, what it considers "facts," and what it considers its role and purpose. Practitioners of a discipline tend to act and behave as the discipline's assumptions tell them to.[18]

In the social science disciplines, the assumptions are susceptible to continuous change.[19] This means that in social science disciplines, an assumption that was valid yesterday may have changed today. The assumption may have become invalid (or at least totally misleading) overnight. The discipline's paradigm—its prevailing general theory—being premised on such an assumption has thus become outmoded, obsolete and unreliable as a description of the basic reality.

The assumptions underlying the paradigm of law practice have changed—and most importantly—are changing, indeed rapidly, as Bill Gates maintains, "at the speed of thought." Gates begins his book with the

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[13] Alfred Tennyson (1809) may have had it right when he said: "The old order changeth, yielding place to new; and God fulfils himself in many ways, lest one good custom should corrupt the world." — "The Passing of Authur" *Bartlett's Familiar Quotations,* 9th Ed. www.bartleyby.com/99/424.html.

[14] *Drucker Challenges*, p.9 .

[15] That is not to say that there are not differences in management from one organization to another. The mission of an organization defines its strategy. The strategy of an organization defines its organizational structure. An army differs from a computer manufacturer, from a church or synagogue, from a small law firm—because their respective missions are different.

[16] *Drucker Challenges*, p. 3.

[17] *Id.*

[18] *Id., at* 4.

[19] In the natural science disciplines, assumptions are, by definition, based on "natural laws" about the physical universe; these assumptions change little over centuries.

sentence: “Business is going to change more in the next ten years than it has in the last fifty.”[20] These changes have or are transforming the practice of law, even in the absence of a practice reinventing itself.

The Old Reality: Law Practice Is a “Profession,” Not a “Business”

The most debated of those basic assumptions has to do with the nature of the enterprise we call the practice of the law. One of the arguments advanced by the Con Report[21] is that the practice of law is a “profession” not a “business,” citing as “authority” a statement from a 1954 Florida Supreme Court case involving the appeal of a lawyer discipline matter.[22] The report seems to argue that because the court in 1954 said “[the practice of] law is not a business” that the court’s assumption of reality in 1954 continues to accurately reflect reality today.

Such an argument is based on an historical (indeed, backward-looking) perception of reality. It is premised on the assumption that the practice of law at the beginning of the 21st century is the same as it was when the profession was created, when the bar was integrated in 1950, or when *Murrell*[23] was decided in 1954, etc. This assumption is so far removed from today’s reality that it has become an obstacle to fully understanding the theory and practice of law in the 21st century.

Unfortunately, this issue seems to frame much of the MDP debate. The argument is a potentially divisive one, and the emotions of advocates of both points of view run high. At worst, it is an argument that bespeaks the clash between the new paradigm and the admittedly idealized paradigm of yesteryear. At best, it is an argument misguided by one’s personal perception of reality. A fair comparison of the two requires that one ask the right questions.[24]

Historically, the practice of law evolved as a closely-knit and noble profession, but times have changed and significant decisions from outside the “profession” have greatly reduced the profession’s ability to market and price its services, to regulate the size and to some extent the level of competence of its members, and in many ways to control its own destiny. Decisions of the United States Supreme Court in the fields of antitrust and competitive negotiations on the price of services,[25] and commercial free speech involved in advertising, solicitation and freedom of association[26] have resulted in the practice of law being considered a business more than a profession per se. The practice of law continues to have some attributes of a profession, as do some other historic professions active in the marketplace. But the practice of law has now become, fundamentally,[27] a business.

The New Reality: Principles Applicable to the New Paradigm

What is the context of the MDP debate? What discipline controls? What are the rules govern the discipline? Who makes the rules? In his recent book, *Management Challenges for the 21st Century*, Peter F. Drucker, the most respected authority in the discipline of management, argues convincingly that all modern enterprises—whether business, civil service, university, hospital, large church or military— are organizations, and all organizations are guided by certain universal principles and practices of management.

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[20] Gates, Bill, *Business @ the Speed of Thought (Using the Digital Nervous System),* Warner Books, New York, 1999, p. i.

[21] See Con Report at 12

[22] *State ex rel. The Florida Bar v. Murrell,* 74 So. 2d 221 (Fla. 1954).

[23] *Id*.

[24] What are the attributes or characteristics of a profession, of a service business? Who makes decisions regarding the nature, scope, and quality of services, and on what basis are these decisions made? The regulator of the profession or the consumer? How do those attributes impact the design, development, delivery, cost, and pricing of legal services and what is the organizational form through which these services are best delivered to the consumer? On what theoretical basis are market choices made?

[25] *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)(a minimum fee schedule for attorneys enforced through the prospect of professional discipline by the state bar association and the state supreme court violated the Sherman AntiTrust Act).

[26] *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

[27] *Id.,* at n.9.

Each of Drucker's principles[28] applies to the modern enterprise of the practice of law and is implicated in the crosscurrents of the MDP debate and the larger issue of the need to re-invent the practice of law. The discipline of management, the general rules governing the management of organizations and the special rules applicable to legal service organizations -- all apply to the MDP debate, and, in our opinion, provide a contextual framework within which the MDP debate can be understood. Here follows the general rules applicable to all organizations, including legal service organizations.

The mission of the enterprise defines its strategy.

The mission of an individual or an organization designed to practice law, for example, is the delivery of competent legal services to clients who contract for those services. Legal services in this context include all those services that are usually and customarily performed by a licensed attorney and counselor-at-law. A strategy for accomplishing that mission is defined and adapted to that stated mission.

The strategy of the organization dictates its structure.

The strategy of the organization dictates the structure of the organization, through which the strategy is best implemented.

There is no one "right" organization.

There is no single organization that is "right" for all enterprises, even in the same industry. There is no exclusively "right" way to organize for the delivery of legal services. The organization and its structure are best dictated by the task to be performed. The marketplace is replete with differing forms of organizations involved in the delivery of legal services: from the simplicity of the sole practitioner, to the efficiency of a small law firm with a boutique focus, to the medium size firm that specializes in employer-employee relations law, to the large size firm that offers comprehensive legal services on a regional or global basis. The strategy adopted by the enterprise and the tasks that emanate from that strategy dictate the organization of the enterprise.

[28] For those who would like a more detailed explanation, see chapters II and III of *Drucker Challenges*.

Technologies and end-users are not given.

The old assumption was that technology was unique to one's own industry, and that technology outside of one's industry did not matter. The only technology that mattered was the technology created in one's own company.[29] Now that assumption has been overtaken by change. The new reality is that the technologies likely to have the most impact on a company and the industry of which it is a part are those outside the company's own field.[30] The communication technologies, to cite one example, have drastically changed the law practice. Now your practice is antiquated if you cannot use the Information Super Highway with ease. You might well consider yourself "behind the curve"— if you do not have an office electronically capable of communicating with fellow lawyers and the court, housing your firm's Website, conducting Internet-based legal research, filing pleadings and papers electronically, or signing papers via digitized signatures.[31] Lawyers did not invent the new technologies, but their presence has transformed how lawyers (and their clients) communicate and do business.

"Since WWII, end-users are not uniquely tied any more to a certain product or service."[32] The same want is being satisfied by different means. For example, persons in need of news are no longer tied to newspapers or magazines or, indeed, to any printed materials. In the new reality, news as a service is provided in print, digital and graphic forms, over the air, through the air and under the ground.

The end-user of legal services is no longer uniquely tied to the services of a lawyer. Thousands of litigants in our courtrooms today have chosen to satisfy their need for legal services by doing it for themselves. Hence the emergence of the most expansive example of "self-help" since the Chinese "invented" alternative medicine, the *pro se* movement.[33] Others in want of legal services are finding them in other settings, like Big-Five accounting firms, paralegal clinics and the like. "Increasingly the same want is being satisfied by very different means. It is the want that is unique, and not the means to satisfy it."[34]

"The customer never buys what the supplier sells."[35] Quality or value in the mind of the customer or client is different—sometimes radically so—from the way the supplier perceives "quality" or "value" with respect to the same products or services. Therefore, "the starting point for management can no longer be its own product or service, and not even its known market and its known end-users for its products and services."[36] The starting point must be what the consumer considers of value or quality, not what the governmental regulator of professional standards considers of value or of quality.

The scope of the enterprise should not be limited by its legal definition.

The legal definition of an organization is inadequate and too limiting to be used as a basic assumption of management of an organization, although historically such was the case. The legal definition of the enterprise, a corporation, partnership or whatever the legal description, forms the inner circle of command and control for the organization, but the organization cannot survive in the current realities if it does not extend the boundaries of its influence beyond the inner circle of its "legal self."

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[29] During the period when that assumption accurately reflected reality, the company that managed to have the best, most creative and innovative research and development department succeeded while others failed. Examples of such companies are Siemens, the German chemical industry leader, the 1950s version of IBM and the Bell Labs.

[30] The pharmaceutical industry is a good example. That industry, once just a chemical industry, now depends on technologies that are fundamentally different than the technologies on which the "original industry" was based. The technologies that differentiate companies' performance in the industry are those that apply technologies in such fields as genetics, microbiology, molecular biology, medical electronics, etc.

[31] *See* Georges, Richard M., "The Impact of Technology on the Practice of Law — 2010," Fla. Bar Journal, May 1997, p. 36.

[32] *Drucker Challenges*, p. 24.

[33] *See*, Garcia, Mike Jay, "Key Trends in the Legal Profession," Fla. Bar Journal, May 1997, p. 16.

[34] *Drucker Challenges*, p. 26.

[35] *Id.,* at 29.

[36] *Id.*

The Japanese are credited with inventing the term "Keiretsu"—a management concept in which the suppliers to an enterprise are tied together with their main customer for strategic planning, product or services development, cost control and related purposes. Throughout corporate America, Keiretsu is a best management practice. To be successful today, an organization must realize that the sophisticated consumer is being advised by his or her management to extend the boundaries of the consumer to include the suppliers of products and services consumed by that consumer. When this concept was evolving, it took the form of highly integrated corporate organizations.[37] There are many other examples of this type of integration into a single management system that is linked economically rather than controlled legally.

Nowadays, the integration is not as formal as the vintage GM model. Now more equal partners do the integration, by joint ventures, by "strategic alliances," by "regional trading sectors" and by "networked communities,"[38] on a permanent or a project-by-project basis, etc., but the scope of the enterprise is extended, nonetheless. The participating organizations are tied together for strategic planning, product or services development, coordination of multi-tasked functions, cost control, access to technology and capital, and related purposes. Keiretsu is practiced. Does this sound like MDPs?

To cite one example, some sophisticated consumers of legal services, such as banks, are interested in sitting down with their suppliers of legal and related services to determine how best to handle the documentation of loans. Banks may divide the loan documentation function into discrete tasks, such as, application review and approval, underwriting review, communication to customer, document drafting, forms preparation, title examination, legal compliance review, loan closing and similar functions. By doing so the bank can perform the tasks within its organization or out-source the discrete tasks to competent individual providers. Obviously, some tasks require the involvement of an attorney, but most of these tasks do not. If the bank follows best management practices, it may seek to out-source the entire loan documentation function, to one or more providers, but to do so under terms that permit the bank to take advantage of the benefits flowing from Keiretsu-type relationships, such as strategic planning, coordination, and cost control.

Restrictions in the Model Rules on "partnering" with nonlawyers — the essence of the MDP debate — impair innovation and flexibility in the delivery of legal services. Refusal to modify those rules in a timely fashion may relegate the legal profession to the same economic junk heap as the "mature " smokestack industries of yesteryear, if history is an accurate teacher.

Lawyers cannot remain frozen in time, viewing themselves as deliverers of only "legal services," however one defines the term. If the railroads had seen themselves as a transportation business as opposed to a railroad business delimited by steel rails, today we would be flying the friendly skies of Union Pacific Airlines. The same is true of our perception of the law practice. Lawyers are not just in the business of drafting legal documents; in some practice settings lawyers should consider themselves in the larger business of supplying loan documentation services, for example.

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[37] For 30 years General Motors, for example, enjoyed a 30 percent cost advantage over Ford and Chrysler, because it bought up and operated as separate divisions the suppliers of 70 percent all of the parts and accessories that went into GM's automobiles.

[38] *See* McNaughton, Ann L., "Corporate Use of Assisted Negotiation Strategies: Expanding Your Practice through Multidisciplinary Problem-Solving," *The Accountants Are Coming, A Practical Lawyer's Survival Kit* (1999).

The ecology of the enterprise is not defined by political boundaries.

Industries are increasingly organized, not along political boundaries, but along functional ones. Large corporations are run on a worldwide basis, with individual tasks such as research, design engineering, development, testing, manufacturing and marketing, organized on a transnational or global basis. As a regulated profession, the practice of law is presumed to operate in a local ecology. That assumption is at best problematic in the postindustrial, information-based, global economic environment. Lawyers are now in cyberspace and clearly beyond the political borders, if not practical and legal reach, of “independent” states. Jurisdictional differences in the provision of legal services are likely to exist for many years, until those differences Balkanize an otherwise unobstructed global marketplace or until the World Trade Organization’s influence is exerted in earnest. In the meantime, jurisdictions would be wise to minimize jurisdictional differences in the impact of its regulation system to maintain a competitive parity.

Changes Within the Profession

Obviously, a lot has happened in the world during the six years since Ward Bower’s admonition. A lot has happened within the legal profession as well. First, Bower’s “mature” market prediction is holding true. According to *The Florida Job Bank 2000*, which claims to be the “#1 Job Directory Series for 20 Years,”

> [p]rospective lawyers will continue to face intense competition through the year 2006, due to the overabundance of law school graduates. Consequently, fewer lawyers are working for major firms, and are working instead for smaller firms, corporations, and associations (citing the U. S. Department of Commerce data). Firms have reduced their support staffs, while large corporations are establishing in-house legal departments to avoid paying for the services of expensive, big-name law firms.

The Florida Job Bank 2000, 13th Ed., Adams Media Corporation (1999), p. 235.

Another evidence of a mature market is the growing *pro se* movement in Florida. It is a strong signal that many traditional legal services are not value-added from the client’s perspective. According to *The Florida Bar News*, there are over 45,000 pro se litigants in the Florida court system on any given day. Over 80 percent of the final hearings in dissolution of marriage cases are now pro se. The Florida Supreme Court has adopted Rules of Family Procedure (pro se) to allow the court system to function. How long will it be before the Florida Rules of Civil Procedure have a consumer version? The Florida Supreme Court has made it clear that it is not a lawyer protectionist court and that pro se is a positive consumer movement.

Also in keeping with a mature market, new law school graduates are having a difficult time finding work in the legal profession. The average debt out of law school in the United States is over $60,000.

Coupled with the market-driven changes discussed above, leaders in the legal profession recognize that a new paradigm for the practice of law now exists, and that the new paradigm acknowledges the delivery of legal services as part of a compendium of professional/consulting services linked by a common business objective.

Does the Consumer Prefer “One-Stop Shopping”?

From the individual consumer to the largest multinational corporation, consumers of legal services often present lawyers with problems that are multidisciplinary in nature (i.e., require the active evaluation and counsel by more than one professional) and extensive in scope. Such problems require competent, efficient and cost-effective one-stop solutions.

- Surveys indicate a strong preference for the MDP environment.
- *Financial Times* reported on September 9, 1999, that more than half of the big corporate buyers of legal services in the U.K. and U.S. would be willing to use a firm that combined lawyers and accountants.
- In U.S. financial organizations, over 75 percent were willing to use such firms.

- According to a National Association of Realtors 1997 survey of over 5,000 home buyers, over two-thirds of the people who had recently purchased a home would, in the future, select a company that is able to provide every service they need under one roof.
- The survey has proven the need for realtors, lenders, title insurance agents, and any other service provider to be part of a one-stop entity.
- Does the Florida real estate attorney have a chance of survival without an MDP relationship?

Although never officially labeled "MDPs," de facto MDPs have existed in the marketplace for a long time. As the MDP Report found —

- Lawyers in accounting firms, in consulting firms, in financial institutions, in insurance companies, in American Express, in H&R Block, in Century Business Systems, and hundreds of others, lawyers are being employed as lawyers and they are performing "consulting services," such as:
- Consulting services in tax, in mergers, in acquisitions, in business transactions, in human resource management, in employment law, in labor law, in intellectual property law, in environmental law, in real estate transactions, in telecommunications, in media and entertainment, law, in health care law, in construction law, in mediation matters, in arbitration matters, and a in a variety of similar services.
- They are performing "litigation support services" such as:
- Pre-trial preparation, investigation, legal research, preparation of interrogatories, preparation of deposition questions, preparation of witnesses, outlining arguments, preparing discovery plans, and preparing litigation budgets.

In the U.S., we have never segregated the practice of law from other businesses as practices were segregated within the English barrister system and the French avocat. The formal evolution to MDPs is no more than a logical step in a process that goes back a long way.

The ABA's Ancillary Business and MDP Proposals

Two practice changes have burst into the consciousness of lawyers in the six short years since Ward Bower's "Writing on the Wall." First, in 1994, the ABA adopted Model Rule 5.7, which defines the parameters under which a lawyer who provides "law-related services" (ancillary business services) will be subject to the Rules of Professional Conduct. Second, in August of 1999, MDP Commission recommended a limited relaxation of the prohibitions against sharing of legal fees and forming a partnership or other association with a non-lawyer when one of the activities is the practice of law. (Note the number of articles in the *American Bar Association Journal* and *The Florida Bar News* in the last 18 months, for example.) The MDP Report reflects exhaustive and insightful work by a blue-ribbon panel. We believe the report and findings of the MDP Commission should be given great weight. It is important to review what the Commission said and did in its recommendations, as amended by the Commission Update Report. Some of the key features of the Commission's proposal are summarized as follows:

- The legal profession should maintain its Rules of Professional Conduct to protect the profession's core values, but that these rules should not unduly or unnecessarily inhibit development of new structures through which a lawyer might deliver legal services to the public more effectively and offer better public access to the justice system.
- Lawyers would not be permitted to "share" fees with non-lawyers in any context other than MDPs as those delivery systems would be identified under the Model Rules.
- Allowing lawyers to delivery services through MDPs would not change the prohibition against non-lawyers providing legal services.
- A lawyer in an MDP should remain bound by the Rules of Professional Conduct, particularly those relating to confidentiality and loyalty, and could not defend misconduct by citing orders from a non-lawyer supervisor.
- All Rules of Professional Conduct that apply to law firms would apply to MDPs.
- All MDP clients should be treated as lawyers' clients when determining potential conflicts of interest.
- For a list of other key features of the Commission's Report, see TFB Bar-Related Issues Background Papers, July 1999, Multidisciplinary Practices, et. al., published on TFB Website, www.flabar.org.

According to the Commission, the Model Rules fail to reflect the marketplace realities imposed by the modern law practice, irrespective of size or scope. Many of the protections in the current Model Rules are unnecessary and inappropriate in a consumer-driven society.

Importantly, the MDP proposals have carried with them a critical focus on the forces within and without the legal profession that are provoking changes in the rules governing the conduct of law practice. Examples of these forces include:

- The Big-Five professional service firms have thousands of lawyers on their current payrolls.
- Rogers & Wells, a large U.S. law firm, Clifford Chance, a large UK law firm, and Punder, a large German MDP, announced a merger to become the largest law firm in the world with well over 2,000 lawyers. If one applies the current attribution rules, the firm is engaging in the unlicensed practice of law.
- Morrison & Foerster has formed an alliance with KPMG, according to a *CALLAW* story of August 5, 1999.
- King & Spalding has lost much of its tax department to Ernst & Young. See *Wall Street Journal* and other articles.
- The new firm "McKee Nelson Ernst & Young" is moving into Ernst & Young office space in Washington, D.C. This new firm is really an MDP in "ancillary business" clothing.
- It is difficult for law firms to find LLMs in tax as the Big Five continue to out recruit major law firms.

- American Express Investors and Century Business Services provide comprehensive tax planning and financial planning services. The lawyer's role is diminished to a relatively inexpensive word processing service.
- Big-Five firms as well as other non-lawyers are providing litigation support and alternate dispute resolution including mediation, arbitration, and more sophisticated methodologies aimed at more effective dispute resolution than that provided by the judicial system. The costs of traditional litigation have become obscene.
- Competition by non-lawyer providers is fierce for many traditional legal services.

Implementing MDP and Other Changes in Florida

The marketplace realities and the forces within and without the legal profession simply must be addressed. Ignoring them will not make them go away. Changes in the Model Rules should be made in order to allow practitioners the flexibility they need to respond to those realities and forces, without compromising the "core values" of the profession. The issue that confronts us now is whether the practice of law — from the firm with the global reach to the firm with the small town touch — can be re-invented to provide relevant legal services in the 21st century marketplace. Many persons outside the legal profession recognize the urgency of the lawyers' date with destiny, and some – such as the accounting profession – set in motion a comprehensive process of self-examination, leading to the design and re-invention of professional practice paradigms for certified public accountants. Whether law practice paradigms may be similarly re-invented requires an examination of the roles performed by The Florida Bar, and the processes of the practice of law.

Are MDPs Right for You?—Options for the Practitioner, Large and Small

Consumers of professional legal services—from the individual consumer to the largest multinational corporation—increasingly present lawyers with problems that are multifaceted, multidisciplinary in nature (i.e., require the active evaluation and counsel by more than one professional) and extensive, even global, in scope. Such problems require competent, efficient and cost-effective one-stop solutions. More and more we are seeing synergistic combinations of professionals marshalling intellectual and other resources to best serve the client's needs and to expand the client's access to the justice system. Examples of these possible combinations include the following:

- *Litigation attorneys* — teaming with certified public accountants, actuaries and economists to provide multidisciplinary support to a client in complex litigation such as antitrust, RICO, money laundering and similar cases.
- *Patent attorneys* — teaming with civil and electrical engineers to provide a full range of patent law and related services.
- *Environmental attorneys* — teaming with biologists, geologists, hydrologists, urban land planners and civil engineers to provide environmental permitting services.
- *Design-build construction attorneys* — teaming with architects, engineers, land surveyors, landscape architects, general contractors and urban land planners to provide design-build construction services to the single owner.
- *Criminal attorneys* — teaming with investigators, social workers and psychologists to provide not only the best defense but the start of rehabilitation prior to government-imposed rehabilitation.
- *Family law attorneys* — teaming with accountants, financial planners and family counselors to provide comprehensive services to assist clients in their adjustment to life as single persons.
- *Elder law attorneys* — teaming with financial advisors, insurance agents, social workers and geriatric care managers to provide holistic care to chronically ill elders and their families.

These combinations of cooperating professionals—ad hoc as they may be under the circumstances of current law—have realized economies of scale in planning, marketing and service delivery. They have discovered that strategic decision-making, coordination and teamwork are often fostered when professionals from different disciplines work cooperatively within a single service organization for the same client and for the same client objective. "Clients of many non-legal firms would benefit if those firms had, under the same

roof, skilled and experienced lawyers who were available for consultation on legal questions." The MDP is already here, well beyond critical mass. The only question remaining is how the bar will deal with it. Professor Terry has presented for us a logical and reasonable implementation strategy. We commend it to the Board of Governors.

Professor Terry's "Checklist for Change"

Professor Laurel S. Terry, who teaches at Penn State Dickinson School of Law in Pennsylvania., has written extensively on MDPs. She is currently on sabbatical in Germany, studying MDPs in Europe. She testified before the ABA Commission on Multidisciplinary Practice on March 12, 1999, providing the commission with a checklist of issues to be considered in examining whether the rules should be changed to allow MDPs. Professor Terry divided her checklist into three main sections: (i) the initial questions to be asked; (ii) how MDPs should be structured; and (iii) what should be considered in changing the current ethics rules.

Initial Questions — Standards, Core Values and Rules

Professor Terry proposed that the primary standards upon which a decision regarding MDPs should be based are "client protection" and in the "public interest," as opposed to protecting the economic interests of attorneys, ensuring regulation of all attorneys, or allowing the market to decide the form of attorney practice. She identified "core values of the profession" as being "competence, independent legal judgment, confidentiality and loyalty." Regarding application of the rules, she determined that identical rules should apply to all lawyers regardless of the size of the firm in which they practice. The standard of proof recommended by Professor Terry was clear and convincing evidence, and she placed the burden of proof on those who recommend the status quo because the current Rules of Professional Conduct "restrict both lawyer and client autonomy." She posited that there is at least some evidence that clients are in favor of multidisciplinary practice and that MDPs currently in existence are providing legal services. She also pointed out that the commission had heard some evidence of harm by MDPs, such as failure to disclose the nature of the services offered, incompetence, conflicts of interest and "steering" clients to other services. She concluded, however, that the Rules of Professional Conduct should be amended to allow MDPs, thus allowing clients the ability to choose the form of professional services they require, because she remains unconvinced that lawyers within MDPs would not fulfill their ethical obligations merely because of the type of organization within which they offer their services.

How MDPs Should be Structured

Professor Terry then turned to the question of how MDPs should be structured. She indicated that form should not be elevated over substance, and concerns over ethics issues should be addressed directly, rather than indirectly by limiting the structure within which attorneys practice. She concluded that the appropriate model is the fully-integrated model, one in which lawyers would be allowed to:

- Form MDPs with any other person, as opposed to being limited to only other "professionals";
- Practice in MDPs whose main purpose is providing services other than legal services (as opposed to the D.C. model); and
- Practice under the name of the MDP.

Regarding control of the MDP, Professor Terry recommended that the rules should not require majority ownership of MDPs by lawyers, but should ban "passive investment" in MDPs in which lawyers practice. She concluded that one of the greatest problems faced by lawyers in MDPs is what she describes as the need for "transparency," which she maintains should be resolved by full disclosure to clients of the lawyer's interest and role in the MDP and a full disclosure of the MDP's partnership agreement to a regulating agency.

Changing the Rules

Finally, Professor Terry discussed the issues of changes to and application of the Model Rules to address MDPs. She concluded that a lawyer whose practice is fully integrated into an MDP, to the extent that client information is shared with all members of the MDP, should not be permitted to represent clients who are being provided audit services of the MDP. She also proposed that all lawyers practicing in MDPs should be bound by the Rules of Professional Conduct, and that nonlawyers working directly for attorneys in MDPs in the provision of legal services should be bound by those rules as well. When conflicts arise between rules of different professions within an MDP, Professor Terry argues that MDPs must be prepared to decide which rules will prevail, although an attorney should be required to withdraw should the resolution of the conflict cause the attorney to violate the Rules of Professional Conduct. She also recommended that attorneys be required to carry professional liability coverage. She proposed that knowledge be imputed from lawyers to nonlawyers in an MDP, and that lawyers recognize loyalty obligations to customers of the MDPs nonlawyers, so that attorneys must address conflicts of interest regarding customers of nonlegal services of the MDP as well as clients of legal services of an MDP.

The American Institute of Certified Public Accountants' "Vision Project" helped CPAs in small as well as large firm practices identify new areas for CPA 21st century practice. Many of these "assurance practices" compete with lawyers for legal services. While we debate the pros and cons of MDPs, and are precluded from competing because of outdated ethical rules such as Model Rule 4-5.4, our practices are being stripped away from us by other professionals who are laughing up their sleeves at our inability or unwillingness to see the present, much less the future of our profession. For example, take the position of the International Academy of Mediators in commenting on the draft Uniform Mediation Act. "One important goal of the IAM is the general acceptance, especially among the business and professional community which utilizes commercial mediation services, of mediation as a separate and distinct discipline and profession. While commercial mediation often involves consideration of legal issues ... it is not the practice of law." (See appendix, "Letter presented to the Uniform Mediation Act authors on behalf of the International Academy of Mediators.")

Organizational structure should not be considered a per se loss of the independent professional within the MDP anymore than it is for other professions. Is the insurance defense counsel less independent because he or she cooperates with the insurance company representative over scope of services? Likewise, doesn't the Judge Advocate General officer exercise independent professional judgment prosecuting or defending a client, even when on the direct order of the JAG officer's superior?

We believe that MDP is a metaphor for the need to substantially reform, to re-invent, the practice of law and the regulation of it. Changing the Model Rules to permit MDPs is not enough. The leaders of the legal profession must be agents of change, "change leaders" -- to use Drucker's description-- to blaze the trail of renewal as the profession enters the new millennium, to cause the profession — from the grass roots up — to re-invent itself. The reinvention would create a future for the practice of law, but it would require, in Hamel's terms the "re-engineering [of the legal services] industry itself."[39] Here follows some examples of re-engineering of the process and client relationships, as a beginning point for change.

From Re-engineering to Re-invention of the Practice of Law

For years, in Europe and later throughout corporate America, Total Quality Management has been welcomed as one of the "self-improvement" remedies that really works. The Section on General Practice of the International Bar Association began in 1994 to debunk the myth that TQM concepts did not apply to service industries like the practice of law. In the quarterly *Report to Legal Management*, to its large-firm clients (many of the most prominent law firms in America), Altman Weil Pensa's Ward Bower argued that the concepts imbedded in TQM can and should be applied to law firms. These TQM concepts, which over the past six years have become truisms in the discipline of management, are summarized as follows–

[39] Hamel Competing, p. 19.

- *Law firms must become "client-driven."*[40] Client-driven organizations use client surveys, client audits, client focus groups, client interviews, and even matter-by-matter assessments to obtain feedback to improve performance and to meet or exceed the clients' expectations. They ask clients on a frequent and continuing basis, "How are we doing?" and "What can we do better?" And they actually listen to client responses and use the feedback to improve their performance.
- *Law firms must make continuous improvements in their clients' perceptions of the quality of their legal services*. The objective of continuous improvement requires the use of statistical measurement in benchmarking and monitoring performance, and in measuring the quality of legal services.
- *Law firms must redesign and "re-engineer" the process of the delivery of legal services*. By the use of "process mapping" (flow charting) legal services by case type, for example, a firm's management practices can be evaluated and improved with the purpose of enhancing the clients' perceptions of the quality of service. What steps are required to deliver the legal service task? What steps or processes are redundant, unnecessary, or not cost-efficient? What steps could be delegated to lower competent staff (i.e., partner work that could be done by associates, associate work by legal assistants, etc.)? How could automation and technology be used effectively to reduce the human resources required, to facilitate communication within the firm and with the client, and to improve the competence level of the legal task being performed? What system of compensation, other than hourly-rates, might more competitively but fairly compensate the firm for its services?
- *Law firms must redefine their relationships with their clients as partners*. "Partnering" relationships between law firms must be based on trust, on the sharing of each other's business objectives, on effective lines of communication, and on foundations designed for the long term. Partnering initiatives include: client surveys, seminars for clients, "reverse seminars" presented by clients, shared staffing, joint CLE, technology integration (email, voice mail, direct access to billing information), electronic access to client documentation and firm research resources.
- *Law firms must institutionalize the goal of quality performance*. Client perceptions of quality are markedly different that those of most lawyers. Clients' perceptions are influenced more by service factors (i.e., responsiveness, timeliness, frequency and responsive of communication, etc.) rather than by product quality (i.e., the perfect brief, cross-examination, or contract). Improving service factors requires a team effort, for the factors are shared responsibilities among the lawyer and his or her staff. Achieving service quality in a law firm requires multi-level improvement teams, the empowerment of staff, and the removal of the barriers of a hierarchical organization in favor of a more functional and "horizontal" structure of the organization.

Re-engineering the process of delivering legal services is indicated from a public interest perspective as well. Providing access to the courts and serving the un-served or under-served clients of our civil justice system may require re-engineering of the delivery system for legal services: indeed, the "unbundling of legal services."[41] In her very thoughtful article, Ms. Walker questions the "full service or nothing" assumption on which the legal practice paradigm is based. Rules governing "professional responsibilities" in the practice of law, including the Code of Professional Responsibility and standard of care rules in a malpractice settings, assume that the client wants and has contracted for the full service array of services typically provided in similar circumstances.

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[40] Altman Weil Pensa, *Report to Legal Management*, article by Ward Bower, *"Putting TQM In Perspective: Four Things That Work."* vol. 20, no. 9, June 1994.

[41] See Vernetta L. Walker, "Legal Needs of the Public in the Future," Fla. Bar. Journal May 1997 at 42.

For example, in the typical litigation retention, the lawyer is expected to advise the client regarding the applicable cause of actions, defenses, remedies, alternative resolution options, and substantive legal issues and procedural implications; conduct a fact investigation to confirm certain facts, prepare legal documents and pleadings, conduct discovery, advise the client regarding the progress at critical phases of the litigation, conduct negotiations for settlement, and represent the client in all hearings at the trial court level, just for a start.

Walker argues that the unbundling of services from the "full-service" package would give the client the right to select a portion of the services from the package that he or she actually wanted and could pay for. The type and depth of services selected would depend on a number of factors including the "extent and accuracy of information given to the client, the personality of the client, the complexity of the tasks, and the cost and availability of resources."[42] Walker suggests that many of the un-served clients who can not afford the full service package would be greatly benefited by more targeted cafeteria-type selection of legal services. (Not unlike the concept endorsed by Chief Justice Rehnquist[43] when he counseled that a criminal justice system that could not afford to provide Cadillac-type services to everyone, should stop deluding itself about "equal access" and "equal justice" and provide a Chevrolet-type services within everyone's means.)

Ms. Walker describes these services as including any one of the discrete tasks of the typical full service package, but also including such services as ghostwriting of letters and court pleadings, review or comment on what the client has prepared, acting as a coach in mediation and negotiations, and similar services. The Walker article is complete with a Model Limited-Scope Engagement Attorney Counseling Service Agreement. While the unbundling of legal services presents some obvious problems, it is innovative and entrepreneurial and has great promise particularly in serving the non-clients of the current civil justice system. It is one of many innovative models that should be considered and authorized. Change must include the machinery by which the profession is regulated in the public interest.

Re-Invention of The Florida Bar As an Organization

The Florida Bar is an agency of the judicial branch of Florida government. It is an "arm" of the court system. As an agency of the Florida Supreme Court, TFB performs two essential roles.

As an agency of government, TFB is the essential vehicle through which the practice of law is regulated in the public interest. Through dues from its members, TFB funds and administers the largest and most efficient professional regulatory system in Florida government. The standards and ultimate control of the system are vested exclusively in the administrative of the Florida Supreme Court, but TFB plays an essential and important role.

In addition to its role as a partner in the process of lawyer regulation, TFB performs the role of representative of the legal profession. Consistent with the limits placed on it as a mandatory dues organization,[44] TFB represents the profession on such key public policy issues as revision of Article V (the judicial article) of the Florida Constitution, equal access to Florida's civil and criminal justice systems, merit retention and selection of trial court judges, mandatory CLE for attorneys, the review and revision of rules of court, and a host of other policy issues.

As the representative of the legal profession, TFB has also assumed the member-service role of "voluntary" bar associations. In this context, and primarily through its divisions and sections, TFB provides member services designed to improve all aspects of the practice of law and to enhance the public's perception of the practice of law as a time-honored profession, of the court system, and of the civil and criminal justice systems.

Of the dual roles of TFB, the public role—as an agency of the judicial branch—is paramount. Like the court itself, TFB's primary role in a traditional institution like an integrated bar is to act on behalf of the public

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[42] *Id*.

[43] In his remarks at the Holland Law Center during the dedication of the Geer-Bruton Hall.

[44] By such cases cited in *In Re. Amendment to Integration Rule of The Florida Bar (Political Activities of the Bar)*, 439 So. 2d 213 (Fla. 1983), and *The Florida Bar re. Thomas R. Scharz*, 526 So. 2d 56 (Fla. 1988) and *Keller v. State Bar of California*, 496 U. S.1 (1990).

in preserving continuity of institutional values and norms (i.e., the "core values") while at the same time being agents of change. "Change and continuity are ¼ poles rather than opposites."[45]

In matters involving the regulation of the practice of law, TFB, if not a "gatekeeper," is the "eyes and ears" of the court. In this capacity, TFB has a unique and important responsibility to serve as what Peter F. Drucker calls a "change leader," an organization that makes a special effort to be receptive to change and one that is able to change.

As an organization, therefore, TFB has the responsibility to assist the court in striking that all-important balance between ***continuity*** *of the values and norms of the profession and* ***change*** *and their effects on the assumptions upon which the paradigm of the profession is based.*

Compromise is required, notwithstanding the apparent reluctance of the Con Report to even speak of it. The famous British political philosopher, Edmund Burke (1729-1797) was eminently correct when he observed, "All government, — indeed, every human benefit and enjoyment, every virtue and every prudent act, — is founded on compromise and barter."[46]

The Pro-MDP Subcommittee believes that TFB has not measured up to its responsibilities. It has not acted as a change leader during the six years since Ward Bower's "Writing on the Wall." With few exceptions, the regulation of the practice of law has not changed in material part over the last 22 years, since the Karl Commission, which had as its purpose the restructuring of the disciplinary process. Even the adoption of the "new" Rules of Professional Conduct, in 1986, was done with little regard for the changing paradigm of practice. With notable exceptions, there has been little done to prepare the bar and its members for the enormity of the challenges now facing the TFB, the attorneys of Florida, and the public.

Change is the most significant driving force affecting our lives and our practices. TFB should recognize the need to act as a "change leader." TFB should institutionalize adaptation to change. This must include a process for the continual or at least periodic review of regulations affecting the practice of law, i.e., Sunset provisions.

TFB should adopt standards for the review of the Rules of Professional Conduct and modify or repeal rules that are anti-competitive, unnecessary for the protection of the public, and irrelevant in a market-driven economy.

The business landscape of Florida has passed through one, or by now even two phases of corporate mergers, consolidations, downsizing and re-inventions and "re-engineering" of themselves, their products and their procedures. Governmental functions, like economic development, have been privatized. Federal, state and local governments have embraced the notion of the inevitability of change and have adopted legislation and executive policies rooted in the need to find their new roles in the changing paradigms created for them in the Information Age. Government decision-makers are re-inventing their roles and functions and are re-engineering processes at all levels of government, but surprisingly little has changed in TFB.

By adopting the Taxation and Budget Reform Commission's Revision of Article III of the Florida Constitution, in 1992, the people of Florida required the implementation of a total quality management and accountability program " ¼ [t]o ensure productivity and efficiency in the executive, legislative, and judicial branches [of state government]." Since 1993, all departments and agencies of Florida's government (including the judicial branch) have been required to develop and implement a strategic plan that is vertically integrated into a single "state planning document."[47] The Florida Supreme Court has adopted a strategic plan and has recently adopted an integrated operational plan, consistent with the objectives of an enlightened state government. But TFB in its role as an agency of government or in its role as a voluntary bar association has done very little -- even to keep pace with other agencies of government.

If it is to deal with the realities of the postindustrial, knowledge-based, global economy has washed away with hurricane force the old order. The old order has changed, yielding presence to a new. TFB should be encouraged to appreciate the practice of law in the new paradigm—for example, as part of a compendium of

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[45] *Drucker Challenges*, p. 90.

[46] *Barlett's Familiar Quotations*, 9th Ed., www.bartleby.com/99/276.html.

[47] Art. III, § 18, Fla. Const. (1968 Rev.)

professional services linked by a common business objective, thus permitting attorneys to be part of a multidisciplinary system for the delivery of professional services.

What TFB needs is a strategic plan that recognizes the changed paradigm of law practice, that will serve as the basis for the *re-engineering of the regulatory process*, that will serve as the basis for the *reinvention of the practice of law* as a regulated profession, that will provide the basis for TFB taking a more pro-active and *supportive role to attorneys*, and that will provide TFB as an organization with a roadmap for the delivery of member services in the future.

An enlightened TFB must focus on the strategies that will enlarge the scope of law practice, as opposed to depleting our resources and energies by fighting over smaller and smaller specialized areas of practice while competing with those professionals who recognize the need to change.

Conclusion

Lawyers are skilled at taking highly complex information and translating it so the information makes sense to clients. Twentieth century services may be of marginal benefit to 21st century clients. However, the opportunity to serve the 21st century client with new 21st century services is nearly unlimited.[48] There is no question as to whether there is going to be a revolution. The question is, “Who is going to lead it?” This report is presented to the Board of Governors. We believe it is time for that institution to lead … Florida’s 67,000 lawyers and the public who depends on the lawyer’s services to protect their rights and preserve their liberties.

[48] See, e.g., Naisbitt, John, *Global Paradox (The Bigger the World Economy, the More Powerful its Smallest Players)* William Morrow and Company, Inc. (1994).

Acknowledgments

The Pro-MDP Subcommittee wishes to express it sincere appreciation for the assistance member, Charlie Robinson, an esteemed practitioner whose elder law practice is based on Clearwater, has given so untiringly to the drafting of this report. Charlie is the Subcommittee's leader who is deeply committed to our profession's core values and their continuity, but he who is also a visionary, a futurist among colleagues whose eyes rarely reach the horizons of future opportunity. He has been an inspiration.

We would also like to thank Susan Trainor who served as the unofficial editor of all of the early (and more difficult) drafts of this report. Elizabeth Tarbert is the sole staff assistant for both subcommittees. She has done an very admirable job in keeping us on track, at least our delays have not been her fault. She has been the Bar's point person in staying abreast of the actions by other bar associations and the pros and cons to the ABA Commission's report. We thank Nancy McDaniel who forgot more about desktop publishing than most of us ever knew, for her labors at the desktop on our behalf. Finally, we thank Dale DeHart-Grigas, who at the last minutes in the preparation of this report has added value to the report by her critique and suggestions from a long range planning point of view.

The Territory Ahead:
25 Trends to Watch in the Business of Practicing Law

by Simon Chester and Merrilyn Astin Tarlton

If you think the last decade was a head spinner, you ain't seen nothin' yet! Law practice management in the 2010s won't be anything like the 1990s. How will it change? We asked some of the smartest people we know (see "Millennium Brains Trust: A Thousand Years of Insight") to peer into the future, then distilled their answers into these 25 trends. Here they are: Benchmark issues that are redefining our profession. How will you respond?

1 The global practice.

Large firms are opening offices throughout the world to follow the internationalization of capital, clients and cultures. Others ask why they need the real estate. The Internet allows a lawyer in Tucumcari, New Mexico, to practice in Bali. Instantaneous communication powers a practice, with scant regard for time or place.

2 Redefining the law firm.

The whole paradigm is up for grabs! What is a law firm? Who manages it? More and more practices look to professional nonlawyer managers whether experienced paralegals or MBA CEOs snatched from corporate empires. Who is billable? What is billable? Who does the typing? A move past hourly billing significantly will challenge the values and traditional hierarchies of the law firm. Who's working for whom? Will law firms go the way of HMOs? Will lawyers become employees?

3 The Internet upends every assumption.

A global communication web reaches every village and office. An explosion of growth. Businesses rise and fall overnight, fueled with energy and imagination, with scant regard for old models of capital, tradition and planning. For law firms, the possibilities seem staggering. Who'll be first to figure out how to ride the wave?

4 Client-controlled marketplace.

Lawyers who are used to shaping the needs of their clients must get used to having their work defined by the client. Increasingly sophisticated consumers, like in-house counsel before them, are learning to define and manage their lawyers' work. Client caprice is zapping even good firms into oblivion. Law firms exploring new growth no longer limit the data to where their lawyers live. Today the market guides firms to position themselves based on the evolving needs of the marketplace. If you have the keenest ear to the market, you win!

5 Intellectual capital.

If the most valuable thing your firm possesses is the work of your minds and the wisdom that came from all that hard-won experience . . . and if you believe the greatest opportunity for leverage lies in the ability to resell work product . . . and if you understand how new technologies let you capture, preserve and retailor the firm's work for later distribution, giving new meaning to the concept of leverage . . . then what are you waiting for? Learn to manage information and write your own ticket for profitability.

6 Corrosive influence of greed.

Who is driving up the demand for more and more "profits per partner?" We don't have Steve Brill to scapegoat any more . . . so it must be that we ourselves are the villains. It just isn't the easy, fraternal old firm it used to be. Must we kiss collegiality goodbye and surrender to the cold, hard, paranoid business of law? As long as the primary driver in your firm is more money, sit back and watch the demise of all you've traditionally valued about the profession and your work.

7 Women.

And ethnic minorities . . . and those guys in the London office. They're all shaking up the ethos of the American legal profession with their unique perspectives and fresh ways of doing things. Women are making opportunities that take advantage of different ways and styles of doing business. And when women succeed, stand back — the existing culture will be transformed. The life of the law is about to become something else. What will that new culture feel like? How will you respond? Who will we be?

8 Competition from accounting firms.

Give up any hope that this isn't happening. Your bar association is not going to be able to stem this tide. The Maginot Line of the legal guild has been breached. Think fast: How can you take advantage of this upheaval? Think outside the box: What does a multidisciplinary practice hold for you and your firm that could improve your quality of life and the service you provide clients?

9 Irrelevance of law school — but a simultaneous need for broader training of young lawyers.

In a world changing by the minute, lawyers must not only be prepared to manage people and businesses but also solve problems using tools from many disciplines. So how can you compete with just a law degree? Savvy law schools will stop fighting the culture wars of discredited ideologies. They will explode the curriculum to include business, the social sciences, technologies and beyond. Smart schools will fuse combined degrees with the "other" professional schools on campus. Classrooms will focus on reality and survival.

10 Beyond CLE.

Even if you graduate with a multidisciplinary degree in law and the other core disciplines, you'll still need — every day of your career — to focus on constant learning and relearning if you want to keep up with the rest of the world. And we're not talking about CLE. Where is your client's industry taking her? What new technologies can improve your practice efficiency? Could organizational psychology improve your trial style? Thinking like a lawyer just isn't going to be enough.

11 Demand for balance.

You've become more and more concerned about the portion of your life (time with the kids?) you sacrifice to make payments on the BMW. But your employees and colleagues are about to stun you with radical life choices designed to take back their lives. How will you modify your expectations and the firm's human capital systems to survive the imminent lifestyle revolution?

12 New legal economics.

It can no longer be true that to make more money you must continue to sell critical portions of your life and psyche. Lawyers will continue to find ways of setting fees that not only make more sense to the client but also break the wicked cycle of hours expectations. Yes, it will be your responsibility to sell clients on the idea. No, it won't be easy. Yes, you will develop ways to do it that benefit you both.

13 Redefinition of the role of lawyer.

Future lawyers will not be able to resell information that is free on the Internet. Lawyers no longer will be paid to do technical work that can be performed by artificial intelligence. What will lawyers be paid for? For their wisdom. Experience. Care. Strategic and tactical skill. We must become owls, not falcons. And, yes, successful lawyers will become competent entrepreneurs, capable of running a business, managing multidisciplinary projects and developing new work.

14 Generational cultures.

The baby boomers are retiring . . . and they all seem to want to do it early. What does that do to your firm's bottom line? And these Gen Xers — who knows how to manage them? (Money isn't the key.) Will we be installing pinball machines in the war room & 25-hour nurseries? And who knows what Gen Y brings?!

15 Changing models for dispute resolution.

When will public skepticism and paranoia finish off the court system's stranglehold on resolving differences? Can it be far off? Will lawyers who make new methods of forging agreements and resolving differences come at a premium? What are you doing, now, to help clients avoid the monetary and psychological cost of litigation?

16 Lawyers as free agents (human capital).

Used to be a lawyer graduated from law school, ran the gauntlet of interviews and then waltzed across the threshold of the firm that would shape the rest of her or his life. A career marriage. No more. Lawyers move as freely as professional athletes. Many of your partners at this very minute are listening for the next telephone message that ups their personal ante in dollars and respect. What can we do to rebuild loyalty and the value of personal investment in the future of the firm?

17 Lawyers as businesspeople rather than members of the bar. It's a subtle but enormous difference.

What was once a calling is becoming a highly specialized business. Face it: Lawyers who nurture the profession's fine tradition of intellectual and human excellence while keeping a keen eye on the bottom line (a bottom line that contemplates the value of humanity, knowledge, caring and cooperation) will come out ahead.

18 An exploding legal population.

Where did all these lawyers come from? Who can afford them? And what will they do when the public's average legal needs begin to be met without the involvement of a lawyer?

19 The new leverage.

In 1985, we took as gospel that the only way to become a successful law firm was to create the fabled "pyramid" — many more associates than partners, with the partners thriving from the junior surplus. Today, the market rejects large associate populations. But the point of leverage lives on in a different guise. How foolish to assume the only value you can sell is the time you spend doing something.How will we use new technologies to replace those pyramids? How will the multidisciplinary practice expand the value of our work to clients? If it's bet-the-business work, should we really be charging by the hour? (And if it's mind numbing and could be done by a simpleton . . . how dare we charge our hourly rate?)

20 Paperless, borderless communication.

Not only are lawyers today functioning in virtual teams through the seamless community of the Internet, intranets and extranets; these systems effortlessly span the globe. Will we cease to care about jurisdiction? Will we even know about jurisdiction? Will the law become global and uniform? Where will we find the courts? Will they exist in time and space? Could courts become totally electronic? Justice merely an exchange of electrons?

21 Flex time, flex place, road warrior, virtual law firm.

Who says you have to conform to tradition? We know lawyers will work flexible hours and telecommute from home and elsewhere. The road warrior has become the new Wall Street standard. But that's not the end. Will we move to virtual firms, coming together electronically for a project and dissolving when it's complete?

22 Nimble law firms can take on large competitors.

Large firms don't have a lock on smarts and nerve. Boutiques and solos that understand their business — and how technology helps — can compete head-on. Megafirms have much to learn from solos who have managed to trim overhead to the core and who know that keeping up with new software is essential. Smart young lawyers who see partnership tracks becoming tougher now have an attractive option — and the freedom to run their own businesses.

23 Dissolution of practice monopoly.

Legal contract kiosks. Wills on disk. Dial-a-deposition. Legal self-help books and software. Web sites that offer legal advice and downloadable knowledge. Court records on the Internet. Paralegals helping clients who once sought lawyers to solve legal problems. CPAs. Engineers. Consultants. Where will it stop? A long way from here. How will you swim with the sharks?

24 Leadership.

All this change! And it will happen so quickly. How will lawyers — trained to anchor decisions to precedent — respond to a future that is not a straight line from the past? Leadership in the legal profession is being redefined. Yes, our leaders are our finest practitioners. But they also will be the best business heads, the most intriguing innovators, the organizers of effective teams and the challengers of the process.Where will you fit in?

25 The unexpected.

The "big bang" theory of law practice management contemplates that your life will be changed drastically and irreversably by sudden unanticipatable change. A hurricane. War. Dissolution of the Supreme Court. Bankruptcy of your main client. List the rock solid assumptions in your practice . . . and then imagine they are no longer true. Scary? Now what?

WHERE ARE WE GOING?

Collaboration spawned this project. Technology gave it life. It was a virtual team effort, powered by e-mail and Web research. In hours, e-mail brought a brains trust together to brainstorm in cyberspace. A serendipitous surfing session led us to www.mindmapper.com, where downloaded software brought visual order to a huge gift of ideas (42 single-spaced pages!) from the "brains trustees." Mindmapper sorted ideas and clarified their relationships. MS Word's "track changes" feature made joint writing a snap.This issue of LPM is a demonstration of and a tribute to how new colaborative technologies can enrich, revolutionize, accelerate and inspire. And — oh, yes — make work loads of fun.Your office can use these tools!

The following article appeared in "The Elder Law Advocate," Florida Bar Elder Law Section newsletter, fall 1997-part 1 and winter 1998-part 2; and in "Action Line," Florida Bar Real Property, Probate, and Trust Law Section, January-February 1998; and in "Legal Secretaries International Inc.," July 1998 issue.

Stampede to Extinction?

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Our profession faces quantum change. I hope we can help teach each section member and every Florida Bar member how to get ready for the years to come. I believe lawyers are like the great buffalo of the 1800s, locked in a stampede for extinction. Is the cliff two years away or five? Those in the middle of the herd will not survive, because they won't be able to turn unless they start to move now. Those on the edges may have an option to change direction. Even those with the physical ability to avoid the cliff will have to understand that the cliff is close in order to understand the need to change direction. I believe that at least six out of 10 American lawyers will go over the cliff.

I see the stampede image for several reasons. Increased competition within and outside the profession is accelerating rapidly. AARP has essentially standardized fees for routine legal work. AARP members know that the organization has screened the approved lawyers, provided training and provides ongoing support and CLE. They know there is an 800 number to call if there is anything wrong with the service provided. There are 33 million AARP members, and someone in America becomes eligible for membership every seven seconds by turning 50. In the test states, a large number of lawyers has applied for AARP approval, and the average experience of those selected is 20 years of practice.

Over 70 percent of the domestic relations cases in our county are pro se on at least one side. You can throw away the lawyers weapon, The Rules of Civil Procedure.

American Express Investors Services is now one of the top 10 CPA firms in the U.S. They have been buying up CPA practices to offer totally integrated planning services. They are a baby step away from hiring in-house lawyers to complete the package. (In-house lawyers may not be necessary; however, since they can find lawyers to do document drafting at such low cost that some services may well stay out-sourced.)

Merrill Lynch now offers a program called Retirement Management Service. For $500 per year, a Merrill customer can have a medical insurance claims service, a 24-hour hot-line on health and retirement issues with an RN available to handle health questions. In addition, consultations on estate planning and insurance are included, along with discounts on prescription drugs and long-term care insurance premiums.

If you don't have a little knot in the pit of your stomach concerning the future of your estate planning practice, consider yourself in the center of the buffalo herd.

Most lawyers are risk identifiers, not risk takers. Our training in stare decisis (precedent) makes many believe that you can only find the future by studying the past. We walk through life backwards. Identifying risk may not be a high value need now or in the future. Jennifer James, an urban cultural anthropologist, includes bar associations along with the American Medical Association and others as lodge cultures in her book Thinking in the Future Tense, (1996, Simon and Schuster). A lodge culture enforces and maintains a nostalgic and unrealistic view of life and work. She describes lodges as a cooperative alliance in which the members bond together for power or protection or both. Lodges often do poorly during periods of rapid change because they are rarely visionary. Without significant transformation they go out of business.

Compare doctors, lawyers and CPAs in the last 10 years.

Our health care system has gone through major change in the last five years. Our doctor clients tell us they are working harder for substantially less income, and doctor-patient relationships are at an all-time low.

Major change in the health care system was inevitable, yet the medical profession has yet to make one proposal for change to the system. Jennifer James believes that no profession in history has lost so much standing in such a short period of time absent revolution.

Technology makes the average 1040 income tax return a very simple undertaking for many taxpayers. If a taxpayer keeps up-to-date information with a program such as Quicken, it is hard to find the accountants role in the process. Many banks and brokerages encourage customers to use their on-line services through the Internet. Looks like another lodge headed for the dinosaur pit, right? Not so. The leadership of the Florida Institute of Certified Public Accountants (FICPA) formed the Visioning 2000 Task Force in 1989 and followed with a Re-Visioning 2000 Task Force in 1995, according to the June 1997 issue of Florida CPA Today. The task forces were commissioned to look to the future to allow CPAs to remain competitive in a marketplace going through quantum change. The focus of the task force proposals was to unshackle CPAs from rules based on a manufacturing economy to allow freedom to compete in an economy driven by technology, information and services. The CPAs wanted to compete at many levels in providing financial services while maintaining the professions reputation for integrity, independence and objectivity. They lobbied for legislation which essentially allows a CPA to sell financial products, to receive commission splits and even to sell part of the practice to non-CPAs. It passed the Florida House and Senate unanimously and takes effect October 1, 1997.

Where can we find visionary activity in The Florida Bar or American Bar Association leadership? Where is the Visioning 2000 Task Force in the organized bar? Do we really believe that UPL activities are protecting our profession from competition from outside the profession? Instead of a task force on the future, we set up task forces devoted to nostalgia for the past. Do we really train those in our ranks without scruples or manners to change their ways through professionalism task forces? Compare The Bars attitude to the CPA leaderships attitude. Which group is more likely to survive?

On the other hand, the judiciary in Florida has seen the handwriting on the wall. The Legislature made it clear some years ago that there would be no blank checkbook for expansion of the judiciary. Computerized case management systems appeared in chambers long before The Bar heard of case management software. Our Sixth Circuit, under the leadership of Court Administrator Bill Lockhart, is nationally known for its leadership in technology. Florida Supreme Court Justice Ben Overton is leading the judiciary into the 21st century. JOSHUA, the Florida Supreme Court web site, is a model for others to follow. Judge Earl Zehmer of the First District Court of Appeal led the efforts to electronically link all of the Florida appellate courts. Second District Judge Jerry Parker took over that responsibility after Judge Zehmer’s death.

Ten years ago, I would have recommended psychiatric help for anyone suggesting that Americas lawyers would be passed by the CPAs and the judiciary. Such predictions would have been as ludicrous as the possibility of the removal of the Berlin wall or the breakup of the USSR.

The Florida Supreme Court is committed to public access. Don’t be too surprised to see JOSHUA provide citizens a choice of documents and pleadings to prepare. What would you like to do today? Update your will? Probate a simple estate? Start a dissolution of your marriage? The first list will include those documents and pleadings the Supreme Court mandated the Young Lawyers Division and several substantive Florida Bar sections to provide the public. The Internet visitor will be given a checklist to fill in on-line, and when the checklist is completed, the visitor will be able to save and print the documents on a computer at home or on one of the computers provided to the public at the courthouse.

Which approach to the future will we follow? The Florida Bar, the Florida Judiciary or the CPAs? Law firms traditionally have been structured more like civic clubs than businesses. Lawyers take on management and marketing as menial tasks to share, rather than opportunities to lead. We have rewarded the technicians in firms while the entrepreneurs tend to fly solo. I don’t believe lawyers feel safe unless they are doing client work.

Appendix 2

The lawyer market was probably saturated in the mid 1980s, yet we produce 36,000 graduates a year in the USA. There is no time to learn the practice at a reasonable pace because law school debt- often $60,000 or higher-along with impossible billing requirements, crush the new lawyer, forcing her to forego opportunities to see our profession at its best. Where is the time for professional development, networking, volunteer work and other personal growth opportunities that make us more professional lawyers who are concerned about meeting clients' needs and expectations?

Technology should help us be more effective in doing our work, communicating with clients and meeting their needs. We need to be up-to-date. If you don't have computers with Windows 95, Jennifer James believes you should wear a sign that says, "I am obsolete." (Thinking in the Future Tense, Simon and Schuster, 1996) With color printers widely available for well under $500, why do we plod along in black and white? The old Courier font makes reading the documents we prepare difficult. Why don't we change it? Jim Taylor, senior vice president for global marketing at Gateway 2000, says, "Complaining that technology changes fast is like complaining that rocks are hard."

At Gateway, they talk with 100,000 people a day, including those who are shopping, ordering or getting tech support. Their web site gets 1.1 million hits per day. The time it takes for an idea to enter the organization, get processed and go back to customers for feedback is only minutes. Gateway is designed for speed and feedback. How would your practice and mine change if they were devoted to speed, feedback and immediate action?

The Internet will change our world as much as the invention of the printing press changed the world 500 years ago. Those of us who see technology as an opportunity will change the way we do business, redefine our roles with our customers — and prosper. By the way, we will be changing our roles constantly if we plan to do well.

Boundaries are disappearing. Half of all marriages end in divorce. The new family more closely resembles the sitcom Friends than it does Father Knows Best or Leave it to Beaver. Tax planning now includes planning for citizenship as a steady stream of U.S. citizens willingly become citizens of a country they do not consider home.

The workplace is changing as well. The ex-military types who formerly dominated the legal administrators' domain are almost gone. Lawyers have pioneered one area that the business world has now followed enthusiastically — company disloyalty. Lawyers have been mobile for some time now, and any vestige of loyalty is out from the beginning of practice. The first job is a training experience for a new lawyer and his trainer. Promises of lifetime employment for top performance are empty promises. We can sigh for the "good old days" when a lawyer could start and finish with the same organization, but the chances are even worse that the lawyer will start and finish with the same spouse.

We should feel liberated by these changes, not resentful. Tom Peters suggests that everyone needs to rewrite his personal resume at least quarterly to review skills learned during the last three months. If there is nothing to add to your resume, you have stopped growing.

It is important to listen to today's thinkers for guidance, but there is great wisdom to draw from the past. The following, for instance:

What I must do is all that concerns me, not what the people think. This rule, equally arduous in actual and in intellectual life, may serve for the whole distinction between greatness and meanness. It is the harder because you will always find those who think they know what is your duty better than you know it. It is easy in the world to live after world's opinion; it is easy in solitude to live in our own; but the great man is he who in the midst of the crowd keeps the independence of solitude.

— Emerson, Self-Reliance

What in the World is the Future of the Legal Profession?

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I am a sole practitioner in Clearwater, Florida, and have practiced here since 1967. I am Florida Bar board certified as a specialist in Elder Law. I have been hyperactive in the bar; local, state and ABA for many years. I love law practice but I believe the practice is in for some very significant changes and that the quality of bar leadership now and into the next century will determine our profession's future. I am concerned that my state bar and the American Bar Association leaders don't share my deep concern for the future. As time goes on, my worries about the profession continue to grow. Why can't our profession "get it?" In a previous article ("Stampede to Extinction") I predicted that 60% of today's lawyers would be out of business or in another line of work within 5 years. Non-lawyers I respect read the article and think I may be conservative in my projections. What will it take to get us lawyers to start looking to the future of the profession in a positive, proactive way so that my dire predictions don't come true?

What in the world is the future of the legal profession? What practice specialties are in the most serious danger? Will only the trial lawyers survive as the office practitioners are subsumed in a competitive war with those we call "non-lawyers?" Will litigation costs and delays, alternative dispute resolution methodologies, and the "Rambo" mentality seen too often in today's courtrooms end up delawyering even trial work now performed semi-exclusively by lawyers? Will our grandchildren wonder what we mean by the word "lawyer?" Will information technology do away with the need for information now provided by lawyers? Will we see an end to the one to one attorney client relationship? Will the public be better off or worse off without lawyers?

In 1994, the Barreau du Quebec (Quebec Bar Association) formed a committee on the future of the profession. The committee's mandate was to "determine the short, medium and long-term evolutionary trends in the practice of law, set the objectives to be obtained by the year 2000, and identify the actions which should be taken in order to achieve these objectives."

The committee issued its report October 1, 1996. The committee found change to be rampant in the population, the economy and the environment of the legal profession. The report wonders if lawyers will face up to the change and adjust their law practices accordingly. The committee came up with 14 "inescapable hypotheses." I will touch on only a few and add my own thoughts and comments.

Hypothesis 1 suggests that computerization will bring irreversible structural changes to the profession and that such changes occur every 50-60 years. (Many authors in the business community feel the changes going on now are more like the major upheavals we see every 500-600 years.)

Hypothesis 2 deals with globalization and the disappearance of distance brought about by information technologies. The Internet brings every person in the world six-tenths of a second away from everyone else. Hypothesis 6 emphasizes that the changes are not going away no matter how much we may try to wish them away.

Hypothesis 9 confirms that the number of lawyers is relatively high in our demographics and that competition is brisk, both within and outside the profession as we see ongoing erosion in our market.

Hypothesis 10 suggests that the need for legal services will continue to grow and that lawyers have a challenge to produce services that have a perceived value at or above the lawyer's price for services. Laws and regulations are more numerous and complex. Deregulation often results in more rather than less complexity. Lawyers have strong skills in dealing with highly complex information and translating complexity into understandable information. These translational skills may be the most valuable of the future lawyer's practice arsenal.

Hypothesis 13 suggests that the regulatory framework governing the profession will change as well because of nonlawyer competition, high number of lawyers, new technologies and public skepticism toward lawyers as major factors. I have participated in a number of trend-identifying meetings and the implications coming from those trends. Each group concluded that we would see the end of state bars and state bar regulations.

The California Bar meltdown is a great example of what the Quebecois were worried about. California has an integrated bar. Apparently, even though the Bar is dues funded, the legislature must pass enabling legislation for the California Bar to have access to its revenue. This spring, the legislature did its usual pro forma bar-enabling legislation. Governor Pete Wilson vetoed the legislation. In his veto message, Governor Wilson called the bar "bloated, arrogant, oblivious and unresponsive" to member or public needs.

Wilson said "The Bar has drifted, and become lost. It is now part magazine publisher, part real estate investor, part travel agent, part critic, commingling its responsibilities and revenues in a manner which creates an almost constant appearance of impropriety."

The California lawyers and the public met this grand announcement, not with anger or enthusiastic applause, but with apathy. Few openly disagreed with the governor's comments. Apparently, there is no driving movement to restore the California Bar to its former position.

I believe the California Bar situation is a call for relevance in all the bar associations. If the Florida Bar governors and officers don't worry at least a little bit about what happened to California and wonder if it could happen here, it will happen here. For now, the Florida Bar doesn't answer to the legislature, but it does answer to its members. If our members would be just as happy if the bar organization disappeared or became voluntary, there is a management problem in our bar. I believe the integrated bar in Florida must begin to treat members as if each member would join the Florida Bar given a choice. The Florida Bar must begin a serious look at the future of law practice and that look must begin sooner rather than later.

Scenario planning is a useful technique for trying to understand the future. The Barreau du Quebec decided to tangibilize their 14 Hypotheses by creating three scenarios for the future of the profession. They named the three scenarios "Albania," "Status Quo," and "Singapore."

The Albanian approach attempts to limit the supply side of services. In Florida the Albanian approach begins with aggressive Unlicensed Practice of Law (UPL) enforcement. The definition of law practice must be presented with the strictest possible meaning. We go on the attack and root out nonlawyer Alternative Dispute Resolution (ADR) advocates, CPA business and estate planning advisors, financial planners, title companies, and anyone getting in the way of our definition of law practice. I see the Albanian approach showing up to reduce passing numbers on the bar exam and to reduce admissions to law school so that those of us in practice will build a wall to new lawyers and nonlawyer competition, thus increasing our market share.

The second scenario is Status Quo. This scenario says "if it ain't broke, don't fix it." Status Quo is the Scarlett O'Hara notion that we will deal with all problems tomorrow but let's not spoil today. As the world goes through meta change coming from so many sides at once, no one finds logical justification for Status Quo. However, we must remember that our training as lawyers requires that we look to the past to predict anything.

Appendix 3

Frank Feather is a professional futurist. He addressed a program on the future of the practice called "The Ends of the Profession" at the 1998 ABA Annual Meeting in Toronto by stating the question as follows: "In a time of revolutionary change, the 'Big Question' is of course, 'What does unprecedented change imply for a precedent-oriented profession?'"

Dr. Feather, as a consultant for the panel at the program, identified four major trends that are changing law and law practice forever. Those trends include the info-globalization of the law, the commercialization of the law, the socio-culture of the law, and the politicization of the law. These trends and others changing our lives leave the Albania and Status Quo scenarios as pretty bleak and terrifying places to be.

The truth is that in a time of chaotic change, everything is broke and everything needs fixing. Unfortunately, our profession seems firmly camped between the Albanian approach and the Status Quo. If our profession follows the Albania/Status Quo combo, I have no doubt at all that our great profession will have a bit player's role in the future. The public will suffer most of all from our demise.

The third scenario, Singapore, pictures the profession taking a proactive attitude for change and earning its place in the future. Under the Singapore scenario, law firms embrace information technology rather than fighting it. The Singapore approach requires the profession to increase volume of high quality work and produce it more quickly and at lower cost. Lawyers will have to learn the skills required of us in the next century. We must adapt at the personal, organizational, and economic levels. We must recognize and embrace our abilities to compete in this new world. The Singapore scenario presents eight themes to illustrate the changing conceptions to which lawyers must adapt including culture, management, lawyers as human resources, impact of information on the provision of legal services, technology applied to legal services, globalization and its impact on law, and the profession as such.

What skills will we need to be successful lawyers in the 21st Century? What valuable new services can we add to make the future of our profession exciting and positive? After too much reading and perhaps not enough thinking about that question, I believe we must do the following.

1. Study trends, both global and legal profession trends. Flesh out the implications of those trends to our profession and to us personally from each of these trends. There are tools that help find implications and make implementation plans.

2. Start formally envisioning our future without relying on licensure exclusivity or stare decisis as our reason to exist. We should plan to flourish and do well in the future, not merely survive into the future. It would be extraordinarily valuable for the bar to lead the profession in the visioning process. However, if that leadership is not there for us, we must press forward individually and in our firms to examine our future roles.

3. Determine our core values individually and as a profession. The American Institute of Certified Public Accountants (AICPA) has done an outstanding job of leading their profession with their vision project (www.cpavision.org). The AICPA identified five values in their vision project. They are continuing education and life-long learning, competence, integrity, attunement with broad business issues, and objectivity. What are our core values?

4. Identify core services. What skills do we have that are highly valuable to the public?

5. Determine our core competencies. CPAs identified communications skills, strategic and critical thinking skills, focus on client and market, interpretation of converging information, and technology.

6. Identify the top five issues for the profession. What must we change to improve the real and perceived value of our services in the future?

We are almost beyond our time to approach the profession's future proactively. If we follow the Albanian or Status Quo scenarios as our way to the future, our profession will abdicate its role in society and even disappear. We can create our future and we can enhance our real and perceived value with the public. We must begin.

Letter Presented to the Uniform Mediation Act Authors On Behalf of the International Academy of Mediators

November 23, 1999

Professor Richard C. Reuben
HARVARD LAW SCHOOL
506 Pound Hall
Cambridge, Massachusetts 02138

Re: Draft — Uniform Mediation Act

Dear Professor Reuben:

The International Academy of Mediators enjoyed the recent opportunity to engage in a lively dialogue with you at our annual conference in Washington, D.C. We trust that the feedback received by our members will be of assistance to NCCUSL and the ABA Drafting Committees. To that end, allow me to highlight some of the comments from our members, and to provide the overall position of the International Academy of Mediators.

As you know, The International Academy of Mediators (IAM) is an honorary association of professional commercial mediators, which exists to promote the highest standards of integrity and competence in the profession of mediation. One important goal of the IAM is the general acceptance, especially among the business and professional community which utilizes commercial mediation services, of mediation as a separate and distinct discipline and profession. While commercial mediation often involves consideration of legal issues by the participants, it is not the practice of law. In fact, it is practiced with a high degree of competence by non-lawyers (including some of our membership). Even when the mediator has been trained as an attorney, the function of the mediator is not to represent any client or to otherwise practice law in any sense.

To become a fellow in the Academy, our members have to demonstrate that they have been active as a mediator in at least 150 commercial disputes over the preceding three-year period. Accordingly, the feedback the committee receives from us is from some of the most advanced practitioners in the field, as opposed to many who might teach mediation theory or mediate a case now and then as an adjunct to their law practices. In short, our membership lives with the daily challenges of interpreting and understanding its confidentiality requirements, and has a distinct and unique perspective on how those requirements play out in the real world.

Our experience confirms that preserving the profession of mediation as a discipline distinct from the legal profession, private in nature, and as a true alternative to administrative and judicial methods of dispute resolution, is essential to the integrity and success of the process of mediation. To the extent that our profession may be grafted onto the legal profession and legal institutions in the future, it will lose a measure of its distinctly private and confidential character. Regulation by the ABA or other bar associations of the professional work of mediators, who happen also to be licensed attorneys, is unnecessary. It is no more appropriate than would ABA regulation of the professional activities of business executives, real estate professionals, accountants, or clergy — any of whom may also to be licensed as attorneys. The professional activity in each case is not the representation of clients in legal disputes or transactions, but a distinctly different activity.

Appendix 4

The International Academy of Mediators acknowledges that many months of hard work by dedicated and skilled drafters has been invested in this project, as evidenced by the Draft and the scholarly Reporter's Notes. These comments are offered with the desire not to offend the Committee, which has labored for the welfare of the legal and mediation professions, and the protection of the public which uses our services. The undertaking is laudable. We ask, however, that you consider that the regulation of mediation and mediators, under model rules promulgated by organizations which exist solely to regulate attorneys in the practice of law, is conceptually flawed.

Updated Background And Informational Report And Request For Comments

Introduction

In August 1999, the Commission on Multidisciplinary Practice (Commission) recommended that the Model Rules of Professional Conduct be amended, subject to certain restrictions, to permit a lawyer to partner with a nonlawyer even if the activities of the enterprise consisted of the practice of law and to share legal fees with a nonlawyer.[1] After conducting more than sixty hours of public hearings, listening to the testimony of fifty-six witnesses, and receiving written comments from interested individuals and organizations, the Commission concluded that such a change was in the best interest of the public, would expand the availability of legal services, and would facilitate the development of a new business structure enabling lawyers to reconfigure their practices to assist clients in resolving multidisciplinary problems. However, in recognition of the differences between the legal profession and other professions and so to ensure that the core values of the legal profession, which exist for the protection of the public, were adequately safeguarded, the Commission recommended the adoption of a certification-and-audit regulatory regime. See Commission on Multidisciplinary Practice, Report to the House of Delegates, <http:www.abanet.org/cpr/mdprecommendation.html>

The Commission presented its Recommendation to the House for debate on August 10, but in recognition of the many requests by state and local bar associations for more time to consider the issues, moved to defer the vote. The House subsequently voted to substitute and adopt a resolution of The Florida Bar that reads as follows:

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

Exchanges on the floor of the House in connection with the Resolution made it clear that the Commission could continue to study issues related to MDPs and report back to the House when it determined such action was appropriate. In response to the concerns expressed in the Resolution, Commission members have made themselves available to discuss the issues raised by the Commission's Report and receive comments directed toward possible changes to the Commission's position. In particular, Commission members have endeavored to work with state and local bar associations in advancing the discussion.[2] The Commission has invited state and local bar associations that have been studying the issues to participate in an open discussion at the ABA Midyear Meeting in Dallas on Saturday, February 12. In addition, ABA President William Paul has announced a town hall meeting on multidisciplinary practice in Dallas on Sunday, February 13.

The Commission is issuing this Updated Background and Informational Report in order to (1) provide an overview of pertinent developments that have occurred since the August 10 vote; (2) summarize and reply to the comments and criticisms that have been made in response to the Commission's Recommendation and Report; and (3) encourage further dialog. Part I of this Report describes the pertinent developments both in the United States and abroad since August 10. Part II identifies the major criticisms directed to the Recommendation, explains the Commission's rationale for the Recommendation, and suggests some possible accommodations.

Part III presents alternatives to the Commission's Recommendation, raises specific questions that would need to be answered with respect to each alternative and provides an analysis of the different types of

affiliations in the MDP context. The alternatives are designed to encourage comment and reflections from state and local bar associations, regulatory authorities, clients, and other interested groups and individuals. At this point in its deliberative process, the Commission especially wishes to receive reasoned input from state and local Bars and emphasizes that it has not reached a conclusion on the scope of revisions to its Recommendation.

Part I

Pertinent Post-August 1999 Developments in the United States and Abroad

As the Commission noted in its Report and Recommendation and the Reporter described in more detail in the accompanying Reporter's Notes, the delivery of tax advice and law-related services by professional services firms has grown rapidly over the course of the past five years. The Big Five accounting firms have significantly expanded their tax practices in the United States and abroad. The expansion is not simply a matter of the employment of more lawyers. While the quantitative growth in the number of lawyers is impressive,[3] even more impressive is the firms' success in recruiting tax partners from leading law firms and prominent government lawyers to join the Big Five[4] and in persuading law students to join their staffs directly after graduation rather than following the more traditional law-firm career path.[5]

Strategic and other alliances between law firms and Big Five accounting firms are becoming increasingly popular. This development was the subject of extended commentary in the legal press beginning in 1997 with the announcement of a strategic alliance between PwC and Miller & Chevalier, a Washington, D.C. law firm with a highly specialized practice representing domestic and international clients involved in high stakes, complex tax controversies in the United States.[6]

The popular press characterized the alliance as a "significant step on the path the big six firms are taking towards offering comprehensive legal services."[7] Other alliances have followed this past year. For example, in August, KPMG announced the creation of a strategic alliance with certain law firms that are members of Saltnet, a network of state and local tax lawyers. Among the law firms that have entered into the alliance with KPMG are Morrison & Foerster[8] and Horwood Marcus & Berk.

- in November, five partners from the Atlanta and Washington D.C. offices of King & Spalding broke away from the firm and formed a separate law firm in Washington D.C.[9] Based on the press release issued by Ernst & Young and articles in the legal press it would appear that the law firm has entered into a highly unusual relationship with Ernst & Young. Ernst & Young has agreed to furnish a significant amount of start up capital to the firm and to lease it space in a building it owns. In exchange, the law firm has agreed to be known as McKee Nelson Ernst & Young.[10] The two firms have stated that they are separate entities, but many commentators regard the affiliation as a major step by the accounting firms toward the eventual establishment of a multidisciplinary partnership that includes legal services.

Other new and unique relationships between professional services firms and lawyers and law firms also deserve comment.

- in October, Bingham Dana, LLP merged its money-management practice with Legg Mason, Inc., an investment firm. Their affiliation is reported to be the first partnership between a law firm and an asset management firm in the United States. The new entity has become a registered investment advisor and is intended to be a vehicle for offering wealthy clients more sophisticated investment advice.[11]
- in January, Bingham Dana formed a consulting entity to provide advice on state-specific concerns. The firm's managing partner has observed, "Our philosophy is that delivering a variety of integrated products makes sense for law firms. The accounting firms have proven that."[12]

- in October, the ABA Section on Litigation and PwC announced that the Section had selected PwC as its "litigation consulting sponsor," an arrangement in which PwC will provide enhanced benefits and resources to the Section's members.[13]
- between June and the present, several mergers of U.S. and foreign law firms were announced.[14] In part, such mergers are a reflection of the changes in the global marketplace for legal services and an acknowledgment of the competition traditional law firms are facing from MDPs in countries outside the United States.[15]

In addition to the foregoing developments, the Commission also notes that the Supreme Court of Indiana in October rejected the proposition that the use of in-house counsel by an insurance company to defend its insureds constituted the unauthorized practice of law by the employer-insurer. Of the thirteen states that have considered this issue, only two have condemned it.[16]

The legal landscape outside the United States is also undergoing rapid change.[17]

- the Council of the Law Society of England and Wales has taken the first step to approve the establishment of MDPs in the United Kingdom. Since implementing legislation will be necessary, it has authorized as an interim measure the establishment of a "legal practice plus" and a "linked partnership" that will allow, respectively, a nonlawyer partner in a solicitor firm and certain alliances between accounting and solicitor firms.[18]
- the International Practice of Law Committee of the Canadian Bar Association has issued a Report on Multi-disciplinary Practices and the Legal Profession in which it recommends that lawyers be permitted to enter into partnership with nonlawyers and share fees with nonlawyers subject only to the rules of professional conduct that regulate lawyers in traditional practice structures.[19]
- the National Multi-Disciplinary Partnerships Committee of the Federation of Law Societies of Canada has recommended that the rules of professional conduct be relaxed to permit MDPs.[20]
- legislation has been introduced in New South Wales, Australia, that will allow law firms to incorporate, share profits with nonlawyers, and raise capital through passive investment. Shares in these law firms will float on the Australian Stock Exchange.[21]
- in furtherance of its publicly stated goal of being one of the world's five leading law firms by the year 2004, PwC announced in October that it had selected the name "Landwell" for its network of globally affiliated law firms. It now employs one thousand six hundred lawyers in forty-two different countries.[22]

A survey conducted by the Financial Times (London) of one hundred senior executives at large companies and financial institutions in the United States and the United Kingdom showed a willingness by the executives to purchase legal services from MDPs, if they could offer such services.[23]

- the General Assembly of the Union Internationale Des Avocats has adopted a Resolution on Multidisciplinary Practice approving minimum standards for lawyers in MDPs in the jurisdictions in which MDPs are allowed. Those principles reflect core values of the legal profession similar to the ones identified in the Commission's Recommendation.[24]

Part II

Preliminary Response to Post-Report Comments and Criticisms

Since its appointment in 1998, transparency of process and fostering of dialogue have been important to the Commission. Accordingly, the Commission would like to take this opportunity to respond to the major comments and criticisms directed towards the June 1999 Recommendation. An item-by-item commentary explaining the Commission's rationale is provided below and specific issues are flagged for further discussion.

1. Competence should be added as a core value.

The testimony of the witnesses and the written comments submitted to the Commission focused almost exclusively on loyalty, confidentiality and independence of judgment as the core values of the legal profession implicated in any proposal to authorize MDPs. Consequently, the discussion in the Recommendation and Report centered on these values. The Commission never intended to denigrate the importance of competence and assumed that competence as a core value was implicit in its Recommendation. It regrets that the Recommendation was not as clear as it should have been on this point. The Commission agrees that in any future Recommendation and Report competency should be listed as a core value.

2. Empirical evidence of need for legal services rendered through MDP's.

Though empirical evidence is always a plus, the Commission believes that this request is misdirected and does not take into account the full record. First, in a society where people are free to make choices about the goods and services they purchase, there is no sure way of accurately estimating whether the market will favor a new type of service until it is available.

Second, the criticism ignores all the positive support for MDPs from general counsels, consumer groups, and two Sections of the ABA.[25] Third, the fact that lawyers now are working in various multidisciplinary settings, even though they may be in the shadow of the law, is some further empirical evidence of need. Development of this type of delivery mechanism is presently inhibited, not by the market forces for services, but by legal prohibition, notably Rule 5.4(a) against fee sharing. It will be possible to measure the extent of "need" only if the taint of illegality is removed from legal services provided through MDPs. If clients choose not to purchase these services from MDPs, then it will be the market B not the legal profession acting as a regulatory gatekeeper B that has found this delivery option wanting.

Finally, the Commission acknowledges the concern of some commentators that if MDPs are allowed, unforeseen ethical problems may arise. While the question, "How do you get the genie back in the bottle?" is a legitimate one, the Commission does not believe that the question carries enough weight to bar a relaxation of the present prohibitions on fee sharing and partnership with nonlawyers. If a similar concern had carried the day with respect to the provision of legal services by in-house counsel to corporate clients, by staff lawyers to union members, or by lawyers in legal services organization to needy clients, important innovations in the delivery of legal services would not have occurred. Moreover, the Commission realistically expects that some of the individual states will modify the Commission's Recommendation to protect the public interest in light of the particular conditions of the states' marketplace for legal services. These modifications will provide useful models for change if there is a need to address unforeseen ethical problems.

3. Should passive or equity investment continue to be prohibited?

Some commentators have criticized the Recommendation's ban on passive investment as having an unintended anti-competitive effect. They argue that if any form of MDP practice is ultimately authorized the ban will put traditional law firms at an economic disadvantage because, as a practical matter, bank financing is their primary source of capital. In contrast, professional services firms and consolidators will be able to draw upon their substantial earnings to finance and even subsidize the operation of their legal services unit.

The Commission's decision to continue the present prohibition on equity investments rested primarily on two considerations. First, the Commission was concerned that equity investment could pose a particular threat to lawyer independence of professional judgment. The Commission was concerned that equity investors would be more interested in the bottom line rather than in service. Second, the Commission was well aware that the House of Delegates had previously rejected a proposal to permit passive investment and agreed with that decision. The Commission did not consider lifting the ban at this time to be a necessary step to accomplish the goal of best serving the public through the relaxation of the rules that currently prevent multidisciplinary practice.

The Commission invites those who believe that a departure from the current ban is warranted to bring to its attention supporting information about law firm financing. Some members of the Commission have expressed the strong view that lawyers who practice in law firms should not be placed at a competitive disadvantage, if MDPs are allowed, and are willing to consider well documented comments, especially from the state and local Bars, indicating that the continuation of the ban would have a deleterious economic impact and putting forward alternative proposals.

4. The segregation of fees and client funds.

The Commission on IOLTA has requested that any future Recommendation more explicitly address the issue of client funds. A client who deposits trust funds with an MDP may seek the services both of a lawyer and a nonlawyer on a given matter or may first seek the services of a lawyer and later a nonlawyer on related matters. In the IOLTA Commission's view, it is important to have a single set of rules and the highest available standards to govern the MDP's handling of client trust funds. The Commission on IOLTA has proposed the following specific language to amend the Recommendation:

> It [the MDP] will establish, maintain and enforce procedures to protect a lawyer's professional obligation to segregate funds assure that the rules of professional conduct governing a lawyer's receipt, safeguarding and distribution of client funds, including the Interest on Lawyers' Trust Account (IOLTA) Rules are strictly applied to all client funds received by the MDP. For these purposes, a "client" is a client of the MDP, whether seeking legal services, non-legal services or a combination of the two.

The Commission specifically invites comment on whether this amendment will be sufficient to protect client funds and whether it can be practically implemented.

5. Should the certification and audit procedures be reaffirmed, modified, or withdrawn?

The Commission's Recommendation essentially treats the consent to practice law given to an MDP by the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in the delivery of legal services as a quid pro quo for the court's granting the MDP an exception to the present rule barring fee sharing and partnership with a nonlawyer. If a court concludes that the MDP has failed to comply with the quid pro quo safeguards it has mandated, it could enter an injunction barring all lawyers licensed in the jurisdiction from practicing in the MDP. Depending on the circumstances of the noncompliance, it might also enter an order disciplining the lawyers in the MDP for their own noncompliance or their failure to report the MDP's noncompliance. Furthermore, lawyer and nonlawyer members of an MDP that continued to provide legal services after an injunction had been entered could be prosecuted for the unauthorized practice of law.

The Commission anticipates that the funding to support the supervision of MDPs by the court will not be a problem in many jurisdictions because the MDPs' annual certification fee will be adequate. The Commission acknowledges, however, that in some jurisdictions where the number of MDPs is relatively small this may not be the case. The Commission has not suggested whether the annual certification fee should be uniform or vary with the size of the MDP or whether the fee should include a reserve for unforeseen emergencies. The Commission believes that in almost all instances the details of any funding mechanism should be left to the individual states for determination in response to local needs and practices.

The Commission has been criticized for not defining in specific enough terms the way in which the certification and regulatory process for MDPs would operate. The Commission was confident that its proposal was feasible. Furthermore, it deliberately did not want its initial "conceptual" approach to be too detailed, fearing that such details would interfere with the discussion of the more important general principles.

These details, moreover, would have to be worked out within each jurisdiction in response to local needs, practices, and concerns. The Commission is considering whether and to what extent it can contribute any guidance to the states to assist them in structuring the regulatory and certification procedures. Finally, the Commission notes that it is in contact with the Conference of Chief Justices which has a committee studying issues related to MDPs. The Commission welcomes comments on how the certification and audit requirements might be modified or, if withdrawn, what regulatory structures, if any, it should recommend. It specifically invites comments directed to peer review as an alternative.

6. How can independence of judgment be best safeguarded?

The most common concern expressed about MDPs is that working in such a practice setting will inevitably lead to the erosion of a lawyer's professional independence. This concern is highly selective, however. It ignores other practice settings in which the problem is more frequent and may be more severe. Among these settings are full time employment by a single client (e.g., in-house corporate counsel, lawyers employed by a union providing services directly to union members, and lawyers employed by a legal services organization under the direction of a nonlawyer board), employment as an associate under the direction of a partner (see Rule 5.2, allowing a subordinate lawyer to take direction from a supervisory lawyer regarding difficult ethical issues), and membership in a partnership in which difficult ethical issues are frequently resolved by a managing partner or an executive committee and in which compensation is dependent on billings (e.g., whether to take a new matter in the face of a possible conflict of interest or to disclose alleged client fraud).

The Commission invites comment on whether it should suggest that a separate rule addressing professional independence be adopted to apply to all lawyers in all practice settings regardless of the manner in which they are compensated.

Part of the concern regarding professional independence arises from the perceptions that a nonlawyer in a management position in an MDP will not appreciate the legal profession's concept of professional independence and that a nonlawyer who has not been trained in legal ethics cannot properly supervise the delivery of legal services. The Commission invites comment on how it should address this concern, including: (1) permitting only lawyer-controlled MDPs; (2) requiring that the lawyers in fully integrated MDPs who provide legal services to third parties be segregated in a separate legal division headed by a lawyer; or (3) mandating specific procedures to safeguard lawyer independence. Finally, it acknowledges the view expressed by some commentators that the rules governing MDPs may need to vary according to the size of the MDP and invites comments on the advisability of the Commission's drawing such a distinction, what the content of such rules should be, and where the dividing line among MDP firms should be located.

7. Is a definition of the term "the practice of law" an essential component of a rule of professional conduct permitting a lawyer to work in an MDP? And if so, how should the term be defined?

The Commission has been criticized for suggesting a definition of the practice of law that some regard as too inclusive. The Commission may have erred by failing to attach the commentary from the original D.C. rule that the Commission used as its illustrative example, and in so doing may have omitted information that, in the words of one of the drafters of that rule, "is essential . . . to illustrate the subtlety of the issue." (The Commentary is posted at <http://www.abanet.org/cpr/schaller.html>.) The Commission's intent was to leave the definition to the individual jurisdictions. Accordingly, it did not include the definition in the Recommendation, but rather provided it as an example of one possible definition. The Commission did not intend to use the term in an exclusive sense to limit non-lawyer activity. Unfortunately, the Commission's intent was not sufficiently clear. The Commission invites comment on whether it should include a definition in any subsequent Recommendation.

8. Should the control of an MDP be limited to lawyers?

Many comments related to the concerns about independence of judgment have suggested that any move toward MDPs should include a requirement of lawyer control of the entity. Such a change would result in the elimination of the need, as perceived by the Commission in its Recommendation, to treat lawyer controlled and nonlawyer controlled MDPs differently, a stance that also has been criticized by some.

The Commission's Recommendation rested upon the conviction that the ABA should expand the opportunities for client choice as much as possible, consistent with the protection of the legal profession's core values. The Recommendation endeavored to assure that clients would be informed of the differences in the services and protections offered, thereby reducing client confusion. In addition, the Commission viewed allowing nonlawyer controlled MDPs as the most effective way of properly bringing those lawyers currently working at professional service firms under the legal profession's regulatory umbrella.

9. Should an MDP be allowed to provide audit and legal services to the same client?

In Recommendation 9, the Commission stated:

> To the extent that the delivery of non-legal services to a client is compatible with the delivery of legal services to the same client and with the rules of professional conduct, a lawyer should be required to make reasonable efforts to ensure that the client sufficiently understands the that the lawyer and nonlawyer may have different obligations with respect to disclosure of client information and that the courts may treat the client's communications to the lawyer and nonlawyer differently.

In footnote 3 to the Report accompanying the Recommendation the Commission specifically addressed the question of the simultaneous provision of legal and audit services:

> In a letter from the Office of the Chief Accountant (OCA) of the Securities and Exchange Commission (SEC), this Commission was advised that the SEC has asked the Independence Standards Board (ISB) to place the topic of legal advisory services on its agenda. The SEC intends to look to the ISB for leadership in establishing auditor independence regulations applicable to the audits of the financial statements of SEC registrants. According to the letter, the SEC auditor independence regulations specifically state that the roles of auditors and attorneys under federal securities laws are incompatible. The OCA would consider an auditing firm's independence from an SEC registrant to be impaired if that firm also provides legal advice to the registrant or its affiliates. The Commission believes that this issue is correctly initially discussed in those fora. When the ISB completes its study, appropriate ABA entities will wish to comment on its recommendations and, possibly, to take formal positions.

In essence, the substance of the footnote reflected a letter from the SEC dated January 15, 1999 to the Commission. In a second letter dated July 12, 1999 after the Report's publication, the SEC confirmed its view that the roles of auditor and attorney are incompatible under federal securities law.

The Commission shares the SEC's position and regrets that it did not make this point sufficiently clear. Finally, the Commission notes the concerns expressed by SEC Commissioner Norman S. Johnson, who views the expansion of accounting firms into legal services as problematic.[26] Commissioner Johnson's concerns focused on many of the same issues as did this Commission's Report and Recommendation, such as the preservation of a lawyer's independent professional judgment and the lawyer's duty to preserve a client's confidences and avoid conflicts of interest.[27]

Part III

Possible Alternatives

More enforcement of UPL rules

Some critics of the Commission's Recommendation strongly support the status quo, urging that no changes be made to the rules of professional conduct that prohibit partnership and fee sharing with a nonlawyer. They call for stepped up enforcement of (1) the ethics rules prohibiting a lawyer from assisting a nonlawyer in the practice of law and (2) unauthorized practice of law (UPL) statutes prohibiting the delivery of legal services by corporations and other business entities controlled by nonlawyers.[28]

The Commission notes that despite the considerable publicity about the alleged delivery of legal services by the Big Five and other consulting-type firms, regulatory initiatives have rarely occurred and where they have, the process has been terminated before any presentation to a court. For example, in 1998, the UPL Committee of the Texas Supreme Court announced that it would not file a complaint against Arthur Andersen after an eleven-month investigation.[29] In 1999, Virginia bar counsel made a similar statement with respect to the compliance law services offered by an unnamed professional services firm.[30]

Professional services and consulting firms are employing more and more lawyers to provide law-related advice to their clients. No reason exists to assume that this trend will not continue. Those lawyers are operating outside the "regulatory tent," vigorously maintaining that they are providing nonlegal consulting services and thus are not subject to the rules of professional conduct or bar discipline. In many instances, it is seemingly impossible to distinguish the consulting services they render to the firms' clients from those rendered to clients by lawyers in traditional law firms. As noted above, however, no fact finder has yet determined that such consulting services constitute the practice of law.

The Commission invites comments on 1) whether stepped-up enforcement of UPL and related code of conduct provisions is in the public interest and/or an achievable objective; and 2) assuming arguendo that such enforcement is unlikely, whether the public interest would be served by continuing the status quo in which the lawyers working for the Big Five and other professional and consulting firms are essentially unregulated by the bar.

The D.C. Model with or without modification

This model permits a lawyer to form a partnership and share legal fees with a nonlawyer subject to certain clearly defined restrictions. Washington, D.C. is the only jurisdiction in the United States to have adopted this model. The Washington, D.C. version of Rule 5.4 requires that the law firm or organization must have "as its sole purpose" the provision of legal services to others; the nonlawyer must agree "to abide by these rules of professional conduct;" the lawyers with a financial interest or managerial authority must Aundertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1; and these conditions must be set forth in writing.[31]

The text of the Rule does not define or limit the vocation of the nonlawyer partner. However, the Comment refers to certified public accountants working in conjunction with tax lawyers or others who use accountants' services in performing legal services, economists working in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers working with family law practitioners to assist in counseling clients, and nonlawyer lobbyists working with lawyers who perform legislative services.[32] Finally, the Comment specifies that the rule does not permit partnership for the purpose of investment.[33]

The Commission invites comments on 1) whether it should recommend replacing the current version of Model Rule 5.4 with one modeled on the Washington, D.C. version; 2) whether the "sole purpose" language should be changed to "a principal purpose" and if so, how principal purpose should be measured; 3) whether any restrictions should be placed on the vocation of a nonlawyer partner such as permitting partnership with a nonlawyer professional only; and 4) assuming arguendo that partnership with only a nonlawyer professional is in the public interest,

a) how "nonlawyer professional" should be defined;

b) whether the public's interest would be adequately protected by defining a nonlawyer professional as "a member of a recognized profession whose conduct is governed by ethical standards;"

c) whether the definition in item b) should be supplemented in the text or accompanying commentary by an illustrative recitation of nonlawyer professionals similar to that found in the comments to the Model Rule 5.7 and the Washington, D.C. version of Rule 5.4 or should be left to the states.[34]

d) what measurements should be used to determine that the lawyer-principals of the MDP actually possess the power to resolve issues relating to the firm's finances, management, operations, and ethical responsibilities. Is it sufficient simply to require that fifty-one percent of the firm's principals be lawyers? Should supra-majority requirements for all or certain types of decisions be required in MDPs?

e) what specific practices and policies capable of expression in a rule of professional conduct exist to create and foster an institutional culture conducive to the observance of ethical norms?

The Contract or Affiliation Model

In this model, a professional services firm and an independent law firm contractually enter into a close working relationship. Typical terms might include the following: an agreement to refer clients to one another on a non-exclusive basis and/or to work together on related matters for clients,[35] a loan of working capital from the professional services firm to the law firm for start-up purposes or expansion, the law firm's leasing of office space in a building housing the professional services firm, the law firm's purchase of administrative and support services from the professional services firm, including technology assistance and staffing, and the firms' sharing of library and computer services.[36]

Provided that the contractual arrangement is not a sham masking fee sharing or papering over what is really a partnership relationship with respect to the control and management of the law firm, it does not appear that the Contract or Affiliation Model violates the Model Rules of Professional Conduct. To some degree the relationship between the law firm and the professional services firm may be analogized to the relationship that exists among independent lawyers in a shared office suite who are not partners but refer clients to one another, use common facilities, and contribute proportionately to the costs and expenses of the suite. Such exchanges do not automatically transform the lawyer members of the suite into partners.

On the other hand, the Commission recognizes that at some point even if there is no formal fee sharing, economic interdependence may so entwine the firms that they become a single entity. Evidence of such interdependence might include, for example, brand naming, concessions or other economic benefits to offshore affiliates, and benefits to each other's clients. A law firm's economic dependence on a professional services firm may threaten the exercise of independent professional judgment by the firm's lawyers. (Of course, a similar danger can arise in any instance in which a law firm is dependent on a single client for a substantial portion of its revenue. Fear of antagonizing the client may interfere with the exercise of independent professional judgment by the firm's lawyers.)

The Commission invites comments on 1) what criteria should be used to determine whether a professional services firm and a law firm have become so economically entwined that they should no longer be viewed as separate firms; 2) what weight should be given to each criterion; and 3) whether, as some foreign bar regulators have urged, each contract between a law firm and a professional services firm should be reviewed by the highest court with the authority to regulate the legal profession in each jurisdiction in which the law firm and the professional services firm jointly offer services pursuant to the contractual agreement between them.

The Fully Integrated Model

In this model, there is no free-standing law firm. There is a single professional services firm, whose ownership, management, and profits are shared by lawyers and nonlawyers. The Fully Integrated Model permits a nonlawyer to have ultimate managerial authority over all aspects of the MDP's provision of legal

services to the clients of the MDP. In its Recommendation, the Commission urged that the Model Rules be amended to permit fully integrated MDPs. The Commission did not require a separate legal department or division. The Commission specifically invites comment on

a) whether it should recommend that the lawyers in an MDP who are delivering legal services to the MDP's clients be organizationally housed in a separate unit of the MDP, which would be subject to oversight by a supervisory lawyer whose responsibilities would resemble those of a general counsel of a corporation or other organization who supervises the professional work of the in-house lawyers. The supervisory lawyer would have ultimate managerial authority with respect to the lawyers in the unit, for example, deciding the number of lawyers and support personnel necessary to staff a matter and which lawyers to assign to a matter, and fixing the terms and conditions of the compensation of the lawyers in the unit.

This proposal would apply to all MDPs delivering legal services, regardless of size. The precise organizational features of the legal services unit would be left to the discretion of the MDP, just as the organizational features of a legal department and law firm are left, respectively, to the corporate or business client and the lawyers in a law firm. It is likely, however, that the legal services unit of a large MDP would require a more elaborate structure than that of a smaller MDP.37 In a smaller MDP, such structures might constitute needless formalism and impose unnecessary costs.

b) whether it should recommend that only those lawyers practicing in the separate legal services unit described in a) supra be allowed to deliver legal services to the MDP's clients. Thus, a person admitted to practice law would not be permitted to hold him or herself out as a "lawyer," competent to deliver legal services to a client of the MDP, if that person were assigned to another unit of the MDP and the person's professional work involving legal services was not subject to supervision by the supervisory lawyer in the legal services unit of the MDP. Furthermore, it would be the responsibility of the MDP and each such person to make reasonable efforts to ensure that the MDP's clients understand that the person is not acting as a lawyer even though that person is licensed to practice law.

c) whether it should recommend that all MDPs (i.e., those controlled by lawyers as well as nonlawyers) should be subject to the audit and certification procedures proposed in the Recommendation.

d) whether it should amend the audit and certification procedures proposed in the Recommendation by extending their application to a "firm" (as defined in the Terminology Section of the Model Rules) and each lawyer in a firm.

e) whether it should recommend peer review as an alternative to audit and certification and if so, how such peer review would operate.

f) whether it should recommend specific practices and procedures to preserve the attorney-client and work product privileges; and if so, what those practices and procedures should be.

Endnotes

[1] The Commission employs the terms "partner,"and "partnership" throughout this Report, conforming its discussion to the language used in the Model Rules. The reader should interpret these terms broadly to include, respectively, a shareholder in a law firm organized as a professional corporation or similar association, and a professional corporation or similar association by means of which lawyers structure their relationship inter se for the delivery of legal services to clients. See generally Terminology, Model Rules of Professional Conduct (1983) (defining "partner").

[2] A list of meetings that Commission members have attended since the Annual Meeting is posted at http://www.abanet.org/cpr/mdpmtgs.html.

[3] In 1997,The Wall Street Journal reported that

> Ernst & Young has 800 tax attorneys on its U.S. staff, double the 400 it had several years ago. Price Waterhouse has around 500 tax lawyers in the U.S. up from 250 three years ago. Arthur Andersen has 1,000 tax attorneys, 20% more than it had in 1994.

See Elizabeth MacDonald, Accounting Firms Hire Lawyers and Other Attorneys Cry Foul, Wall St. J., Aug. 22, 1997, at B8. Subsequent to the publication of this article, Price Waterhouse and Coopers & Lybrand merged, forming

PricewaterhouseCoopers (PwC). "PwC" will be used throughout the Report to refer to the merged entity and its predecessor, Price Waterhouse.

[4] Bruce Balestier, Under One Roof: ABA Faces Arrival of Lawyer-Accountant Pairings, N.Y.L.J., Nov. 19, 1998, at 5 (referring to a "high profile coup" by an accounting firm in hiring a noted tax partner); Tom Herman, A Special Summary and Forecast of Federal and State Tax Developments, Wall St. J., June 18, 1997, at A1 (reporting the departure of a well-known law firm tax partner to an accounting firm); Jeffrey L. Jacobs, Multidisciplinary Recruiting War. . . The Tax Brain Drain to Accounting Firms Intensifies, 17 Of Counsel 7 (1998) (same); MacDonald, Accounting Firms Hire Lawyers and Other Attorneys Cry Foul, supra note 1, at B8 (same).

[5] Mark Schauerte, Big Five Use Stock Options, Usable Hours to Woo Law Students, Chicago Law., Nov. 1999; Anna Snider, Taking a Look Inside the Big Five, N.Y.L.J., Sept. 7, 1999, at S11. The senior vice president and general counsel at Hildebrand, Inc. has commented:

> The Big Six are recruiting at the major law schools, and not only tax lawyers. They are telling students that if they come with them, they will be doing M&A, litigation and other kinds of work that goes well beyond tax counseling.

David Rubenstein, Accounting Firm Legal Practices Expand Rapidly. How the Big Six Firms Are Practicing Law in Europe: Europe First, Then the World?, Corp. Leg. Times, Nov. 1997, at 1.

[6] See <http://millerchevalier.com/pr/PWAlliance.html>; Sheryl Stratton, Practice of Law by CPA Firm Members Raises Legal and Ethical Questions, Tax Notes Today, April 25, 1997, 97 TNT 80-6; Big Six Firm Forms Strategic Alliance With Law Firm, Tax Notes Today, April 16, 1997, 97 TNT 73-53.

[7] The Big Six Move In, Int'l Fin. L. Rev., Nov. 1997, at 25. According to the two firms, the alliance allowed them to offer their clients a seamless web of services:

> US tax controversy work goes from the pre-examination stage to litigation. Up to the litigation stage [Price Waterhouse] can do the work, but sometimes a case cannot be settled and it has to go to court. Sometimes clients like to have the stage set, with attorneys involved. Because we do not litigate, we cannot give the IRS the impression that we are ready to go to court. With Miller & Chevalier as part of a team, we are in a position to go to court if we need to.

Id.; see also supra note 4.

[8] See <http://www.us.kpmg.com>;Arian Campo-Flores, Dream Team Tax Team, Am. Law., Sept., 1999, at 18; Brenda Sandburg, MOFO Allies with Accounting Giant, N.Y.L.J., Aug. 9, 1999, at 2; Ritchenya A. Shepherd, Why MOFO Teams with KPMG, Nat'l L.J., Aug,. 23, 1999, at A12; KPMG Joins Forces with a group of state and local lawyers, Wall St. J., Aug. 4, 1999, at A1.

[9] The Washington, D.C. version of Rule 5.4 permits a lawyer to form a partnership with a nonlawyer and to share legal fees with a nonlawyer. The "sole purpose" of the partnership must be the delivery of legal services, however. In the press release announcing the establishment of McKee Nelson Ernst & Young, the firm did not indicate how — if at all — it would take advantage of the Rule. Ernst & Young, News Release (Nov. 3, 1999).

[10] News Release, supra note 9; Siobhan Roth, Inside the Ernst & Young Deal: Law Firm is launched with Big 5 loan; lawyers say that they remain independent, The Recorder/Cal, Law., Nov. 10, 1999; Jonathan Gronerand & Siobhan Roth, Envisioning A Big 5 Law Firm: Ernst & Young Positioning to Offer Full Legal Services, Legal Times, Oct. 25, 1999.

[11] Ritchenya A. Shepherd, Law and finance under one roof, Nat'l L.J., Nov. 15, 1999, at A21; Today's News Update, N.Y.L.J., Oct. 5, 1999, at 1. See also Mark Schauerte, Law Firms Eye New Ventures As Big Five Encroach on Legal Turf, Chicago Law., Nov. 1999, at 6.

[12] Ritchenya Shepard, Legal and Financial Advice Under One Roof, Nat'l L.J., Nov. 9, 1999, at 5. The law firm of Fredikson & Byron, the fifth largest firm in Minnesota, expressed a similar sentiment in announcing the establishment of a consulting service for physicians and medical organizations. See http://www.pioneerplanet.com/business/biz_docs/016107.html.

[13] Sheryl Stratton, Pricewaterhouse Coopers to 'Sponsor' ABA Litigators, Highlights & Documents, Tax Notes, Oct. 19, 1999, at 589.

[14] John E. Morris, The New World Order: Clifford Chance and Rogers & Wells Are about to Pull Off the First Large-Scale Transatlantic Merger. Did the Eat-What-You-Kill Americans Ever Come to Terms with the Lockstep Brits? And, More Importantly, What Will It Mean for the Competition?, Am. Law., Aug. 1999 (describing the three-way merger of Rogers & Wells, Clifford Chance, and Punder, Volhard, Weber & Aster. They are respectively, a U.S., U.K. and German law firm); Today's Update, N.Y.L.J., Sept. 28, 1999, at 1 (describing the two recent, separate mergers of Coudert Brothers with an Australian and a Belgian law firm). See also Anna Snider, Paris-New York Merger Breaks New Ground, N.Y.L.J., Sept. 18, 1998,

at 1 (describing the merger of Christy & Viener in New York and Salans Hertzfeld & Heilbronn in Paris); Today's News Update, N.Y.L.J., June 17, 1999, at 1 (describing the "strategic affiliation" between Holland & Knight and Haim Samet, Steinmetz Haring & Co., an Israeli law firm, noting that the two firms did not formally merge because Israeli law prohibits profit-sharing between Israeli and foreign law firms, and that the Haim firm was being treated "as part of Holland & Knight.").

[15] Ward Bower, The Future Structure of the Global Legal Marketplace, Metropolitan Corp. Couns., Oct. 1999, at 45.

[16] Cincinnati v. Wills, 717 N.E.2d 151 (Ind. 1999). See also infra note 26; John Council, Allstate Goes on the Offensive Against UPL Committee, Tex. Law., Jan. 18, 1999, at 5; Darryl Van Duch, Insurance Counsel Under Attack: Suits Say Use of Company-Owned Law Firms to Defend Policy Holders is Fraud, Nat'l L.J., Dec. 14, 1998, at A1.

[17] See generally Bower, supra note 15.

[18] Lucy Hickman, LawSoc votes for MDPs after 10-year wait, The Lawyer, Oct. 18, 1999, at 2.

[19] Canadian Bar Association International Practice of Law Committee, Striking A Balance: The Report of the International Practice of Law Committee on Multidisciplinary Practices and the Legal Profession (1999); see Breaking Barriers, Int'l Acc. Bull., Sept. 30, 1999, at 9.

[20] Federation of Law Societies of Canada, National Multi-Disciplinary Partnership Comm., Multi-Disciplinary Partnerships: Report to the Delegates (Aug. 1999).

[21] Shaw Should Watch the Society He Keeps, ABIX, Sept. 3, 1999, 1999 WL 26582433; Andrew Burrell, Shackles removed for law firms, Austl. Fin. Rev., Sept. 1999.

[22] Jean Eagleshaw, PwC reorganizes global network of legal firms, Fin. Times (London), Oct. 11, 1999, at 8; Konstantin Richeter, Managers & Managing: Pricewaterhouse Renames Legal Unit, Adopting Landwell as Brand, Wall St. J. Eur., Oct. 12, 1999, at 30, 1999 WL-WSJE 27641212.

[23] Long arm of the law: The Big Five may be right that clients want them to move into legal services, Fin. Times (London), Sept. 9, 1999, at 29. While approximately two-thirds of the surveyed respondents indicated that they still preferred to purchase legal services from a traditional law firm, the Financial Times survey affirms the general proposition that corporate clients want the option to purchase legal services from alternative providers. In this respect, the survey offers additional evidence for the resolution adopted by the Board of Directors of the American Corporate Counsel Association "support[ing] a broader range of choice for clients to select from service providers . . . ." See Reporter's Notes at C23, n.58. But see Michael Chambers & Richard Parnham, Accountants in the Legal Market: Has the strategy failed?, 21Commercial Law. 40 (1998).

[24] See Union Internationale des Avocats, Resolution on Multidisciplinary Practices (Nov. 3, 1999).

[25] See Reporter's Notes at C9-10.

[26] See SEC Commissioner Johnson Addresses Auditor Independence, SEC Today, Oct. 13, 1999, at 5-6.

[27] Id.

[28] The Ohio State Bar Association (OSBA) has submitted a Recommendation and Report for consideration by the House of Delegates at the upcoming ABA Midyear Meeting calling for each jurisdiction "to establish and implement effective procedures for the discovery and investigation" of violations of UPL statutes and "to pursue active enforcement of those laws." See letter from Thomas J. Bonasera, President, OSBA, to "Fellow Bar President" (Dec. 3, 1999).

[29] Arthur S. Hayes, Accountants vs. Lawyers: Bean Counters Win, Nat'l L.J., Aug. 10, 1998, at A4; Tom Herman, A Special Summary and Forecast of Federal and State Tax Law Developments, Wall St. J., July 29, 1998 at A1.

[30] Comment posted on the Washburn Legal Ethics Listserv., Nov. 4, 1999 by James McCauley, Ethics Counsel, Virginia State Bar. See also, Perkins v. CTX Mortgage Co., 969 P.2d 93 (Wa. 1999) (declining to find that the activities of a mortgagee in connection with the completion of financing documents constituted the practice of law); In re Florida Bar Advisory Opinion-Nonlawyer Preparation of Pension Plans, 571 So. 2d 430 (Fl. 1990) (declining to find that the law-related activities of ERISA consultants constituted the unauthorized practice of law); in re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 422 S.E.2d 123 (1992) (concluding that CPAs may represent clients before agencies and the Probate Court without violating the state's UPL prohibition).

[31] Washington, D.C. Rules of Professional Conduct Rule 5.4(b)(1)-(4) (1999).

[32] Id. [cmt.7]. In the same vein, the Comment to Model Rule 5.7, Responsibilities Regarding Law-Related Services, lists the following activities as examples of law-related services:

> providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax return preparation and patent, medical or environmental consulting.

Model Rule 5.7 [cmt. 8].

[33] Comment [8] states:

Paragraph (b) does not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes. It thus does not permit a corporation, an investment banking firm, investor, or any other person or entity to entitle itself to all or any portion of the income or profits of a law firm or other similar organization. Since such an investor would not be an individual performing professional services within the law firm or other organization, the requirements of paragraph (b) would not be met.

Id. [cmt. 8].

[34] See supra note 32 and accompanying text.

[35] See supra notes 6-8 (describing the strategic alliance between Miller & Chevalier and PwC and the Saltnet network).

[36] See e.g., supra note 10.

[37] See Rule 5.1 cmt. [2] (distinguishing between the measures that might be needed by “a small firm” and “a large firm” to fulfill the responsibilities the Rule prescribes).