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An “Issue Checklist” for the ABA Commission on Multidisciplinary Practice

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Multidisciplinary Practice

Staying Competitive and Adapting to Change

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Law Practice Management Section
American Bar Association
An "Issue Checklist" for the ABA Commission on Multidisciplinary Practice

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This material was developed by Professor Terry to assist the ABA Multidisciplinary Practice Commission. It provides a cogent analysis of the issues and alternatives.

I. THRESHOLD ISSUES TO CONSIDER WHEN DECIDING WHETHER TO RECOMMEND A REVISION TO MRPC 5.4:

A. WHAT STANDARDS TO USE WHEN DECIDING WHETHER TO RECOMMEND RETAINING MRPC 5.4 IN ITS CURRENT FORM (that is, whether to permit lawyers to join multidisciplinary practices?)

Recommended Answer:
1. Client Protection
2. Public Interest
   Alternatives:
3. Protecting Lawyers' "Turf";
4. Defining the "Public Interest" more specifically, for example, to include:
   a. Preserving the "rule of law" (for example, from the IBA Policy Statement);
b. Preserving the independence of the lawyer;
c. Bringing lawyers “into the tent” so that they participate in, and are subject to, the lawyer regulatory system;
d. Preserving the number of law firms available in order to maximize client choice (see Consultation Report of the Law Society of England and Wales at p. 19; proposed CCBE);
e. Providing freedom of choice for both lawyer and client (id.);
f. Preventing harm to the public from nonlawyer practice;
g. Keeping lawyers competitive and/or relevant to clients; and/or
h. Efficient delivery of legal services (which might include cost & ease of administration).

5. Deregulating the provision of legal services and letting clients and the market decide how much “ethics” such as confidentiality and conflicts is important to them.

B. WHAT ARE THE CORE VALUES OF LAWYERS THAT MUST BE PROTECTED IN ORDER TO ACCOMPLISH THE REGULATORY AIMS IDENTIFIED IN QUESTION A, ABOVE?

Recommended Answer:
1. Competence
2. Independent Legal Judgment
3. Confidentiality
4. Loyalty (as ensured through conflicts of interest rules)

Alternatives:
5. Lawyer’s role as collaborator of justice (similarly, preserving the lawyer’s role in ensuring the rule of law);
6. Honesty & integrity;
7. Service to the client;
8. The standing and independence of the profession as a whole (Law Society Report at p. 19);
9. Stopping the unauthorized practice of law;
10. Lawyer self-governance;
11. Protecting the attorney-client privilege

C. SHOULD RECOMMENDATIONS APPLY EQUALLY TO LARGE “WALL STREET” FIRMS AND SMALLER “MAIN STREET”-TYPE FIRMS? AND IS THE ISSUE RELEVANT TO BOTH?

Recommended Answer:
1. Yes; there should be the same rules and the issue is relevant to both Main Street and Wall Street lawyers and clients;
Alternatives:

2. Yes; there should be the same rules, which are relevant to both; but perhaps there should be different interpretations of the rules when applied to different fact patterns. In other words, more disclosure might be required with respect to unsophisticated clients.

3. No; have different rules for Wall Street and Main Street lawyers (for example, permit only small MDPs)

D. WHERE DOES THE “BURDEN OF PROOF” LIE? THAT IS, SHOULD THE ABA REVISE MRPC 5.4 UNLESS IT IS CONVINCED THE STANDARDS IN SECTION A, ABOVE (FOR EXAMPLE, CLIENT PROTECTION/PUBLIC INTEREST) WILL BE INJURED? OR SHOULD THE CMDP RECOMMEND MAINTAINING THE STATUS QUO UNLESS IT IS CONVINCED THAT THESE VALUES WILL NOT BE INJURED?

Recommended Answer:

1. Those seeking the status quo have the "burden of proof": Since MRPC restricts both lawyer and client autonomy and choice and since all lawyer regulation should be justifiable, the ABA should retain the current version of MRPC 5.4 only if it is convinced that the regulatory interests set forth in A above require the current rule.

Alternatives:

2. Those seeking to change the rule have the "burden of proof": Before it recommends any change in the status quo, the ABA should be convinced that the core values of the legal profession will not be harmed and that the regulatory aims can be protected should MRPC 5.4 be revised and MDPs permitted.

E. WHICHEVER SIDE HAS THE BURDEN, HOW MUCH “EVIDENCE” IS NEEDED BEFORE RETAINING (REVISING) MRPC 5.4?

Recommended Answer:

1. Something akin to clear and convincing evidence

Alternatives:

2. Something akin to a preponderance of the evidence standard

3. Something akin to a beyond a reasonable doubt standard

F. IS THERE CURRENTLY A CLIENT NEED OR DEMAND FOR MDPS AND WHAT IS THE SIGNIFICANCE OF THIS QUESTION?

Recommended Answer:

1. Yes; there is at least some client demand and perceived need for MDPs, as demonstrated by the direct testimony of Witnesses Elizabeth Wall and Steven Bennett, who presented the views of corporate counsel “clients,” and the indirect testimony of Witnesses Lynda Shely (State
Bar of Arizona) and Abbie Willard (Assistant Dean of Career Services, Georgetown University Law School), among others. Given at least some client demand and perceived need for MDPs, the question of the degree of client need or demand for MDPs is irrelevant. The ABA must face the issue of whether the current MRPC 5.4 is a justifiable restriction upon the autonomy and choices available to at least some clients and lawyers.

**Alternatives:**

2. Yes; not only is there client need and demand for these services, but if lawyers do not begin to offer MDP services, they risk having nothing of value to offer clients because of clients’ changing needs and demands.

3. No; the perceived demand is really “smoke & mirrors” and other service providers exist.

4. No; the perceived “client” demand for MDPs is in fact being driven by the ABA “supply” and in the absence of significant demand, the ABA should not change rules which historically have worked quite well.

5. Irrelevant; lawyers must decide what rules are appropriate and client demand should not control the analysis.

G. DO U.S. LAWYERS AND NONLAWYERS WHO PRACTICE IN AN MDP APPEAR TO BE OFFERING WHAT WOULD BE CALLED “LEGAL SERVICES” IF OFFERED IN A TRADITIONAL U.S. LAW FIRM?

**Recommended Answer:**

1. Yes; substantial testimony showed that lawyers and nonlawyers in MDPs were offering services that would be called legal services if provided by lawyers in a traditional law firm (see, for example, Witnesses Holden, Powell, Bower, Moser, Galler, Fox, Dzienkowski, Jones).

**Alternatives:**

2. No; lawyers in MDPs are not offering what would be called “legal services” if offered in a traditional law firm.

3. No; nonlawyers in MDPs are not offering what would be called “legal services” if offered in a traditional law firm.

H. DID THE ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE HEAR TESTIMONY OF ANY ACTUAL PROBLEMS CAUSED BY AN MDP?

**Recommended Answer:**

1. Yes; Witness Elizabeth Wall, who has been an MDP client, testified concerning legal services being provided without disclosure that they were part of the “bundled” product; and about information being disclosed by one MDP consulting branch to the MDP legal branch, despite being requested not to; and about MDP lawyers’ failure to
disclose their status during meetings. Witness Karen Petrillo testified, as a lawyer observer, about incompetent work performed by nonlawyers in MDPs. Witness Hellwig referred to conflicts problems and Witness Fox cited reports of MDPs using the audit power to steer clients.

Alternatives:
2. No.

I. THE ULTIMATE QUESTION: SHOULD MRPC 5.4 BE AMENDED TO PERMIT MDPs IN SOME FASHION?

Recommended Answer:
1. Yes; see Terry Testimony for explanation.

Alternatives:
2. No.
3. Reformulate the Question:
   a. Is the current MDP ban in MRPC 5.4 necessary in order to protect lawyers’ core values and advance legitimate regulatory aims?
   b. Has there been convincing evidence of a sufficient need or reason to change the current ban and a showing that lawyer core values can be protected in an MDP environment?
   c. Should we know what it would answer to the “functional” questions before answering this fundamental question?
   d. Will the failure to allow MDPs mean that lawyers will be driven out of the market because they are not adapting and offering the services that clients need or want?

II. IF THE ABA REVISES MRPC 5.4, HOW SHOULD THE “FUNCTIONAL” ISSUES REGARDING ACCEPTABLE MDP “FORMS OF ASSOCIATION” BE ANSWERED?

A. SHOULD THE ABA PLACE ANY LIMITS ON THE TYPES OF INDIVIDUALS WITH WHOM A LAWYER MAY HAVE AN MDP?

Recommended Answer:
1. No.

Alternatives:
2. Yes, a lawyer should only be able to participate in an MDP with a limited category of professionals who share the same values as lawyers. (Note that in Germany, this includes accountants (auditors) but in The Netherlands, it does not).
3. Yes, a lawyer should only be able to participate in an MDP with other licensed “professionals” (perhaps defined as those with licensure requirements and codes of ethics).
4. Yes, a lawyer should only be able to participate in an MDP with "registered" nonlawyers, who have been "vetted" by the bar (See Law Society of England and Wales Consultation Report, p. 13).

B. SHOULD LAWYER PARTICIPATION IN MDPS BE LIMITED TO MDPS WHOSE SOLE OR MAIN PURPOSE IS THE PROVISION OF LEGAL SERVICES?

**Recommended Answer:**

1. No.

**Alternatives:**

2. Yes. (This would be comparable to D.C. Rule 5.4)

C. WHAT NAME WILL YOU PERMIT THE LEGAL SERVICES ARM OF THE MDP TO USE?

**Recommended Answer:**

1. If separately organized, the legal services arm of an MDP may use any name it wants, so long as the name is not misleading. See MRPC 7.5. The use of a trade name, (for example, MDP Legal Services Worldwide) is not misleading.

**Alternatives:**

2. The legal services arm is required to use the name of lawyers currently practicing in the firm.
3. The legal services arm need not use the names of lawyers currently practicing in the firm, but use of the MDP's name will be considered to be false and misleading.
4. The legal services arm must use either #2 or #3 above, but is permitted to add a sentence saying that it is affiliated with the MDP firm.
5. An MDP's name must disclose its nature (Compare to Germany, where firm letterhead reveals how the firm is organized, *that is*, whether it is a Wirtschaftsprufer GmbH, Rechtsanwalt GmbH, partnership of the two, etc.)

D. IF THE ABA RELAXES MRPC 5.4, SHOULD IT ADOPT RULES REGARDING LAWYER MAJORITY OWNERSHIP AND/OR CONTROL, OR REQUIRE THE LEGAL SERVICES ARM TO BE A SEPARATE LEGAL ENTITY FROM THE REST OF THE MDP?

**Recommended Answer:**

1. No, see Terry Testimony. (Cf. *Fully-integrated model* listed in the Commission's Hypotheticals.)

**Alternatives:**

2. Yes; for example, a rule might require lawyers to have the majority ownership interest in an MDP. (This would be similar to what is
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required under the German statute creating limited liability partnerships for lawyers.)

3. Yes; for example, a rule might require lawyers to have the controlling managerial interest in an MDP (Cf. Command and Control Model listed in the Commission's Hypotheticals).

4. Yes; for example, a rule similar to that in New South Wales might require lawyers to earn 51% of gross profits.

5. Yes; for example, a rule might allow a law firm to operate an ancillary business that provides professional services to its clients. (Cf. Ancillary Business Model listed in the Commission's Hypotheticals.)

6. Yes, for example, a rule might require the legal services arm to be separate from the MDP. (This would be similar to what is required under the current French rules.) This rule might permit lawyers to share fees or profits with the MDP or might only permit cost sharing. (Cf. Contract Model listed in the Commission's Hypotheticals.)

7. Yes; for example, the ABA might adopt one of the many variations on the above listed on p. 13 of the Consultation Report of the Law Society of England and Wales.

E. SHOULD THE ABA PERMIT PASSIVE INVESTMENT IN A LAWYER-AFFILIATED MDP?

*Recommended Answer:*

1. No

*Alternatives:*

2. Yes

F. SHOULD THE ABA REQUIRE TRANSPARENCY, AND IF SO, WHAT KIND?

*Recommended Answers:*

1. Yes; require disclosure to clients by lawyers; and

2. Recommend to either the Ethics 2000 Commission or a new mega-regulator, consideration of the issue of requiring disclosure of the MDP Agreement.

*Alternatives:*

3. No; there shouldn't be any required disclosure from lawyer to client.

4. No; there shouldn't be disclosure of the MDP agreement.

5. Reformulate the question to specify the types of lawyer-client disclosure required. Possibilities include:

   a. the nature of the MDP firm (or the relationship between firms under the Ancillary Business and Contract models);
   b. identification of lawyers *qua* lawyers on business cards, announcements, etc.;
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c. disclosure of lawyer participation in a particular project *(that is, no Trojan horses)*;
d. the fact that a client who uses one set of services of the MDP (for example, audit) is under absolutely no obligation and will face no penalties if it does not use other services of the MDP;
e. possible compromises to the attorney-client privilege from using an MDP; and
f. the amount of any MDP fee attributable to legal services.

III. IF THE ABA REVISES MRPC 5.4, HOW SHOULD THE “FUNCTIONAL” ISSUES REGARDING AN MDP LAWYER’S “SCOPE OF PRACTICE” BE ANSWERED?

A. SHOULD THERE BE ANY LIMITS ON THE SCOPE OF A LAWYER’S PRACTICE WITHIN AN MDP?

*Recommended Answer:*

1. Yes; if the MDP is organized in such a way that fees among branches are shared and confidences and conflicts are imputed, then a lawyer affiliated with an MDP should be precluded from representing a client if the audit arm of the MDP currently represents the client.

*Alternatives:*

2. Yes; a lawyer practicing in an MDP should be precluded from trying cases in a court, although the lawyer would be permitted to handle discovery and arbitration (Witness Dzienkowski’s proposal).
3. No, there should be no limitations on a lawyer’s scope of practice within an MDP.

B. WHAT IF ANYTHING SHOULD BE DONE WITH RESPECT TO LAWYERS WHO “OPT OUT” OF THE LEGAL PROFESSION’S REGULATORY AND DISCIPLINE SYSTEM?

*Recommended Answer:*

1. Nothing

*Alternatives:*

2. Attempt to find some method of holding these lawyers accountable?
3. Reject any recommended revision to MRPC 5.4 on this basis?

C. CAN OR SHOULD A REGULATOR EFFECTIVELY LIMIT THE “UPL” ACTIVITIES OF NONLAWYERS?

*Recommended Answer:*

1. No (and the ABA should leave the situation and UPL laws as is for the moment).
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Alternatives:
2. No (and the ABA should recommend changes in UPL law).
3. Yes; leave to states to enforce UPL, as currently.
4. Yes; and the ABA should monitor and support UPL prosecutions as set forth in Witness Foonberg’s Resolution 105.

IV. IF THE ABA REVISES MRPC 5.4, HOW SHOULD THE FUNCTIONAL “ETHICS AND DISCIPLINE” ISSUES BE RESOLVED?
A. MUST A LAWYER PRACTICING IN AN MDP OBEY THE LEGAL ETHICS RULES?

Recommended Answer:
1. Yes.

Alternatives:
2. No; the lawyer must use another profession’s ethics rules. No; the lawyer is not subject to any ethics rules.

B. SHOULD NONLAWYERS IN AN MDP USE LAWYERS’ ETHICS RULES?

Recommended Answer:
1. Yes in certain circumstances; the nonlawyers in an MDP should follow the lawyers’ ethics rules when working at the lawyer’s direction on a matter or when necessary for the lawyers to honor their own ethical obligations.

Alternatives:
2. Yes; the nonlawyers in an MDP must always comply with all of the lawyers’ ethics rules, which would be enforceable through discipline of the lawyers in the MDP. (This is the German approach).
3. Yes; in order for lawyers to work in an MDP, the nonlawyers might have to agree to register with the bar and be subject to the lawyers’ ethics rules (See Law Society Report).
4. No; the nonlawyers in an MDP are never required to follow lawyers’ ethics rules, but instead should comply either with the ethics rules of those professionals having a controlling interest in the MDP or their own ethics rules.
5. Maybe; have a megaregulator develop new rules that would apply to an MDP.
6. Maybe; have the professions involved negotiate this.

C. WHOSE RULES PREVAIL WHEN DIFFERENT SETS OF ETHICS RULES WITHIN AN MDP CLASH?

Recommended Answer:
1. It depends (the procedural answer): an MDP must have in place procedures to address the situations in which different sets of ethics
rules clash. But the lawyer might have to take appropriate steps, such as withdrawal, if he or she could not comply with the applicable ethics regulations.

Alternatives:
2. Lawyer’s rules should always take precedence.
3. The “stricter” rules should always take precedence.
4. The dominant professional’s rules should take precedence since those persons have the oversight and liability responsibilities.
5. The ABA could leave this issue silent.
6. A new “mega-regulator” might decide how to resolve such issues.
7. The professions (or some advisory group) should determine this.

D. SHOULD EITHER AN EXISTING OR NEWLY-CREATED ENTITY REGULATE THE MDP ITSELF AND/OR ALL OF THE INDIVIDUALS IN THE MDP?

Recommendation
1. Maybe; the ABA should evaluate whether its goal is to come up with an ideal solution or an achievable solution. If the latter, it must evaluate the political realities on this issue.

Alternatives:
2. Yes; the ABA should establish a federal “mega-regulator” (either for lawyer-auditor MDPs or more generally) on an opt-in basis.
3. Yes; the ABA should establish a federal “mega-regulator” (either for lawyer-auditor MDPs or more generally) on a mandatory basis.
4. Yes; the ABA should establish multiple state “mega-regulators”.
5. Yes; the ABA should require that the MDP be required to register with the Bar, as suggested by the Consultation Paper of the Law Society of England and Wales.
6. Yes; should an existing entity, other than the bar, regulate the MDP itself.
7. No; but the ABA should recommend significant changes in the state systems to permit mutual recognition of licenses; that is, a lawyer licensed in one state can register and then practice in another state.
8. No; but the ABA should recommend changes to fix enforcement problems in the existing regulatory structure.
9. No; no special action is needed.

5. DO LAWYER-MDPS PRESENT SPECIAL ISSUES WITH RESPECT TO MALPRACTICE EXPOSURE OR LIABILITY?

Recommended Answer:
1. Yes:
   a. how would the lawyers’ conflict of interest provisions would operate in an MDP context; and
b. the ABA should seriously consider adopting mandatory malpractice insurance requirements.

Alternatives:
2. Yes; there probably will be difficulties finding an MDP carrier, the ABA should take steps to facilitate such coverage.
3. No:
   a. the ABA should not articulate vision of how the lawyer’s conflict of interest provision would operate in an MDP context; and/or
   b. the ABA should require a mandatory malpractice insurance requirement for lawyers practicing law in an MDP context;
4. No; there are no special malpractice issues.

V. IF THE ABA REVISES MRPC 5.4, WHAT ARE THE THRESHOLD ETHICS PREMISES?

1. IS AN MDP LAWYER’S OBLIGATION TO USE LAWYER ETHICS RULES JUDGED ON A CASE-BY-CASE BASIS?
Recommended Answer:
   a. No; lawyers within an MDP, who are actively licensed lawyers and have not indicated that they are NOT practicing law, should be treated as normal lawyers and be subject to the same regulatory system, ethics rules and discipline system as other lawyers.

Alternatives:
   b. Yes; lawyers in an MDP are subject to the legal ethics rules whenever they provide “legal services” with respect to any given matter.
   c. Yes; lawyers in an MDP should follow the ethics rules of the “dominant” professionals in the MDP, i.e., those with the majority ownership or control.
   d. Yes; lawyers in an MDP should follow the ethics rules of the professional that is, “driving the deal.”
   e. No; lawyers in an MDP are not subject to any ethics rules.

2. SHOULD AN MDP LAWYER’S ETHICAL OBLIGATIONS VARY, DEPENDING ON THE WAY IN WHICH THE MDP IS STRUCTURED?

Recommended Answer:
   a. Yes; the analysis that follows should apply generally to a lawyer practicing law in an MDP context. However, lawyers may choose to provide legal services in a manner that is so separate from the MDP that the analysis will differ; at some point an MDP could approach the Cooperative model listed on the Commission’s Hypotheticals and probably should be treated differently than other “MDPs.”
   (Note: This issue needs significant further development).
Alternatives:

b. No; the ABA should recommend a specified manner in which the ethics rules would apply to lawyers practicing law in an MDP context and this interpretation should not depend on the manner in which the MDP's legal services are delivered. In other words, the model used for an MDP might vary, but the ethics rules would never vary.

c. No; the ABA should recommend a specified and exclusive model by which the MDP may deliver services; accordingly, the ethics rules would not vary because the model used would not vary.

3. HOW SHOULD THE MRPC TERM “FIRM” BE DEFINED WHEN USED IN AN MDP CONTEXT?

Recommended Answer:

a. The fully-integrated MDP should be defined as the entire MDP firm, not just the legal services branch of the MDP firm; and

b. The CMDP must do further study to determine where the line should be drawn if the MDP organizes in a fashion other than the fully-integrated MDP.

Alternatives:

c. Even for the fully integrated MDP, the term “firm” should be defined to include only the legal services branch of the MDP provided that the lawyers take steps to separate themselves in some fashion from the rest of the MDP.

d. The term shouldn't be used; in the MDP context, one should only look at the activities of the individual lawyer in question.

4. DOES AN MDP LAWYER'S DUTY OF CONFIDENTIALITY FORBID GIVING INFORMATION TO NONLAWYERS IN THE MDP?

Recommended Answer:

a. No; the MDP lawyer should be treated like lawyers in traditional law firms. The lawyer is encouraged to keep client information as confidential as possible, is required to keep client information confidential with respect to individuals outside of the MDP firm, but is permitted to share information within the MDP firm in order to assist the lawyer to serve the client.

Alternatives:

b. Yes; the lawyer is required to keep client information confidential even with respect to nonlawyers in the MDP firm unless the lawyer has received informed client consent to such disclosure (that is, a waiver).
5. **IMPUTATION OF KNOWLEDGE: SHOULD WE ASSUME THAT, ABSENT IMPLEMENTATION OF ANY SPECIAL MEASURES AUTHORIZED BY LAW, A LAWYER IS IMPUTED TO KNOW WHATEVER INFORMATION OTHER MEMBERS OF THE MDP KNOW, INCLUDING NONLAWYERS?**

**Recommended Answer:**

a. Yes; absent special steps endorsed by the ABA or applicable law, knowledge possessed by nonlawyers within an MDP firm should be imputed to the lawyers within a firm when analyzing the lawyer’s ethical obligations.

**Alternatives:**

b. No; knowledge possessed by nonlawyers in an MDP firm should not be imputed to the lawyers in the MDP firm for the purpose of conducting an analysis of the lawyers’ ethical obligations.

c. No; provided special steps are taken to put an effective screen in place, knowledge possessed by nonlawyers in an MDP firm should not be imputed to the lawyers in the MDP firm, for the purpose of conducting an analysis of the lawyers’ ethical obligations.

6. **SHOULD WE ASSUME THAT NONLAWYER MEMBERS OF THE MDP HAVE IMPUTED KNOWLEDGE OF THE LAWYER’S INFORMATION?**

**Recommended Answer:**

a. Yes; in devising its recommendations, the CMDP should assume that the nonlawyers in the MDP have had access to the confidential information given to MDP lawyers. In other words, where relevant, knowledge should be imputed from the MDP lawyers to MDP nonlawyers.

**Alternatives:**

b. No; the CMDP should assume that an MDP lawyer’s knowledge will not be imputed to the nonlawyers within the MDP firm.
7. SHOULD THE ABA CONSIDER A NEW MRPC AS A PROMOTING UNDERSTANDING OF, AND COMPLIANCE WITH, AN MDP LAWYER’S OBLIGATION TO EXERCISE INDEPENDENT LEGAL JUDGMENT?

*Recommended Answer:*

a. Yes; a new MRPC covering lawyers practicing in an MDP context would be particularly useful.

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a. Yes; absent special steps endorsed by the ABA or applicable law, knowledge possessed by nonlawyers within an MDP firm should be imputed to the lawyers within a firm when analyzing the lawyer’s ethical obligations.

*Alternatives:*

b. No; knowledge possessed by nonlawyers in an MDP firm should not be imputed to the lawyers in the MDP firm for the purpose of conducting an analysis of the lawyers’ ethical obligations.

c. No; provided special steps are taken to put an effective screen in place, knowledge possessed by nonlawyers in an MDP firm should not be imputed to the lawyers in the MDP firm, for the purpose of conducting an analysis of the lawyers’ ethical obligations.

6. SHOULD WE ASSUME THAT NONLAWYER MEMBERS OF THE MDP HAVE IMPUTED KNOWLEDGE OF THE LAWYER’S INFORMATION?

*Recommended Answer:*

a. Yes; in devising its recommendations, we should assume that the nonlawyers in the MDP have had access to the confidential information given to MDP lawyers. In other words, where relevant, knowledge should be imputed from the MDP lawyers to MDP nonlawyers.

*Alternatives:*

b. No; we should assume that an MDP lawyer’s knowledge will not be imputed to the nonlawyers within the MDP firm.

7. SHOULD THE ABA CONSIDER A NEW MRPC AS A PROMOTING UNDERSTANDING OF, AND COMPLIANCE WITH, AN MDP LAWYER’S OBLIGATION TO EXERCISE INDEPENDENT LEGAL JUDGMENT?

*Recommended Answer:*

a. Yes; a new MRPC covering lawyers practicing in an MDP context would be particularly useful.

*Alternatives:*

b. No; the ABA should not adopt a new MRPC provision covering lawyers practicing in an MDP, either because the CMDP does not
currenty have enough experience to address the issues or because such a rule is unnecessary.

7a. IF THE ABA DECIDES TO DRAFT A NEW MRPC PROVISION TO APPLY TO LAWYERS PRACTICING IN MDPS, WHAT PROVISIONS SHOULD IT INCLUDE?

Recommended Answer:

a. A MRPC provision with the following elements:

1. Have lawyers subject to the legal profession’s existing regulatory and discipline;

2. require clear identification of a lawyer’s role within the MDP (that is, is the lawyer offering legal services or working in a nonlegal capacity?);

3. require consistency in the lawyer’s function within the MDP, i.e., the lawyer should not be able to decide that today I am providing legal services but tomorrow I am not;

4. require appropriate disclosures, including: disclosure to the client of situations in which a “product” provided by the MDP is based on legal analysis or services rendered by the MDP; the nature of the MDP firm (or the relationship between firms under the Ancillary Business and Contract models); the identification of lawyers qua lawyers on business cards, announcements, etc.; and disclosure of lawyer participation in a particular project (that is, no Trojan horses); the fact that a client who uses one set of services of the MDP (for example, audit) is under absolutely no obligation and will face no penalties if it does not use other services of the MDP; and possible compromises to the attorney-client privilege from using an MDP;

5. require supervision and training of lawyers by a lawyer;

6. require evaluation of lawyers’ work by other lawyers;

7. require clearly established lines of authority, so that junior lawyers understand who they report to and so that independence of judgment is preserved;

8. provide clear rules regarding the interpretation of confidentiality, independence, and loyalty requirements in an MDP context (i.e., how should conflicts be evaluated and imputed, etc.); and

9. require a physical situation, including offices, files, and computers, among other things, consistent with the lawyer’s confidentiality, loyalty and independence obligations.

10. transparency, as shown by depositing a copy of the agreement;

11. require a separate legal firm or department;

12. disclosure of possible lesser rights, similar to the “Warnings” discussed in the Consultation Report of the Law Society of England and Wales;
13. disclosure of the amount of any NMP fee attributable to legal services; and/or
14. a provision similar to Pennsylvania RPC 5.7, which requires
application of the MRPC unless the client knows or reasonably should
know that he or she is not receiving the protections of a client-lawyer
relationship. See Laurel S. Terry, Pennsylvania Adopts Ancillary Business
Rule, Vol. 8, No. 1 The Professional Lawyer 10 (Nov. 1996).

Alternatives:
b. No; the CMDP should not recommend a new MRPC provision
covering lawyers practicing in an MDP, either because the CNIDP
does not currently have enough experience to address the issues or
because such a rule is unnecessary.

8. SHOULD LAWYERS IN AN MDP OWE A DUTY OF LOYALTY TO THE
CUSTOMERS OF THE MDP NONLAWYERS?

Recommended Answer:
a. Yes; assuming a fully-integrated MDP, the MDP lawyers should be
viewed as having a duty of loyalty to the customers of the NMP
nonlawyers. Consequently, when analyzing their obligations under
conflict of interest and other rules, the NMP lawyer should take
into account any conflicts of interest arising from the NMP firm’s
representation of customers of the NMP nonlawyers.

Alternatives:
b. No; even in a fully-integrated MDP, the MDP lawyers should not be
viewed as owing a duty of loyalty to customers served by the NMP
nonlawyers. Consequently, when analyzing their obligations under
conflict of interest and other rules, the MDP lawyer need not take
into account conflicts of interest with customers served by the
MDP nonlawyers.
c. the nature of the MDP firm (or the relationship between firms
under the Ancillary Business and Contract models);
d. identification of lawyers qua lawyers on business cards,
announcements, etc.,
e. disclosure of lawyer participation in a particular project (that is, no
Trojan horses);
f. the fact that a client who uses one set of services of the MDP (for
example, audit) is under absolutely no obligation and will face no
penalties if it does not use other services of the MDP;
g. possible compromises to the attorney-client privilege from using an
MDP; and
h. the amount of any MDP fee attributable to legal services.