TERRY APPENDIX B7: SUMMARY OF CMDP PUBLIC HEARING TESTIMONY
Prepared by Prof. Laurel S. Terry, Penn State Dickinson School of Law, ©1999*

	Terry Cone: Cleary, Gottlieb, Steen & Hamilton	**Richard Spivak: Arthur Andersen Tax, North America**	**Richard Miller: General Counsel, AICPA**	**Bernard Wolfman: Harvard Law School**
Threshold Issues	Threshold Issues	Threshold Issues	Threshold Issues	Threshold Issues
A. Standards used in evaluating the MDP issue:	Remember fiduciary nature of lawyer-client relationship. Rules exist to protect clients; not there for the convenience of lawyers.	Public interest and client protection are the primary interests that regulation should protect.		Public interest (not sloganeering about 1-stop shopping, who is eating whose lunch, or pressures brought by self-interested lobbying).
B. Core Values to Protect?		Values of CPAs & lawyers are similar; both take seriously duties to maintain public confidence and trust, and enforce codes of conduct. There's no serious disagreement here, thus focusing on them is only a distraction from the central issue, which is how to meet consumer demand and still protect clients and the public.	*Cf.* CPA core values are similar to lawyers' values: competence, confidentiality, integrity, conflicts. (They have changed their rules to meet the changing market.) Core values of lawyers won't be threatened by MDPs.	Competence, confidentiality, loyalty & service toward improvement of the law.
C. Same rules for Main & Wall St. lawyers? relevant to both?			Yes. To ?, agreed that the small CPA & law firms probably will be the driving force behind these.	
D-E. Burden of Proof?				

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Threshold Issues	Threshold Issues, p. 2	Threshold Issues, p. 2	Threshold Issues, p..2	Threshold Issues, p.2
F. Is there client need or demand for MDPs?	*Cf.* To ? about clients' desires for MDPs & AARP witness, said he doesn't think *Model 5* MDPs will cure the ills of society, and they will create more problems. To ? about client demand from more than just AARP, said he worries that lawyers will seize upon MDPs as an excuse for dumping rules that aren't convenient to follow. But rules are not there for the convenience of lawyers, but to protect clients.	Yes. Problems now involve legal, financial, business dimensions. Clients want professionals with all these skills; lawyers alone don't have all these skills. Ad hoc teams exist today to meet these market demands. MDPs, rather than ad hoc teams, are necessary for efficient & effective integration & delivery of services. MDPs provide good leadership & accountability to clients. With MDPs, communication & sharing info is easier. To ? about how the CMDP can know there is client demand, he said look at what the law firms have done. For the firms that joined the AA network, it was a big change. They wouldn't have done it if they thought their clients would leave them. They talked to their clients & *then* they joined the AA network. Also, Am. Corp. Counsel Assoc. (ACCA) & ABA Solo § have endorsed MDPs.. Weber reflects views of many. Not all consumers want it, including ours. But the issue is choice.	CPAs tend to have an ongoing relationship with their clients & they know about changes in their clients' lives. It's typical for a CPA to suggest that a client see a lawyer to get a will, etc. But the CPA has the same conversation the following year because the client hasn't done so. Clients avoid lawyers & want their CPAs to draft legal documents. When they decline, as they do, these clients often go to legal forms or to a computer program, such as Quicken. This avoidance of lawyers by clients isn't helping anyone. CPAs want to be able to be in a relationship with lawyers. Think about how many areas in which it would be good to have a lawyer partnered with a nonlawyer. To ? about how he knows that clients want this, said that his evidence was anecdotal. CPAs are more entrepreneurial than lawyers. They see that clients want this service.	A recent article in *The Economist* reported on a survey of 100 large corporations in Britain. They overwhelmingly want separate law firms.

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Threshold Issues,	Threshold Issues, p. 3	Threshold Issues, p. 3	Threshold Issues, p.3	Threshold Issues, p.3
G. Are US MDP lawyers & non-lawyers offering what would be called legal services if done in a law firm ?		AA's hiring practices in U.S. haven't changed significantly in the last 25+ years: 15% hired in 1971 were lawyers, it's about the same % or less now. They do the same thing as nonlawyers; both act pursuant to federal & state authority so not UPL. Only go to court if authorized. AA policies prohibit lawyers from practicing law. They don't prepare legal documents, such as wills, trusts, articles of incorporation. Don't hold selves out as offering legal services; don't use JD or esquire. Thinks testimony about lack of resources in TX is rumor, etc. TX UPL C'ee decided it didn't have enough evidence to proceed - that's how fact finding should work. Use facts not rhetoric.		The practice of law & practice of tax have always been blurred & will remain so. But to ?, said no such thing as *the practice of tax*; *tax* is an adjective & needs a noun. Explained history of tax practice and how it came about that CPAs provide tax advice. Says lawyers got involved because CPAs lacked the fundamental legal education & training that are essential in order to address more than the income tax basics; *i.e.* the judicially imposed, pervasive statutory glosses, legislative history & an understanding of judicial precedent, particularly since court decisions both governed & conflicted. Until recently, there was a workable common understanding of what things both could do, & what things should be separate domains. But things have now changed. CPAs are doing things that previously only lawyers did. Some Big 5 now have their lawyers represent clients in Tax Court; also giving complex advice they didn't previously do.
	Terry Cone	**Richard Spivak**	**Richard Miller**	**Bernard Wolfman**
Threshold Issues	Threshold Issues, p. 4	Threshold Issues, p. 4	Threshold Issues, p.4	Threshold Issues, p.4

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H. Personal knowledge of MDPs causing problems?		*Cf.* Those who oppose fee-sharing say it will harm the client, but have little evidence to back up these claims. There's ample evidence to the contrary; his firm has MDPs outside the U.S. & clients have benefitted, & not been harmed. In 28 years in U.S., he's never seen a client confused about privilege.		

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FORMS OF ASSOCIATION	Forms of Assoc. Issues	Forms of Assoc. Issues	Forms of Assoc. Issues	Forms of Assoc. Issues
A. Any limits on who can join an MDP?		To ?, said AA tries for consistency in services, although diversity in backgrounds. (*E.g.* architects, engineers, lawyers, etc.) He did not advocate a particular rule here.	*Cf.* To ?, said that the AICPA itself did not try to define who can be in an MDP. A number of states have statutes on incompatible occupations. E.g., California's § says that you can't have an MDP with someone if it impairs impartiality, objectivity or creates a conflict. He would focus on relationships that would harm the profession's core values. *E.g.*, they eliminated AICPA rule forbidding CPA/Broker partnerships, finding the rule on objectivity sufficient regulation. They even were sued by some members on this issue & won. He sees the towtruckdriver hypo as more of a business judgment, so long as core values not affected.	
B. Is the MDP purpose limited to giving "legal services"?	If this is not done (*i.e. Models 1, 2* are *4* are rejected), then more extensive rule-making becomes necessary.			
C. What is an acceptable MDP Name?				

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FORMS OF A.	Forms of Assoc., p.2	Forms of Assoc., p.2	Forms of Assoc., p.2	Forms of Assoc., p.2
D. Any requirement for lawyer majority ownership or control, or a separate legal entity?	Arguments can be made for *each of CMDP Models 1-4;* the choice depends on comparative weights given to claimed MDP benefits & the rules governing the lawyer-client fiduciary relationship. He does NOT favor *Model 5:* supporters underestimate problems of implementation. Legal ethics are premised on the training & competence that comes from lawyer-owned/controlled firms. The rules lose their meaning if taken out of context, *i.e.* the common law of legal practice in law firms & the fiduciary nature of that relationship. Ernst&Young said to focus on the lawyer not the organization; NY's trend is to the contrary, *see* law firm discipline. This also flies in the face of NY law. *Model 5* issues include imputation of conflicts, atty-client privilege, competence & independence. *Model 2* is simple*; Model 3* has problems (some listed); Hellwig cited some *Model 4* problems; he lists others. To ? about having a *Model 5* legal division, said it's bad; people who ultimately will be in charge aren't lawyers.	*Model 4* doesn't go far enough. But the issue isn't seamlessness as Witness Cone stated. Rather, it's the same issue as when a law firm decides to open a branch office, rather than relying on another law firm. The risk & return of profit-sharing fosters shared values and the promotion of standards to protect against risk. Domination isn't consistent with being partners. *Model 5* is more responsive. If you adopt *Model 4*, the focus will just be on the contract & it encourages complicated arrangements about fees and promoting form over substance. Skeptics say that money will flow. But we want the money to flow because that's what minimizes risk. *Model 5* has transparency, which promotes atty independence. To ? about why CPA rules require majority interest if not needed to maintain independence, said ownership requirement is historical. The change from 100% to 50% is appropriate & trend is to regulate the function (*e.g.* only auditing requires 50%.)		If he were writing on a clean slate, he would prefer *Model 1.* He strongly opposes *Model 5*, even if the MDP has a separate legal department. If the MDP owns the law firm, the financial interest will affect everything. Having a separate legal division doesn't change the reality of a financial interest unless the lawyers control the MDP, but this isn't possible under CPA rules. *Models 2-4* all have seeds in them that could be developed to protect lawyers' core values. He thinks *Model 4* is distinguishable from *Model 5*'s financial interest because he assumes that *Model 4* involves a *nonexclusive* affiliation agreement.

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FORMS OF ASSOC. P. 2	Forms of Assoc. , p. 2	Forms of Assoc. , p. 2	Forms of Assoc. Issues, p. 2	Forms of Assoc. Issues, p.2
E. Is passive investment permitted?			To ?, responded by saying *the fear of Sears*. In an ideal world, you would do what is in the public interest. You would ask whether this kind of ownership relates to independence & compliance with ethical rules. He originally filed a brief against American Express ownership of accounting firms. But then the AICPA board asked why they were doing this. He asked Florida for empir-ical evidence. He doesn't worry about this issue now, but understands process may be political.	
F. Transparency requirements? or other limitations?	To ?, said if *Model 5* were adopted, he would want disclosure to clients of who they are dealing with, etc. To? about whether MDP clients should be told about risks to atty-client privilege & loyalty, said clients often don't give informed consent because they just focus on doing the deal.	Asked about the Paris Bar requirement that the *Model 4* agreement be deposited with it (in order to check *inter alia* if and how money is being sent upstream), he said that *Model 4* doesn't go far enough. Also said that *Model 5* promotes transparency because people aren't focusing on form over substance or drafting complicated contract agreements.		

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SCOPE OF PRACTICE	Scope of Practice Issues	Scope of Practice Issues	Scope of Practice Issues	Scope of Practice Issues
A. Any limits on an MDP lawyer's scope of practice?				Yes. Although the SEC is studying the conflicts raised by Big 5 firms doing audit & consulting for the same client, the CMDP should address this & give serious consideration to such a ban.
B. Would MDP lawyer *opt out*?		If all AA lawyers now giving tax advice were required to join the MDP law department in order to give tax advice, he thinks many would turn in their law licenses or go inactive because they don't seek to create a client expectation that they are practicing law. To ?, said that if a lawyer is in the audit section, it's easier to give up his law license. It's a tougher issue for a lawyer in the tax section because that person might want to do things similar to what lawyers in law firms do. They may want to be recognized as practicing law to get the marketing benefit, to get the privilege and because of the ABA.		
C. Can a regulator be effective re UPL activities of non-lawyers?				

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A Functional Analysis Ethics	Functional Ethics Analysis	Functional Ethics Analysis	Functional Ethics Analysis	Functional Ethics Analysis
A. Must MDP attys obey legal ethics rules?		*Cf.* Situation today is that AA lawyers don't hold selves out as practicing law and are not governed by the legal ethics rules governing client relationships. Today, clients don't have the expectation that they are getting legal services. If MRPC 5.4 is changed, lawyers should be subject to ethics rules only when they create a client expectation that they are practicing law. (Thus, to avoid confusion, should group lawyers together in a law department. Not all lawyers would have to practice in the law department.) To ? about whether being a lawyer by definition creates client expectations, he said it's a good question & needs to be dealt with effectively. (It's not an issue today since AA doesn't provide legal services.) He sees 2 choices: put all lawyers in the law department, or do something more complicated administratively, such as engagement letters & making crystal clear who is providing legal services & who isn't.		Implicit: Yes.
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Functional Ethics	Functional Ethics, p.2	Functional Ethics, p.2	Functional Ethics, p.2	Functional Ethics, p.2

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B. Whose ethics rules should MDP non-lawyers use?	Lists this as one of the "complications" of *Model 3 (which might be avoided by using Model 4).* To ? about how to make *Model 5* more acceptable, said you need an authority with teeth, e.g. courts. But he doesn't favor a new "big brother" enforcer.	Nonlawyer licensed professionals are regulated by their own licensing authority & face discipline. They shouldn't be subject to additional regulation because of the entity in which they practice. (E.g. lawyers wouldn't be happy being regulated by doctors.) Unlicensed professionals are regulated through liability system & diminished reputation (this also would regulate lawyers who opt not to join the "legal department" of an MDP.) In addition, most codes hold the licensed person responsible for those acting under his supervision or control.	*Cf.* To ?, said that nonregulated members in CPA firms are not subject to the accounting rules. AICPA has struggled with this issue. But the regulate individuals, not firms. But a CPA who does not adequate supervise may be subject to discipline for actions of a non-CPA. Thinks the business risks to the firm will help regulate this. To ?, said that CPAs can be a fiduciary, depending on what he is doing. He will not be a fiduciary if he's acting as an auditor or there is an independence requirement. But, for example, if he is in control of the checkbook, as in the Entertainment industry, he is a fiduciary.	To ?, said that nonlawyers should be subject to lawyer discipline. The CPAs who want lawyers in the firm could agree to subject themselves to the lawyer rules.
C. What happens when ethics rules clash?	Lists this as one of the "complications" of *Model 3 (which might be avoided by using Model 4)*.			To ?s, made it clear that imputation rules should apply to the entire MDP firm.

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Functional Ethics	Functional Ethics, p.3	Functional Ethics, p.3	Functional Ethics, p.3	Functional Ethics, p.3
D. Was or should a new entity be created to regulate the MDP?	Endorses NY law firm discipline approach; wants something similar for MDPs to ensure lawyers discharge responsibilities to public & legal system. Doubts whether *Model 3* provides an effective forum for grievances. Does not like the idea of a new *Big Brother* enforcer, but may need it if *Model 5.* To ?, said law firms better self-enforcers of rules than *Model 5* legal division would be. Lawyer-managers understand the fiduciary relationship.	He does not agree with those who recommend discipline of law firms & integrated service firms [MDPs]. Except for NY, state regulation does & should focus on the individual lawyer. The MDP is effectively regulated through liability & reputation. To ? about NY rule, said other states haven't adopted it & so it's not clear it's a trend & they may have decided it is not appropriate. Thinks AA intra-firm regulation is quite effective & more than law firms have. To ?, agrees that MDP would be subject to whatever rules apply to lawyers in NY. A rule requiring lawyers in the MDP to adhere to their own rules wouldn't be anything new for AA; they do that already for other professionals.	Asked to comment on NY's firm discipline system, he said that he doesn't know why regulators should be in the ownership business. He doesn't know why one should regulate firms since one can regulate the individuals. Also said regulators shouldn't try to regulate everyone & that the liability system is an effective regulator.	To ? about periodic audits of MDPs by regulators, said that a penalty on the law department, if large enough, would affect the MDP. Then asked, why not just penalize the entire integrated firm? To ? about the nature of the penalty, said that if the MDP is integrated, then the nonlawyers should be subject by law to those enforcing legal ethics. A penalty that the MDP could not practice law would be severe.

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Functional Ethics	Functional Ethics, p.2	Functional Ethics, p.2	Functional Ethics, p.2	Functional Ethics, p.2
E. Any unusual malpractice liability issues?				

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Threshold Ethics Premises	Threshold Ethics Premises	Threshold Ethics Premises	Threshold Ethics Premises	Threshold Ethics Premises
1. Is an MDP lawyer's obligation to use lawyer ethics rules judged on a case-by-case basis?		Implicit: No. To ? about holding out, & determining when an MDP lawyer must use the legal ethics rules, he arguably suggested that this decision is made on a permanent basis, not a case-by-case basis.		
2. Can an MDP L's obligations vary based on its structure?				
3. How should the MRPC term "law firm" be defined in an MDP context?	Conflicts should be imputed to the entire MDP; good policy reasons exist for current conflicts and imputation rules.	*Cf.* From the perspective of the AICPA rules, imputation should extend to the entire MDP firm, including the legal department.		
4. Does an MDP L's duty of confidentiality forbid giving info to nonLs?		*Cf.* A CPA may only disclose confidential information within the firm on a *need to know* basis.		
5. Should knowledge be imputed from MDP non-attys to MDP Attys		*Cf.* To ?, said that in determining AICPA *direct adversity*, he would impute to entire MDP firm. Thus, absent consent, lawyers could not take on a matter that was directly adverse to nonlawyers' client. To?, said this was also true for lawyers' conflicts rules.		Imputation must operate on a MDP firm-wide basis. It's inevitable that 1 MDP partner may hesitate to *trash* the work of another MDP member, especially if such comments might appear in an opinion & harm the MDP firm's reputation.

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Threshold Ethics Premises, p.2	Threshold Ethics Premises, p.2	Threshold Ethics Premises, p.2	Threshold Ethics Premises, p.2	Threshold Ethics Premises, p.2
6. Should knowledge be imputed from MDP lawyers to nonlawyers?		When asked a follow-up question, again said that in determining AICPA *direct adversity*, he would impute to entire MDP firm. Thus, absent consent, nonlawyers could not take on a matter that was directly adverse to a lawyer's client. In other words, he'd impute to the entire firm where there is *direct adversity*.		
7. Should there be a new rule for MDP lawyers? (Cf. MRPC 1.13)				
8. Does the MDP L's loyalty duty mean MDP non-Ls use this rule?	*Cf.* To ?, said he was criticizing firewalls on loyalty grounds, rather than confidentiality. Distinguished securities industry as not having a fiduciary duty to client (& that Big 5 didn't understand this. E.g. a lawyer can't just withdraw when he wants. He later amended answer to say his firewall objection is based on both loyalty & confidentiality.			

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Comments about Specific Ethics or MRPC Provisions	Specific Ethics Rules	Specific Ethics Rules	Specific Ethics Rules	Specific Ethics Rules
1. Duty of Confidentiality	*Cf.* E&Y is wrong when it says atty-client privilege runs between the lawyer & client, not the firm & client. *E.g.* law firm response to auditor letters. E&Y's comment ignores reality & puts the privilege at risk. To shift privilege to the individual lawyers would allow MDPs to become a device for destroying privilege. To ?, said he doesn't think firewalls work in protecting info.	*Cf.* In his *Law Department Model MDP*, he would expect attorney-client protections to attach to communications with lawyers in this department. To ? about frequency of sanctions for conflicts & confidentiality errors, said he disagrees with Cone that firewalls aren't effective. AA often uses them & he doesn't know of one case of discipline or liability because of a failure. Caselaw Cone cited shows that there is a remedy available should there be a failure. To ? about what happens if repeated violations of confidentiality rules by a CPA in an MDP, said the CPA could have his license revoked. Also said that a CPA's duty of confidentiality is stronger than a lawyer's because disclosure is limited to those who need to know.	To ? about clash between lawyers' fiduciary duty of confidentiality & auditor duty to public, he said that auditors don't disclose client confidences. They are under the same duty of confidentiality as lawyers. To ? about law firm audit letters that are carefully crafted to conceal confidences, he said that maybe the auditor should look at the conflict & not accept a letter from a lawyer in the firm; thought this was a decision that could be made as the case evolved.. Thinks these kinds of issues will be worked out in practice, not in the rules. He also mentioned that the Independence Standards Board (ISB) is considering this issue. To ?, said he doesn't know what CPA firms with lawyers tell their clients about limitations on privilege. There is no standard practice & no rule on point.	Accounting firms view confidentiality differently than do lawyers; *see Prince Jefri v. KPMG.* The court's reasoning is persuasive. KPMG's arrogant & aggressive demand that it be trusted to protect client info is instructive. Screens can work in limited circumstances, but must be the exception to the rule & carefully delineated. Since the Big 5 are as few & powerful as they are, the standards for confidentiality cannot be turned over to them.

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Specific Ethics	Specific Ethics Rules, p.2	Specific Ethics Rules, p.2	Specific Ethics Rules, p.2	Specific Ethics Rules, p.2
2. Conflicts of Interest & imputation	Re E&Y comment that imputation rules be changed: 1) there isn't an information problem in large internat'l firms, as E&Y said; 2) firewalls have problems, as quoted authorities show. Current rules are long-standing & firms deal with them well. If MDPs are permitted, impute to the entire MDP; don't give MDPs a special rule. If CMDP is thinking about a change, do more analysis of benefits to public & legal system. Asked if it wasn't good for clients to have choices, at least where direct adversity & Big 5 also impute, Cone said 2 of Big 5's written remarks are inconsistent. Also he worries about situations where you cannot tell the client details of the conflict because it would compromise L's duty.	Cites the imputation rule as one of two changes needed in order to permit MDPs (observing that wholesale radical changes to MRPC are not required.) Thinks MDPs can manage lawyer conflicts rules provided the bar relaxes the conflicts & imputation rules to some degree. For *direct adversity*, AICPA rules are similar to bar rules in that they impute the conflict to the entire firm. The AICPA rules differ in that all *direct adversity* conflicts are consentable. (But they can't always get consent to disclose the conflict.) He asks the bar to adopt this AICPA approach. AICPA rules do not impute *indirect conflicts* to the entire firm. He sees no reason to do so when the clients are not directly adverse in the same matter. AICPA rules regulate the individual & we haven't found that 1 person's duty is compromised because another person in the firm represents a client on an unrelated matter, adverse to the firm client. MDP clients would never be *required* to use MDP lawyers.	To ?, said that CPAs don't have the same limitations on withdrawal as do lawyers. But on the other hand, they have contracts & a culture in which they honor their commitments. But the *hot potato client* issue would be treated as a business matter, not an ethics issue. He doesn't see withdrawal rules as creating a problem for integrating lawyers & CPAs & doesn't see this as creating a clash of rules. He does not know what CPA firms with lawyers in them tell their clients about conflicts of interest. There is no standard practice & no rule on point. As far as he knows, the firms do not tell their clients that they can take on all comers. To ?, said he'd seen virtually no complaints to disciplinary authorities about conflicts of interest; the issues are most significant in a liability context. To ?, said that even in situations in which the AICPA rules do not require imputation, the courts may impute under agency law. Thus, as a business matter, CPA firms may choose to impute indirect conflicts.	Refers to the *Peoplefeeders* case and asks whether Andersen's conflict of interest in trying to defend the advice it gave to the taxpayer may have resulted in incompetent representation before the Tax Court by lawyers working for that firm. Conflicts can occur between clients & between the firm & a client. He cannot imagine a conflicts system without firm-wide imputation. He does not accept a reality in which 1 partner can oppose a client of another partner, without it having an effect. If nothing else, a partner would want to avoid publicly embarrassing another partner. Mentions audit-consulting for the same client as an example of a conflict (*see* Scope of Practice §) & conflicts when the firm has sold a client a financial "product" with alleged tax benefits & then firm lawyers contest the IRS disallowance. The sale of *products* is a major problem; education may help, but a great deal is in jeopardy.

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Specific Ethics	Specific Ethics Rules, p.3	Specific Ethics Rules, p.3	Specific Ethics Rules, p.3	Specific Ethics Rules, p.3
3. Rules regarding competence	Current rule has meaning because lawyers & firms are controlled, managed & led by lawyers whose reputation & standing depend on ability to judge competence. This is uniquely a lawyer role. Rule would be eviscerated if lawyers weren't ultimately responsible for judging this.	*Cf.* He describes AA's voluntary efforts to establish firm-wide procedures to achieve & maintain the highest standards of professional conduct (*e.g.* CLE, outside audits, formal mentoring, risk management by non fee-earners). He could envision a rule requiring all MDPs with legal services to certify periodically that they provide this kind of training & support.		Lawyers won't lose their original education/pedigree by working for a Big 5 firm. But a lawyer's education is a continuing one that occurs not just through CLE, but by working with other lawyers active in different fields. He doubts whether a tax lawyer in a Big 5 firm will recognize a law link to another field, particularly new ones, or have resources available to him, as a lawyer in a full service law firm would. *Cf.* This may be why tax boutique law firms have not thrived. To ?s, said his concern is diminished if Big 5 take over a big law firm & that it's difficult to write idea in a rule. His work with Big 8 during the tax shelter abuse years suggests Big 5 want a *one size fits all* solution & aren't sensitive to factual nuances. The *mass production* approach, rather than tailoring work to a client's needs, showed him the low competence that can exist. The Big 5 pressure to create *products* shows the same problems exist now. *The Peoplefeeders* case also raises competency concerns.

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Specific Ethics	Specific Ethics Rules, p.4	Specific Ethics Rules, p.4	Specific Ethics Rules, p.4	Specific Ethics Rules, p.4
4. Other Rules or measures for Maintaining Independence & Supervision	In *Model 3,* lawyers should not be subject to control of the entities collaborating with the MDP; if *Model 3* is used, draft the rule to avoid the *Trojan Horse.* Also take into account lawyer-nonlawyer economic relationships. Hellwig explained some *Model 4 risks; be careful about control. Model 5* creates problems for training. To ?, said in-house attys are different because they have only 1 client, who is in a position to fend for itself. *In-house L's* also don't have to reject cases because of conflicts. MDP clients are different because they can't protect themselves. To ? About whether nonlawyers already have significant influence in law firms, said he doesn't accept that; lawyers are still in charge.To ?, said if *Model 5* adopted, he'd want training & support to foster independence & profess-ionalism & extract lots of promises. But enforcement is difficult.	In his *law department MDP Model*, lawyers would report to & be supervised by a lawyer in the law department. To ? about how AA maintains lawyer independence in non-US MDPs, said AA respects it. *E.g* .Dundas & Wilson has been around for 300-400 years & isn't worried about nonlawyer dominance. This is a common fear but record shows no evidence of judgment being impaired. To ? about lawyers' status within the MDP, said that it isn't accurate that nonlawyers would control lawyers & wouldn't share lawyer values. He was on AA Board every year but one between 1989-98. They respect each other. You won't keep people working there if they feel dominated. They did that previously & learned not to. To ? about Friedman's MDP audit idea, said there is much that is appealing. The SEC requires peer review. But he doesn't want different rules for MDP lawyers. If premise is impaired judgment, other situations have similar risks. Maybe ok tho since new area.		If Big 5 absorb or own law firms, CPAs will dominate by numbers & power. Lawyers will be under the control of Big 5 owners who too often have shown themselves unfettered by lawyers' standards of professional conduct, aspirations & traditions, including the obligation to speak out for law reform. To ? about what would be necessary under *Model 4* besides MDP imputation, said he worries that unlike Miller & Chavlier, most affiliations are not public. A lawyer in an MDP must be free to go to another CPA. If lawyers don't control legal services, there is necessarily an erosion of legal values. It's inevitable that the financial ownership will affect these values. To ?, said that although large law firms also have an interest in making a living, lawyers' traditions are higher & better than others': *e.g.* firm wide confidentiality & conflicts. Lawyers are willing to put client interests above own. Big 5 resistance to imputation says it all.

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	Terry Cone	**Richard Spivak**	**Richard Miller**	**Bernard Wolfman**
Specific Ethics	Specific Ethics Rules, p.5	Specific Ethics Rules, p.5	Specific Ethics Rules, p.5	Specific Ethics Rules, p.5
5. Pro Bono Rules	Current rules reflect substantial legislative, judicial and professional experience on many topics, including providing legal services *pro bono publico.*		To ?, said that CPAs' commitment to *public interest* is different than public service and different than the lawyer's *pro bono* obligation. Instead, it's a requirement to serve with integrity and objectivity. He notes, though, that most CPA firms have, as a private policy, a commitment to public service. He disagreed that CPA & lawyer cultures differ; believes lawyer aspira-tional *pro bono* does not show a cultural difference.	*See* Miscellaneous section below for comments about law reform activities.
6. Client Money Rules, including security funds				

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	Terry Cone	**Richard Spivak**	**Richard Miller**	**Bernard Wolfman**
Specific Ethics or Rules, p. 6	Specific Ethics Rules, p. 6	Specific Ethics Rules, p. 6	Specific Ethics Rules, p.6	Specific Ethics Rules, p.6
7. Fee Rules	Purpose of no fee-sharing rule is to safeguard independence. Cited NY lawyer-fiduciary case that talked about subtle influence; MDP influence would be anything but subtle. MDP owners might have different objectives than the fiduciary duty owed to a client. Doesn't think MDPs would change client billing; he expects MDP clients will pay an itemized legal bill, just as they do today. Even with *Model 4,* there are difficult issues of how the captive law firm would bill services, share fees, and share profits.	The fee sharing rules (along with the conflicts-imputation rules) is one of the two rules that must be changed in order to permit MDPs. Despite claims to the contrary, he doesn't think that evidence shows that fee sharing harms the client, impairs the lawyer's professional judgment or leaves the client without an effective remedy.		
8. Advertising-Marketing Rules				

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TERRY APPENDIX B7: SUMMARY OF CMDP PUBLIC HEARING TESTIMONY
Prepared by Prof. Laurel S. Terry, Penn State Dickinson School of Law, ©1999*

	Terry Cone	Richard Spivak	Richard Miller	Bernard Wolfman
Miscellaneous	His expertise includes 40 years practice (25 in NY, 10 in Paris.), experience negotiating cross-border legal practice agreements & laws, & treatise authorship. Another *Model 3* problem, not listed above, is how can the Bar determine what services the MDP should offer if it is not limited to legal services? He sees the NY law firm discipline rule as merely codifying common law. Thus, Big 5 proposal to put responsibility only on the lawyer not the organization would eviscerate NY common law. (His heart also goes out to the hapless MDP lawyer in a firm owned by nonlawyers.) A Big 5 rep. said yesterday that *Model 4* is undesirable because one can't provide seamless services. But the legal system, the atty-client privilege & the adversary system *aren't* seamless & aren't conducive to this. *Seamlessness* shouldn't be the paradigm. To ? about how to deal with reality of UPL & lack of enforcement, said CMDP shouldn't talk as if it's inevitable. MDPs may implode, *see* Archibald firm.	To ? about how AA MDPs outside U.S. work, he said it depends on the country & the nature of its regulations. They use *Model 4* in some countries. To ?, said that if a conflict is not handled properly, the team leader could suffer penalties ranging from a reduction in income up to dismissal. In addition, if it is a rule violation, that person will be subject to discipline. To ?, said he reads *Prince Jefri v. KPMG* case as involving a *defective firewall.* There was a bad process - case doesn't go to the value of firewalls, but defective implementation of a firewalll. To ?, said MDP lawyers in the MDP Law Department would have to use the existing lawyer conflicts rules, but he wasn't familiar with some of the rules cited to him. To ?, said they'll adhere to existing rules, thus necessarily would accept something less than *Model 5.* Understands political realities & difficulty of change. But also thinks legal profession shouldn't act based on lack of information. Objective is transparency. Categorical prohibition is the worst thing.	AICPA has about 340,000 members: 40% are in private practice, 60% in gov't & industry. Most work in firms of 10 or fewer. 70 % of the public has a favorable view of CPAs. Pace of change is geometric. Explains AICPA *Vision Project* & the decision to change those AICPA rules that weren't necessary to protect core values. It chose to regulate individuals not firms. To ?, talked about how rules are changed. Ownership requirement has gone from 100% to 66% to 50%. Only applies if they do attest or call themselves a CPA firm. Many CPAs now practice in firms that do not hold selves out as CPA firms; rules are in looseleaf form because they'll change again. Gave an exam-ple of a CPA sharing space with a lawyer & providing back office services. The bar examined the arrangement & it passed muster. The law firm has grown to 5 lawyers & could be 10 if there was someone to run it. The CPAs & lawyers are not happy; they lack synergy. They want to be able to have an economic tie, a seamless web, sharing of risks & quality control.	His background includes 15 years in practice, including 2 years as Managing Partner, 35 years as a tax law & policy professor, at Penn & Harvard. He maintains an active consulting practice with law firms, sometimes accounting firms, sometimes clients directly. He has consulted on tax policy with the U.S. Treasury Dept, written books on tax policy & ethics, been active in the ABA. He's also been an expert witness for & against 7 of former Big 8 firms. One of his concerns is impact of MDPs on lawyers' long & worthy tradition of contributing to improvement of the law & law reform. Cites the example of ABA Formal Opinion 346, which helped reform the abusive tax shelter practice, but to which the AICPA dragged its heels. Lawyers speak out on issues, e.g. NY Bar; the AICPA Tax Division Commentary has not been of that class. Amalgamation of law firms into the Big 5 won't serve the country well if, as he fears, it leads to a diminution or end to the lawyer's role in public interest.

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BOTTOM LINE ADVICE TO CMDP	*Model 5* is bad. The CMDP should recommend a model in which the legal profession has the responsibility to maintain professional standards and remains in control, in order to enable them to discharge that responsibility. Three arguments for *Model 1 (status quo):* 1) changes would be extensive & might be adverse; 2) current rules are grounded in generations of experience, although updated to reflect today's realities. Don't reject this wisdom because of slogans like "one-stop shopping" or because lawyers don't want to obey the rules; 3) be skeptical about the claim that MDPs will be cheaper. In short, need legal services delivered to the public to be rendered by firms owned, controlled, managed & led by lawyers.	Urges changes to RPC 5.4 to permit MDPs. Sees this as an evolutionary, not a revolutionary change. MDPs won't be the death knell to core values of lawyers; just need a change in fee sharing rule and imputation rule.	The AICPA has learned that it has to react to the marketplace. These lessons should also have value to the legal profession. It is important to examine the profession's core values; it a rule is not necessary in order to protect the core values, then the profession should be willing to change it in order to respond to the market. The cost of not responding is failure and irrelevant of the profession.	If he were king & could reverse recent history without harming innocents, he would urge adoption of *Model 1* (the status quo.) Since he can't, he recommends that the CMDP at least stop *Model 5*. With proper safeguards, with firm-wide imputations to assure competence, confidentiality & loyalty, with assurance that lawyers are in control of the firm & likely to foster traditional standards & traditions with respect to a lawyer's obligation to work for the improvement of the law, it may be possible to develop rules to permit greater CPA-lawyer affiliation. The seeds may be there in *Models 2-4*.

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