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# Cautionary Tale from the Multidisciplinary Practice Debate: How the Traditionalists Lost Professionalism, A The Phyllis W. Beck Chair in Law Symposium: New Roles, No Rules - Redefining Lawyers' Work - Redefining Lawyers' Work: Multidisciplinary Practice

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# A CAUTIONARY TALE FROM THE MULTIDISCIPLINARY PRACTICE DEBATE: HOW THE TRADITIONALISTS LOST PROFESSIONALISM

*Russell G. Pearce\**

I dreamt I was in one of the nightmares Lawrence J. Fox, former chair of the American Bar Association Committee on Ethics and Professional Responsibility, and currently Visiting Professor at Cornell Law School, has so articulately described in his writings and presentations.<sup>1</sup> In the dream, I was in the year 2010 at the convention of the National Association of Multidisciplinary Professional Firms<sup>2</sup> (the “Association”). I had just finished making a presentation on the topic, “How Can We Reconcile Our Pursuit of Profits With Our Responsibility to Promote Justice?” My presentation was part of this year’s “Aaron Feuerstein Program” of the Association’s Legal Services Section. It had become common in the twenty-first century for business organizations to feature “Aaron Feuerstein Programs” to explore their responsibility to the common good in their business operations. The programs honor the example of Aaron Feuerstein, owner of Malden Mills, the largest employer in Methuen, Massachusetts.<sup>3</sup> When a fire destroyed most of the Malden Mills facility in 1995, Mr. Feuerstein passed up the opportunity to move his factory to a location where he could pay his workers less and instead remained loyal to his workers and to the community by rebuilding in Methuen.<sup>4</sup>

After the presentation, I joined the President of the Association for a drink. We talked for a few minutes about two ethics exemplars from Massachusetts: Aaron Feuerstein and Louis Brandeis. Brandeis, of course, had opined in the early twentieth century that both lawyers and business people shared an obligation to promote the common good in their work.<sup>5</sup> In this sense, the Feuerstein Program was the culmination of Brandeis’s vision.

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\* Professor of Law and Associate Director, Louis Stein Center for Ethics and Law, Fordham University School of Law. As usual, I am grateful to my friends and colleagues, Mary Daly, Matt Diller, and Bruce Green, for their insightful comments.

1. See Lawrence J. Fox, *You’ve Got the Soul of the Profession in Your Hands*, Written Remarks of Lawrence J. Fox before the Multidisciplinary Practice Commission (visited Oct. 4, 1999) <<http://www.abanet.org/cpr/fox1.html>> (describing “nightmare” future in which multidisciplinary professional firms ignore concerns of legal profession).

2. I am using Larry Fox’s terminology. See *supra* note 1 for Fox’s description of his “nightmare” involving this convention.

3. See David M. Herszenhorn, *Plume of Hope Rises From Factory Ashes*, N.Y. TIMES, Dec. 16, 1995, at 8 (describing Feuerstein’s relationship with Malden Mills and Methuen).

4. *Id.*

5. See LOUIS D. BRANDEIS, *Business—A Profession*, in BUSINESS—A PROFESSION 1-2 (1933) (stating both business and law are professions).

Larry Fox came by to say hello for a few minutes. After he left, the President of the Association proposed a toast to Larry for his important contribution to the multidisciplinary practice industry.

I was a bit surprised. "You must be mistaken," I responded. "There could be no stronger and more articulate opponent of multidisciplinary practice than Larry."

"Precisely," she answered. "Let me explain. In the late twentieth century, the legal profession was generally divided into Reformers and Traditionalists, all of whom sought to preserve professionalism in the face of new developments in the market for legal services. The Traditionalists rejected any accommodation of market forces to permit multidisciplinary businesses. They argued that allowing multidisciplinary businesses would destroy professionalism by undermining lawyers' independence, ethics, and pro bono commitment.<sup>6</sup> In contrast, the Reformers sought to 'channel' market forces in an effort to protect the core values of professionalism.<sup>7</sup> They were willing to permit multidisciplinary services so long as lawyers' legal ethics rules continued to control the delivery of legal services.<sup>8</sup> If the Reformers had won any victories, we would have faced significant competition and potential obstacles."

"For example," she continued, "in the early 1980s, the ABA's Kutak Commission proposed amending the ethics rules to permit nonlawyers to hold a 'financial interest' or 'managerial authority' in organizations providing legal services.<sup>9</sup> The ABA rejected this proposal.<sup>10</sup> If it had accepted it, by the turn of the century a number of lawyer-dominated multidisciplinary practice firms ("MDPs") would have been strong competitors of the accounting firms."

"Similarly," she noted, "at the end of the twentieth century, the ABA Commission on Multidisciplinary Practice offered another reform. It proposed that lawyers be permitted to participate in multidisciplinary service firms so long as such firms were bound by the legal ethics rules, all clients of such firms were treated as the lawyers' clients for purposes of the conflicts rules, and MDPs

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6. See MDP House Debate, Annual Meeting 1999, Unedited Transcript, Reports 10A, 10B and 10C (1999) (visited Oct. 8, 1999) < <http://www.abanet.org/cpr/mdphouse.html> > (stating positions of Lawrence J. Fox, John L. Curtin, Jr., Cheryl Niro, Thomas O. Rice, Jerome J. Shestack, and Jack Dunbar).

7. A.J. Noble, *Accountants Watch: The ABA's Liberal Stance*, AM. LAW., July 1999, at 52 (quoting then-ABA President Philip Anderson who stated "[m]arket forces cannot be stopped . . . [b]ut they can be channeled").

8. See, e.g., MDP House Debate, *supra* note 6 (stating positions of Sherwin P. Simmons, Philip S. Anderson, Carolyn B. Lamm, and James P. Holden).

9. See CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 159-60 (1987) (reprinting draft of Rule 5.4 proposed at February 1983 ABA meeting); see also Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 593-96 (1989) (discussing proposal and its rejection).

10. See CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 9, at 161-64 (showing deletion of proposed rule and substitution of new Rule 5.4 prohibiting fee sharing between lawyers and nonlawyers).

controlled by nonlawyers were subject to regulation by the courts.”<sup>11</sup>

She smiled. “Imagine the difficulty we would have had with the Commission’s proposals that the lawyers’ conflicts rules apply to our firms and that we submit to regulation by the courts. Thank goodness those proposals were defeated. Their defeat left the organized bar without any coherent strategy for influencing our entry into the legal services business.”

“We continued as we had done before the Commission’s proposals—expanding our legal services business under the rubric of ‘consulting’<sup>12</sup> and ignoring the bar. By the turn of the century, multidisciplinary firms which had begun as accounting firms included four of the five largest employers of lawyers in the world.<sup>13</sup> They employed thousands of American lawyers<sup>14</sup> and recruited increasing numbers of partners from major law firms.”<sup>15</sup>

“While the Traditionalists were strong enough to defeat the Commission’s proposals,” she noted, “they were not strong enough to lead an effective campaign against us for violation of unauthorized practice statutes. In this effort, the bar faced the formidable task of undoing what had become the status quo. And if this hurdle was not enough, the Traditionalists could not unite the bar behind their struggle. Some lawyers rejected the Traditionalists’ approach as a policy matter. Others were wary of alienating clients who favored the development of multidisciplinary practice. But even if they could have united the bar, the Traditionalists didn’t have a compelling message for the public. The cause of protecting lawyers’ independence was not particularly popular with people who didn’t trust lawyers to police themselves or to promote the public interest.”<sup>16</sup>

“Now I hope you understand why I toast Larry Fox,” she concluded. “Without him, we might not have had the same freedom to develop our industry.”

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11. MDP Report, Recommendation, ¶ 2, 4, 8, 14 (visited Oct. 8, 1999) <<http://www.abanet.org/cpr/mdprecommendation.html>>.

12. See, e.g., Elizabeth MacDonald, *Lawyers Protest Accounting Firms’ Hiring*, WALL ST. J., Aug. 22, 1997, at B8 (reporting that managing partner at Price Waterhouse described consulting on human resources, benefits, and stock-option plans as “strictly advice, which doesn’t constitute practicing law”).

13. See Philip S. Anderson, *We All Must Be Accountable*, A.B.A. J., Oct. 1998, at 6 (citing statistic that “[o]nly one of the top five employers of the most lawyers is a law firm”).

14. Exact figures are not readily available. In 1997, one journalist reported that three of the Big Five employed more than 2000 tax attorneys between them. MacDonald, *supra* note 12, at B8. A complete figure would include the non-tax attorneys at those firms, as well as all attorneys at the other two members of the Big Five. Larry Fox has suggested that the total number is 5000. MDP House Debate, *supra* note 6.

15. See, e.g., Tom Herman, *Tax Report: A Special Summary and Forecast of Federal and State Tax Developments*, WALL ST. J., Nov. 11, 1998, at A1 (reporting “high profile” partners at big firms are leaving to join Big Five); P. Hann Livingston, *Trophy Fishing with the Big Five*, AM. LAW., Aug. 1999, at 19 (listing “big-name . . . big firm partners [who] have all signed on with the accounting firms”).

16. Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law as Business Paradigm*, 27 FLA. ST. U. L. REV. 9, 9 n.4 (1999) (collecting polls demonstrating lack of confidence in legal profession and “negative view of lawyers”).

I thought for a moment and then replied. "I too would like to toast Larry Fox, but for a different reason. I was not part of either the Traditionalist or Reformer camps. I opposed professionalism because it blocked equal access to justice and undermined efforts to promote a commitment to the common good among lawyers.<sup>17</sup> Nonetheless, I admired Larry and his opponents for their passionate devotion to the ideal that lawyers should seek meaning in their work from their special responsibility for the administration of justice. In that way, despite today's new roles and new rules, Larry continues to be a role model for all of us. I've got an idea. Why don't you consider him for next year's Aaron Feuerstein Award?"

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17. *Id.*; Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995).

# FOCUSING THE MDP DEBATE: HISTORICAL AND PRACTICAL PERSPECTIVES

*James W. Jones\**

## INTRODUCTION

I am delighted to have the opportunity to participate in this Symposium on the changing roles of lawyers in modern American society and on the issues of ethics and professionalism implicated in such changes. As the former managing partner of a large law firm and presently, as an executive of a worldwide professional services firm, I have spent a considerable part of my professional life grappling with these issues.

During my tenure as a partner at Arnold & Porter, the firm established three subsidiary consulting firms: APCO Associates, to provide public affairs and government relations services; MPC & Associates, to offer real estate development consulting services, principally to non-profit clients; and The Secura Group, to provide consulting services to financial institutions. These ancillary businesses<sup>1</sup> were formed to complement established practices within the law firm by making available the services of talented nonlawyer professionals to supplement the legal services offered by the firm's attorneys. The first of the subsidiaries, APCO Associates, was established in 1984, following a careful review by the firm—and the District of Columbia Bar—to insure that the business would be operated in a manner consistent with the rules of practice imposed upon the lawyers of the firm.<sup>2</sup> Although Arnold & Porter scrupulously

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1. The term "ancillary business" is the phrase used by the American Bar Association ("ABA") to describe law-related services offered by a law firm. The term "law-related services" is defined in the Model Rules as "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7(b) (1999).

2. The operational rules established by Arnold & Porter for its subsidiaries were quite restrictive. First, all subsidiaries were held to the same ethical requirements in terms of conflicts, protections of client confidences, advertising of services, etc., as applied to the law firm itself, and all questions arising in this area were resolved by the law firm's Ethics and Practice Committee. Second, for purposes of conflicts of interest screening, the subsidiaries and the law firm were considered to be one and the same entity, and any potential conflicts that were identified were resolved by the Policy Committee of the law firm. Third, all brochures and other promotional literature produced by the subsidiaries were required to be cleared by the law firm's Ethics and Practice Committee, using principles consistent with those applied in the legal profession. Finally, all promotional literature and all retainer agreements used by the subsidiaries clearly disclosed the relationship of the subsidiaries to

followed these rules for as long as it retained its subsidiaries,<sup>3</sup> it did not prevent the firm's operation of ancillary businesses from becoming a subject of considerable controversy.

By the late 1980s, dozens of other law firms throughout the country had followed Arnold & Porter's example.<sup>4</sup> Subsequently, there arose within the ABA—particularly within the ABA's Section of Litigation—a chorus of objections to law firms engaging in such ancillary business activities. Critics charged that the operation of such subsidiaries by law firms led to irreconcilable conflicts of interest, endangered client confidences and the sanctity of the attorney-client privilege, and ran the risk of compromising the independence of the professional judgment of lawyers participating in such activities.

During 1990 and 1991, I participated in the Working Group on Ancillary Business Activities. This group was formed by the ABA's Special Coordinating Committee on Professionalism to examine and make recommendations concerning ancillary businesses for consideration by the Standing Committee on Ethics and Professional Responsibility and for ultimate referral to the House of Delegates. The process, inaugurated by the work of that committee, led ultimately to the adoption by the House of Delegates of Rule 5.7 of the Model Rules of Professional Conduct, which addresses the operation of ancillary businesses by law firms.<sup>5</sup>

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the law firm. This material specifically notified clients of the consulting groups that the services provided by the subsidiaries were not legal services and that communications with the consulting groups were not entitled to the protections of the attorney-client privilege. These disclosures also made clear that no client of any of the consulting groups was required to use the services of Arnold & Porter, or vice versa.

3. Arnold & Porter sold its interests in all three of its subsidiaries during the early 1990s: APCO Associates was sold to Grey Advertising Inc. in 1991; MPC & Associates was sold to Sallie Mae in 1994; and The Secura Group was sold to Andersen Consulting in 1995.

4. A 1987 survey by the National Association of Law Firm Marketing Administrators found a considerable number of ancillary businesses being operated by law firms of all sizes across the nation. The diversity of these activities was quite impressive. The survey found, for example, law firms engaged in investment banking in Atlanta and Memphis; energy and environmental consulting, management services, and employer-benefits consulting in Atlanta; advertising in Arizona; labor-relations consulting in Philadelphia; real estate brokering in Los Angeles; office support services, seminars, and videos in Pittsburgh; real estate development services nationwide; and business consulting services dealing with international trade in New York. The survey also found that in Washington, D.C., law firms had spawned a great variety of nonlegal affiliates, ranging in specialization from energy and environmental consulting to healthcare consulting and management, from educational consulting to economic research and legislative services. See Phyllis Weiss Haserot, *Multiprofessional Mixes Are Proliferating*, NAT'L L.J., Oct. 19, 1987, at 16.

5. The process by which the ABA's House of Delegates ultimately adopted the current Rule 5.7, during its Midyear Meeting in early 1994, was quite tortuous. At its Annual Meeting in 1991, the House of Delegates, specifically rejecting the recommendations of the ABA's Standing Committee on Ethics and Professional Responsibility, narrowly adopted a version of Rule 5.7 that purported to prohibit lawyers from engaging in any ancillary business activities outside of their law firms. See SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 97 (John S. Dzienkowski & Grace Whittenburg eds., West 1994) (reprinting former version of Rule 5.7). That action led to a wave of protest around the country that resulted in the repeal of the prohibitory version of the rule at the 1992 Annual Meeting of the House of Delegates, again by a narrow vote. *Id.* In November 1992,

I review this history because I believe it relevant to the current debate now underway in the ABA and in state bars throughout the country concerning multidisciplinary practices (“MDPs”).<sup>6</sup> MDPs are, in a sense, merely the “flip side” of ancillary businesses. In an ancillary business, lawyers typically hire and control nonlawyer professionals who provide law-related services, primarily to the lawyers’ clients. By contrast, in an MDP, lawyers enter into arrangements with nonlawyer professionals in which the lawyers may, in fact, work for and report to the nonlawyers. Both cases, however, raise the same questions of ethics and professionalism. Accordingly, the history and experience of the ancillary business debate are relevant to the present inquiry.

Reflecting on the prior debate and on the rapidly changing environment in which the current debate is occurring, I would like to offer four observations—two in the nature of historical perspective and two related to the substance of the current discussion.

#### HISTORICAL PERSPECTIVES

The first historical observation is that collaborations between lawyers and nonlawyers are *not* a new phenomenon. In fact, for about as long as there have been lawyers in this country, they have been engaged in a wide range of activities beyond just the practice of law. For example:

- Many law firms in Massachusetts have operated trust companies for almost a century, including some firms registered with the Securities and Exchange Commission under the Investment Advisors Act of 1940.<sup>7</sup>
- For many years, title insurance has been sold in Connecticut by entities organized and styled as law firms but which, in fact, have

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the Chair of the House of Delegates appointed a special Committee on Ancillary Business to attempt to construct an appropriate ABA position on the controversial issue. The result was the current version of Rule 5.7 that was, as noted above, adopted in early 1994. *Id.*

6. For purposes of this discussion, I use the term “multidisciplinary practice” to refer to a structure in which lawyers and nonlawyers join together to offer a combination of legal and non-legal services through a single entity, typically with some sharing of fees and ownership interests. This definition is essentially the same as that used by the ABA’s Commission on Multidisciplinary Practice (the “MDP Commission”) in its August 1999 Report to the House of Delegates, which defined an MDP as:

a partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. . . . [An MDP] includes an arrangement by which a law firm joins with one or more other professional firms to provide services, including legal services, and there is a direct or indirect sharing of profits as part of the arrangement.

ABA Commission on Multidisciplinary Practice, MDP Final Report (visited Dec. 28, 1999) <<http://www.abanet.org/cpr/mdreport.html>>.

7. ABA Special Coordinating Committee on Professionalism, Working Group, Final Report on the Ancillary Business Activities of Lawyers and Law Firms 10 (Nov. 30, 1990). The following observations are based, in part, on the author’s participation in the ABA Special Coordinating Committee, Working Group.



engaged in no business other than the sale of title insurance.

- Real estate lawyers in dozens of jurisdictions across the country routinely act as agents for title insurance companies.<sup>8</sup>
- Thousands of American lawyers also serve as real estate brokers, life insurance agents, financial planners, accountants, and marriage counselors.<sup>9</sup>
- For some twenty years, over 350 law firms have joined together in the Attorneys Liability Assurance Society to provide malpractice insurance through a company owned and controlled by member firms.<sup>10</sup>

These examples demonstrate that lawyers and nonlawyers in this country have been engaged in business arrangements together for a very long time. For better or worse, the American legal profession has *never* imposed the kind of insulation—or isolation—on the practice of law that existed, at least until recently, under the British barrister system or with the French *avocats*. American lawyers, almost since the founding of the Republic, have combined the practice of law with a host of other commercial and non-commercial activities. They have also managed to sort through the ethical issues raised by such combinations and, in the main, have done so with admirable skill and integrity.

This leads to my second historical observation. Notwithstanding the long history of the involvement of lawyers in related and unrelated business activities, the American legal profession—at least as represented by its formal organs, the bars and bar associations—has always been quite resistant to any changes in the practice of law. Such resistance has been especially true where a change threatened to reorder well-established economic interests within the profession. Numerous examples of this phenomenon might be cited:

- At the end of the last century, the emergence of the modern law firm was condemned by many in the bar as the selling out of the profession to crass commercial interests.<sup>11</sup>
- Some years later, the development of in-house law departments by American corporations was roundly criticized by many prominent leaders of the bar as threatening the professional independence of lawyers.<sup>12</sup>
- In the 1930s, the introduction of group legal services plans (primarily by labor unions and public service entities) to provide affordable legal services to persons of low and moderate income was vigorously attacked by the bar.<sup>13</sup> The controversy was ultimately resolved in a series of Supreme Court decisions in the 1960s and early 1970s that the bar lost.<sup>14</sup>

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8. *Id.*

9. *Id.* at 9.

10. *Id.* at 2-3.

11. *Id.* at 5.

12. *Id.*

13. *Id.* at 5 & n.10.

14. See *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971) (holding right to

- In the 1970s, the introduction of paralegals, in-house investigators, and other paraprofessionals was challenged by many as amounting to the unauthorized practice of law.
- More recently, the proliferation of legal self-help books—and now on-line services—has been attacked by many bars as the unauthorized practice of law and a dangerous threat to the public.<sup>15</sup>
- The debate within the profession in the late 1980s and early 1990s concerned ancillary businesses, a phenomenon that the ABA's Section of Litigation described as "one of the most important [crises] to ever face the American legal profession."<sup>16</sup>

These examples reflect that virtually every innovation in the practice of law over the past one hundred years has been, at least initially, criticized and often roundly condemned by the organized bar. In my view, the current debate over MDPs fits the same pattern. Yet, despite the naysayers and the prophets of doom—and there have been many—I think that the American legal profession is better and stronger today because of the changes described above.

#### SUBSTANTIVE COMMENTS

Against this historical background, I offer two substantive observations on the subject of MDPs. The first relates to the historic changes in the delivery of legal services described above. Almost all of the changes previously mentioned were driven, in one way or another, by client demands for more efficient and cost-effective legal services. The same is true of MDPs as well.

Critics of MDPs are fond of saying that clients are not asking for these services and that the whole phenomenon has been created by the Big Five accounting firms to generate a new line of business. At one level, it may be true that clients do not frequently ask for MDPs per se—particularly because they are not currently permitted in this country. Clients *do*, however, increasingly demand efficient, timely, comprehensive, and cost-effective services of all of their professional service providers. If MDPs are one way of delivering such services—at least in some areas of legal practice—there is no reason that clients

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seek collective legal action through cooperative union of workers is protected by First and Fourteenth Amendments); *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1, 8 (1964) (holding union's program of advising injured workers to seek legal advice and making referrals to counsel is protected under First and Fourteenth Amendments); *NAACP, v. Button*, 371 U.S. 415, 437 (1963) (holding Virginia law prohibiting solicitation of business for attorney violated First and Fourteenth Amendments).

15. See *Unauthorized Practice of Law Committee v. Parsons Tech., Inc.*, No. 3:97-CV-2859-H, 1999 U.S. Dist. LEXIS 813, at \*18 (N.D. Tex. Jan. 22, 1999) (holding software program providing legal forms to users violates state statute prohibiting unauthorized practice of law). This case was subsequently vacated and remanded when the Texas legislature amended its statute to provide that the practice of law does not include "the design, creation, publication . . . display or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney." *Unauthorized Practice of Law Committee v. Parson Tech., Inc.*, 179 F.3d 956, 956 (5th Cir. 1999).

16. ABA Section of Litigation, Report with Recommendations to the House of Delegates, 1991 Annual Meeting, Report, at 37 (1991).

should not be offered the choice of an MDP as one means of meeting their needs.

Having said that, I would also note that the experience and success of the Big Five in offering MDP and MDP-like services in countries around the world provide considerable evidence of the client demand for such services. In September 1999, the *Financial Times* reported on a survey of several hundred major corporations in Europe and the United States in which purchasers of legal services (general counsels, CFOs, and others) were asked about their willingness to use MDPs. The survey found that more than half of the respondents in Europe and the United States said they would consider using MDPs for certain kinds of legal services; among financial institutions in the United States, the number rose to seventy-five percent.<sup>17</sup> It is also significant that the MDP concept has been endorsed by the American Corporate Counsels Association, the organization that represents the major corporate purchasers of legal services in this country.<sup>18</sup>

The client demand for MDPs, however, is not limited to major corporate purchasers of legal services. MDPs have great promise to enhance the practices of solo and small firm practitioners and to facilitate the delivery of needed legal services to important under-served populations. For this reason, the MDP concept was endorsed in statements before the MDP Commission by representatives of the American Association of Retired Persons ("AARP"),<sup>19</sup> the Consumer Alliance,<sup>20</sup> the ABA's Standing Committee on the Delivery of Legal Services,<sup>21</sup> and the ABA's General Practice, Solo and Small Firm Section.<sup>22</sup> A number of practitioners representing the elderly, disabled, and disadvantaged have also embraced the MDP concept.<sup>23</sup>

Simply put, the use of MDPs comes down to a matter of clients' freedom of choice. As noted in the statement of the Consumer Alliance submitted to the MDP Commission:

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17. Jim Kelly, *Big Five: Long Arm of the Law*, FIN. TIMES, Sept. 9, 1999, at 29, available in <<http://www.ft.com/hippocampus>>.

18. See American Corporate Counsel Association, *Multidisciplinary Practice* (visited Dec. 28, 1999) <<http://www.acca.com/gcadvocate/multi.html>>.

19. See Letter from Wayne Moore, J.D., Director, Legal Advocacy Group, AARP, to the Commission on Multidisciplinary Practice, Center for Professional Responsibility, American Bar Association (July 27, 1999) (visited Dec. 28, 1999) <<http://www.abanet.org/cpr/consumer2.html>>.

20. See Letter from the Consumer Alliance Community to the MDP Commission (July 15, 1999) (visited Dec. 28, 1999) <<http://www.abanet.org/cpr/consumer2.html>>.

21. See John S. Skilton, Chair, ABA Standing Committee on the Delivery of Legal Services, Written Testimony before the MDP Commission (Aug. 8, 1999) (visited Dec. 28, 1999) <<http://www.abanet.org/cpr/skilton.html>>.

22. See Larry Ramirez, Chair, General Practice, Solo and Small Firm Section, Oral Remarks before the MDP Commission (Feb. 1999) (visited Dec. 28, 1999) <<http://www.abanet.org/cpr/skilton.html>>.

23. See, e.g., Charles F. Robinson, Solo Practitioner, Oral Remarks before the MDP Commission (Feb. 1999) (visited Dec. 28, 1999) <<http://www.abanet.org/cpr/robinson.html>>; Philip Matthew Stinson, Sr., Statement Before the MDP Commission (Oct. 9, 1999) (visited Dec. 28, 1999) <<http://www.abanet.org/cpr/stinson.html>>.

In most products or services they buy, consumers want choices. Choice is the backbone of America's free enterprise, competitive business community. By allowing lawyers to partner with other types of professionals, every consumer could choose the method of service that best suits his or her needs. Not every consumer will want to consult a multidisciplinary practice that includes a lawyer—but all consumers would benefit from having that option and we believe that lawyers will benefit as well.<sup>24</sup>

This strong consumer interest in MDPs was also confirmed by the Reporter of the MDP Commission, Professor Mary C. Daly, in the following terms:

The Commission heard strong testimony from business clients, representatives of consumer groups, and ABA entities that amending the Model Rules to permit fee sharing and partnership and other association with a nonlawyer is in the best interest of the public. Of particular significance to the Commission was the view of the Council of the ABA General Practice, Solo and Small Firm Section, noting the need for multidisciplinary counseling of individual and business clients and the inefficiencies in attempting to satisfy that need through the coordinated advice of professionals in nonaffiliated firms. The ethics counsel to the Arizona State Bar told the Commission that she has received a substantial number of inquiries from lawyers in Arizona expressing an interest in forming a partnership with a nonlawyer. An informal survey of the opinions of state bar association ethics committees issued over the course of the past ten years indicates that the overwhelming majority of the inquiries on this subject appear to have been submitted by lawyers in solo or small firms.<sup>25</sup>

It thus seems apparent that the interest in MDPs is not limited to large corporate clients and that the MDP phenomenon cannot be dismissed as simply a marketing ploy of the Big Five accounting firms. Moreover, it must be noted that opponents of the MDP concept who raise the client demand question are really dragging a red herring across the trail of this debate. If, in fact, there is no genuine client demand for this new form of service delivery, then the effort to create MDPs will ultimately fail—presumably to the delight of critics—notwithstanding what the Big Five might do. If, however, the demand is genuine, then we lawyers—as providers of professional services intended to serve the interests of our clients—should permit the evolution of MDPs, unless to do so would create a serious threat to the public interest.<sup>26</sup>

Opponents of MDPs have raised a number of public interest concerns that can and should be addressed in the context of the current debate. These concerns include issues of potential conflicts of interest, client confidences and the maintenance of the attorney-client privilege, and the preservation of the independence of lawyers' professional judgment. In my view, however, none of

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24. The Consumer Alliance, Written Remarks to the MDP Commission (Mar. 31, 1999) (visited Dec. 28, 1999) <<http://www.abanet.org/cpr/multicom.html>>.

25. ABA Commission on Multidisciplinary Practice, MDP Final Report, Appendix C, Reporter's Notes (visited Dec. 28, 1999) <<http://www.abanet.org/cpr/mdpappendixc.html>>.

26. Note I said the *public* interest and not the interests of the legal profession.

these issues raise questions that are unique to MDPs. They are all issues that arise in the ordinary practice of law, particularly in large, multi-office or international firms. The potential ethical problems raised by MDPs are, in other words, no different in kind or degree from the sorts of issues that lawyers deal with every day.

In his statement to the MDP Commission, Professor Robert Gordon of the Yale Law School stated the issue succinctly:

Any and all forms of professional practice are subject to pressures, constraints and temptations—pressures from hierarchical superiors or peers, payment systems or fee arrangements, incentives to career advancement or financial reward inside firms or in the profession generally—that may to a greater or lesser extent compromise the exercise of a lawyer's independent judgment. Over the course of this century, the legal profession has adopted many arrangements and organizational forms for representing clients and receiving payment for services that pose conflicts between their own interests on the one hand and the interests of clients and the public good on the other. Hourly billing, to take one of many examples, tempts some lawyers to run the meter, churn cases, and pad bills; contingent fees, to take another, tempts others to shirk on effort, and settle early and low. Such conflicts are unavoidable: No set of arrangements has ever been or ever will be devised that will entirely remove such pressures and temptations. The question your Commission has to ask is, Do the proposed arrangements for lawyers to practice with nonlawyers promise to *add* any significant sources of pressure, constraint and temptation to those that already exist? And even [if] the answer to that question should turn out to be Yes (or Maybe), does the likely cost or risk of adding new sources of pressure offset the likely benefits of multi-disciplinary practices?<sup>27</sup>

After reviewing the issues presented, Professor Gordon concluded that no case has been made that MDPs pose any *additional* risks that should be used to justify their prohibition.<sup>28</sup>

To elaborate further on this point, one should consider the issue of professional independence. The current prohibitions on nonlawyer ownership of law firms and on fee splitting with nonlawyers set out in Rule 5.4 of the Model Rules are justified on the grounds that to permit such activities would run the risk of compromising the independence of the professional judgment of the lawyers involved.<sup>29</sup> Underlying this argument is the assumption that if a lawyer is answerable to a shareholder who is a nonlawyer, or if a lawyer shares fees with a nonlawyer, there is an overwhelming risk that the lawyer's professional judgment could be swayed by his own economic interests or by other improper considerations.

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27. Letter from Robert W. Gordon, Professor of Law, Yale Law School, to Sherwin P. Simmons, Esq., Chair, MDP Commission (May 21, 1999) (visited Dec. 28, 1999) <<http://www.abanet.org/cpr/gordon.html>> [hereinafter Gordon letter].

28. *Id.*

29. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1999).

The problem with the above-described argument is that the bar has already recognized and approved situations in which lawyers may work for, and even be supervised and compensated entirely by, nonlawyers without compromising their professional integrity or judgment. Prime examples include in-house counsel, government lawyers, legal services attorneys, and insurance company lawyers who represent insureds and beneficiaries. Moreover, the bar has recognized that even in the most serious of litigation matters—criminal trials—individual lawyers may competently represent defendants even when the lawyers are employed and supervised by the very government agency that has undertaken the prosecutions. Officers in the military's Judge Advocate General Corps are good examples of the latter, as are lawyers working in public defender services.

From both a logical and practical standpoint, it is difficult to square these examples with the flat prohibition on partnerships and fee splitting with nonlawyers set out in Rule 5.4, at least if the justification for the rule is the preservation of lawyers' professional independence. As Professor Geoffrey Hazard of the University of Pennsylvania Law School noted:

These financial relationship rules are obsolete. They disregard the fact that many respected lawyers are in-house counsel—whose 'fees' come from organizations owned by nonlawyers. How is it that a lawyer whose entire income is dispensed by nonlawyers can be an honorable member of the bar, but a lawyer who derives income with an accountant or MBA is beyond the pale?<sup>30</sup>

Moreover, whatever pressures that a lawyer in an MDP might feel, can we really believe that pressures on lawyers in major law firms are not just as great? Do we believe that senior partners never encourage younger lawyers to mold opinions in ways that are more to the liking of a major client? Or do we think that the hourly billing system—or, more significantly, contingent fee arrangements—do not create built-in conflict situations between lawyers' economic interests and the interests of their clients? If anything, one could argue that these pressures found within law firms are more insidious because they are less obvious.

In addressing the fee splitting prohibition in Rule 5.4 within the context of other activities currently permitted by the Model Rules, Yale's Professor Robert Gordon put the case as follows:

The point is simply that lawyers already experience many forms of pressure and constraint on their independent judgment. The case against multi-disciplinary practice would have to be that it would impose *additional* pressures and constraints, quantitatively and qualitatively more severe in kind and degree, to those that already exist. I am, however, unaware of any empirical support for the position that a lawyer who shares fees with a nonlawyer is more likely to subordinate the exercise of his independent professional judgment to the pursuit of profit than a lawyer who shares fees only with other lawyers. Indeed, the universal acceptance of in-house corporate

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30. Geoffrey C. Hazard, Jr., *Lawyers and Accountants Must Make It Work*, NAT'L L.J., Jan. 11, 1999, at A28.

counsel provides a contrary example. Of course, some witnesses before the Commission have pointed out, the nonlawyer employer of a corporate counsel is also the client, and thus the client remains the focus of the lawyer's attention—though even this is not entirely true, as for example when an in-house lawyer for an insurer represents policyholders as well as his company. But the issue is not merely whether the lawyer will *act* for the benefit of the client, but whether the lawyer will *exercise his own best independent judgment* for the benefit of his client. The fact that the employer is also the client increases rather than decreases the likelihood that a corporate in-house lawyer could be swayed to subordinate his own independent professional judgment about how to advise the client-employer to the client-employer's own profit-driven judgment.<sup>31</sup>

What should be clear from the foregoing discussion is that the only effective line of defense for preserving the professional independence of lawyers is the integrity of the individual lawyer himself. If the bar is truly concerned about such issues—and I would certainly hope it would be—it should focus on making certain that individual lawyers have the training and the procedures for making principled decisions when called upon in particular situations. I suggest, however, that such training and procedures have little to do with the kind of organization that employs an attorney. Indeed, a persuasive argument can be made that the bar's ability to support and enforce the independence of lawyers' professional judgment would be *enhanced*, not diminished, by a repeal of the financial relationship provisions of Rule 5.4.

Under the present rule, by insisting that lawyers can practice law *only* in traditional law firm settings, we effectively force out of the profession lawyers who want to offer their services in non-traditional ways. As a consequence, we compel such expatriates to characterize the services they provide as something other than "legal services" and we exclude such offerings from the bar's ethical and disciplinary system.<sup>32</sup> I believe that yields a bad result—for the bar, for the individual lawyers, and for the public. Our goal should be just the opposite: to make it possible for *all* lawyers to practice their profession without regard to the economic or organizational structure of the entity for which they work and, having done that, to assert the ethical jurisdiction of the bar over *all* lawyers whenever they hold themselves out as offering legal services.

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31. Gordon letter, *supra* note 27.

32. I am, of course, aware that the bar from time to time attempts to assert its control over such activities through its enforcement of prohibitions on the unauthorized practice of law. However, such efforts have been largely ineffective, both because of limited bar resources and because of numerous adverse court decisions. Moreover, it is somewhat anomalous that the bar should rely on unauthorized practice restrictions—which were, after all, designed to protect the consuming public from lay practitioners and others deemed incompetent to practice—to regulate persons trained as lawyers (many of whom are extremely well qualified and experienced) but who elect to offer their services in ways not sanctioned by the bar's highly restrictive organizational rules.

## CONCLUSION

I agree strongly with the conclusion and first recommendation of the ABA's MDP Commission that:

The legal profession should adopt and maintain rules of professional conduct that protect its core values, independence of professional judgment, protection of confidential client information, and loyalty to the client through avoidance of conflicts of interest, but should not permit existing rules to unnecessarily inhibit the development of new structures for the more effective delivery of services and better public access to the legal system.<sup>33</sup>

In that context, I do not believe that the introduction of MDPs will mark the "end of the legal profession as we know it." The sky is not falling here, any more than it did at the introduction of law firms in the 1890s, of corporate law departments in the 1920s, of group legal services plans in the 1930s, or of ancillary businesses in the early 1990s. What MDPs do represent is the latest in a series of developments—going back over one hundred years—that were all essentially market-driven and designed to make legal services more accessible, more efficient, and more cost effective.

In examining the ethical and professionalism issues raised by opponents of MDPs, I find no compelling evidence that permitting lawyers to practice through MDPs will add any *additional* pressures or constraints that are unlike those already faced by lawyers in their everyday practices. Consequently, I do not believe that MDPs will pose any *additional* risks to the independence of professional judgment for the lawyers participating in them.

In conclusion, I believe that the profession—and, more importantly, its clients—would be well-served by the amendment of Rule 5.4 of the Model Rules (and the corresponding provisions of the rules of the various state bars) to permit the creation of fully-integrated MDPs.

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33. ABA Commission on Multidisciplinary Practice, MDP Final Report to the House of Delegates, Recommendation (visited Dec. 28, 1999) <<http://www.abanet.org/cpr/mdprecommendation.html>>.



