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## Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should Be Permitted In The United States

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# Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should Be Permitted In The United States

Gianluca Morello

## **Abstract**

This Note explores the controversy surrounding MDPs. Part I surveys the legal activities of the Big Six accounting firms. Part I then analyzes the current U.S. ethics rules governing law firm ownership, examines proposed U.S. ethics rules that were never adopted, and discusses other U.S. ethics rules related to the practice of MDPs. In addition, Part I studies England's treatment of law firm ownership and MDPs. Finally, Part I offers other reasons for the restrictive rules governing law firm ownership. Part II investigates the arguments in favor of and against MDPs. Part III argues that the current ethics rules permit lawyers to face problems similar to those encountered by lawyers practicing in MDPs. This Note concludes that MDPs should be permitted in the United States.

# BIG SIX ACCOUNTING FIRMS SHOP WORLDWIDE FOR LAW FIRMS: WHY MULTI-DISCIPLINE PRACTICES SHOULD BE PERMITTED IN THE UNITED STATES

*Gianluca Morello\**

I don't like the idea of fighting the accountants at the rules barricades. We should match them — and best them — with service, quality, and performance, and not by throwing a lot of monopolistic "professional" rules at them to squelch innovation and evolution. . . . So let's give credit where credit is due. It sounds like the bean counters are outcompeting us and outinnovating us. Let's look for lessons, and see what we can learn.<sup>1</sup>

## INTRODUCTION

In recent years, the Big Six<sup>2</sup> accounting firms ("Big Six") have moved into the legal services market by establishing, acquiring, or forming ties with law firms around the world.<sup>3</sup> In coun-

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1. See *The Big Six Horns In*, AM. LAW., Dec. 1996, at 36 (quoting partner with U.S.-based law firm Lucash, Gesmer & Updegrove discussing how large law firms can compete with Big Six accounting firms).

2. See *The 1997 Accounting Today Top 100 Tax and Accounting Firms*, ACCT. TODAY, Mar. 17-Apr. 6, 1997, at 25 (demonstrating that Big Six refers to six accounting firms with highest revenues per year). The Big Six accounting firms are Arthur Andersen L.L.P. ("Andersen"), Coopers & Lybrand L.L.P. ("Coopers"), Deloitte & Touche L.L.P. ("Deloitte & Touche"), Ernst & Young L.L.P. ("Ernst & Young"), KPMG Peat Marwick L.L.P. ("KPMG"), and Price Waterhouse L.L.P. ("Price Waterhouse"). *Id.* The Big Six, however, may soon be reduced to the Big Four: on September 18, 1997 Coopers and Price Waterhouse announced that they plan to merge following approval by the firms' partners. See Elizabeth MacDonald & Joann S. Lublin, *Coopers and Price Waterhouse to Merge: Biggest Accounting Firm to Result, But Partners May Not Go Along*, WALL ST. J., Sept. 19, 1997, at A3 (discussing Coopers-Price Waterhouse proposed merger). Ernst & Young and KPMG also recently announced that they will merge if approved by the firms' partners. See Elizabeth MacDonald, *Ernst & Young To Merge with KPMG: Deal Seals Transformation of Accounting Industry Into One-Stop Providers*, WALL ST. J., Oct. 20, 1997, at A3 (discussing Ernst & Young-KPMG proposed merger).

3. See John E. Morris, *London Braces for the Big Six Invasion*, AM. LAW., Dec. 1996, at 5 (noting that Big Six firms have "assaulted" legal markets in Europe and in rest of world). Among other locations, Price Waterhouse operates a law firm in the United Kingdom and has a network of associated law firms in Europe. See Hooman Bassirian, *Dutch Court Blocks Big Six M&P Plans as Coopers Falters*, ACCT. AGE, Feb. 20, 1997, at 2 (explaining Price Waterhouse "operates" law firm in United Kingdom); Chris Klein,

tries<sup>4</sup> that prohibit multi-discipline practices<sup>5</sup> ("MDPs"), the Big Six have been successful in developing legal practices by entering into cooperation agreements and alliances with and forming

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*Gold Rush, Thin Stakes: U.S. Branches Face Fierce Competition From U.K. Solicitors, Accountants*, NAT'L L.J., Aug. 12, 1996, at A1 (revealing that Price Waterhouse has network of law firms in Europe). Andersen operates a law practice in, among other countries, the United Kingdom, the Netherlands, Spain, and France. See Bassirian, *supra*, at 2 (noting that Andersen "operates" legal practice in United Kingdom and Netherlands); Nick Ferguson, *Spanish Firms Regroup to Prepare for A Turbulent Future*, INT'L FIN. L. REV., Oct. 1997, at 38 (explaining large Spanish law firm is part of Andersen's worldwide network of law firms); Klein, *supra*, at A1 (noting that Andersen operates law firm in France). Coopers' law activities include ties with a U.K. law firm. See MDPs — All the Rage, But Beware Conflicting Interests, ACCT. AGE, Feb. 3, 1997, at 11 [hereinafter All the Rage] (noting that Coopers "set up" U.K. law firm in 1997). KPMG, among other places, has a law firm in France, an associated law firm in England, and an alliance with a law firm in Sweden. See Karen Dillon & Catrin Griffiths, *KPMG Fidal the Largest Law Firm on the Continent*, LEGAL BUS., July-Aug. 1991, at 26 (explaining KPMG has law firm in France); *Top Manchester Accountant Slams 'Big Six' Practices*, MANCHESTER EVENING NEWS, Feb. 25, 1997, at 8 [hereinafter Top Manchester Accountant] (noting KPMG "set up" associated law firm in England); New Swedish KPMG-Linked Firm Faces Bar Limits, INT'L FIN. L. REV., Oct. 1997, at 5-6 [hereinafter Swedish KPMG-Linked Firm] (noting that new Swedish law firm is member of KPMG's international network of law firms). Deloitte & Touche's law activities include an alliance with a Dutch law firm. See Deloitte & Touche in Deal with Lawyers AKD, FINANCIEEL DAGBLAD, Feb. 27, 1997, available in LEXIS, NEWS Library, TXTNWS File [hereinafter Deloitte & Touche in Deal] (explaining Deloitte & Touche formed close alliance with Dutch law firm). Finally, Ernst & Young has alliances with several Dutch law firms, has legal practices in Switzerland, Spain, Germany, and France, and has links to a Canadian law firm, among other law activities. See Dutch Veto 'One-Stop Shops', ACCOUNTANT, Mar. 1997, at 8 (discussing that Ernst & Young has agreements with several Dutch law firms and Canadian law firm); Accountants on the Brink of Taking Law Into Their Hands, LAWYER, Nov. 12, 1996, at 7 [hereinafter Accountants on the Brink] (noting that Ernst & Young has legal practices in Switzerland, Spain, Germany, and France); E&Y in One-Stop Shop Threat, LAWYER, July 15, 1997, at 5 (explaining Ernst & Young has links to Canadian law firm).

4. See, e.g., Edwin Godfrey & Anne Damerell, *England and Wales, in LAW WITHOUT FRONTIERS: A COMPARATIVE SURVEY OF THE RULES OF PROFESSIONAL ETHICS APPLICABLE TO THE CROSS-BORDER PRACTICE OF LAW* 51, 72 (Edwin Godfrey ed., 1995) [hereinafter LAW WITHOUT FRONTIERS] (revealing that England prohibits MDPs); Justus Voûte, *The Netherlands, in LAW WITHOUT FRONTIERS, supra*, at 107, 124 (explaining Netherlands only permits MDPs with notaries, tax consultants, or patent agents as partners, not accountants); E. James Arnett, *Canada: Ontario, in LAW WITHOUT FRONTIERS, supra*, at 165, 180 (noting that Ontario's Law Society of Upper Canada prohibits multi-discipline practices).

5. See L. Harold Levinson, *Independent Law Firms that Practice Law Only: Society's Need, the Legal Profession's Responsibility*, 51 OHIO ST. L.J. 229, 261 (1990) (defining multi-discipline practices). In this Note, multi-discipline practice ("MDP") refers either to a partnership that includes a lawyer or lawyers and a nonlawyer or nonlawyers as partners and that offers legal as well as nonlegal services to clients or to a professional corporation or association authorized to practice law for a profit that is partially owned by a nonlawyer or nonlawyers. See *id.* (describing MDPs).

networks of law firms to circumvent the restriction.<sup>6</sup> In some countries<sup>7</sup> accounting firms dominate the legal practice,<sup>8</sup> while in other countries<sup>9</sup> accounting firms must focus their legal work in the tax area because local bar associations place insurmountable restrictions on the practice of law by accounting firms and other organizations owned by nonlawyers.<sup>10</sup> Overall, the Big

6. See, e.g., Emily Barker, *More Accounting Firms Eye The U.K. Legal Market*, AM. LAW., Apr. 1996, at 13 (discussing Price Waterhouse's relationship with associated law firm in England); Bassirian, *supra* note 3, at 2 (explaining Andersen "operates" law firm in England and Andersen reached agreement with Amsterdam bar association to open law firm in Netherlands); *Deloitte & Touche In Deal*, *supra* note 3 (noting Deloitte & Touche formed close alliance with Dutch law firm); Larry Smith, *One Stop Shopping to the Nth Degree . . . Toronto the Latest Tell Tale Sign of Big-6 Legal Ambitions*, COUNSEL, July 7, 1997, at 2, 3 [hereinafter Smith, *One Stop Shopping*] (noting that Canadian law firm recently entered into close arrangement with Ernst & Young).

7. See Klein, *supra* note 3, at A1 (revealing that particularly in France and Spain accounting firms dominate legal realm). For example, in Spain, where MDPs are not prohibited, five of the top ten law firms in revenues for 1996 were Big Six's legal arms. See Javier Sans Roig, *Spain*, in *LAW WITHOUT FRONTIERS*, *supra* note 4, at 125, 139 (examining Spanish rules governing MDPs); Ferguson, *supra* note 3, at 38, 39 (analyzing Spanish law firms' 1996 revenues). In France, where MDPs also are permitted, the largest law firm is a Big Six firm's tax and legal division. See Jacques Buhart, *France*, in *LAW WITHOUT FRONTIERS*, *supra* note 4, at 74, 80 (discussing French regulations governing MDPs); Dillon & Griffiths, *supra* note 3, at 26 (revealing that KPMG's legal and tax division in France is country's largest law firm according to firm's public relations officer).

8. See Klein, *supra* note 3, at A1 (describing accounting firms' activities in France and Spain). In France, in 1996 six of the ten largest law firms were law departments of accounting firms. See *id.* Andersen boasts that through its affiliated law firms, it is the largest legal services provider on the European continent. See Morris, *supra* note 3, at 5.

9. See, e.g., Smith, *One Stop Shopping*, *supra* note 6, at 3 (explaining in United States MDPs are not permitted).

10. See Klein, *supra* note 3, at A1 (explaining accounting firms' legal work mainly focuses on tax law because local bar associations restrict accounting firms' law activities); see, e.g., Smith, *One Stop Shopping*, *supra* note 6, at 3 (explaining in United States accounting firms cannot practice law or own law firms because MDPs are generally prohibited). In the United States, the Agency Practice Act of 1965 ("Agency Practice Act") permits nonlawyers to engage in tax practice so long as they are qualified as certified public accountants ("CPA"). See Agency Practice Act of 1965, 5 U.S.C. § 500(c); (1997) (stating that "[a]n individual who is duly qualified to practice as a certified public accountant . . . may represent a person before the Internal Revenue Service of the Treasury Department."); see also Levinson, *supra* note 5, at 240 & n.19 (examining Agency Practice Act). In addition, the Agency Practice Act authorizes government agencies to permit nonlawyers to practice before them. See 5 U.S.C. § 500(d)(1) (stating that "[t]his section does not . . . grant or deny to an individual . . . the right to appear for or represent a person before an agency or in an agency proceeding."); Levinson, *supra*, at 240 n.19 (analyzing Agency Practice Act). The Internal Revenue Service "is responsible for administering and enforcing the internal revenue laws, except those relating to alcohol, tobacco, firearms, explosives, and wagering." See BLACK'S LAW DICTIONARY 564 (abr. 6th ed. 1990) (defining Internal Revenue Service).

Six's law practices have taken a considerable amount of work from traditional law firms.<sup>11</sup> Although the competition from accounting firms is relatively new for law firms,<sup>12</sup> the intensity of the competition will likely increase over time as accounting firms' law departments increasingly compete for legal work.<sup>13</sup> According to one commentator, the controversy surrounding law firm diversification will define the practice of law in the United States for the next century.<sup>14</sup>

Accounting firms became visible legal service providers in Europe in the tax field because European law firms emphasized litigation<sup>15</sup> and, thus, neglected to perform tax work.<sup>16</sup> According to one person involved in the debate over MDPs, lawyer-accountant combinations in Europe may be inevitable because European clients traditionally have viewed professional services as interrelated, expecting that one set of professionals will meet their needs and making little distinction between services pro-

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11. See Klein, *supra* note 3, at A1 (discussing competition between accounting firms and law firms for legal work). Multinational accounting firms primarily provide advice on countries' tax laws, though they have increasingly advised on laws governing other subjects. See Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 762 (1994).

12. See Klein, *supra* note 3, at A1 (commenting on competition between accounting firms and law firms).

13. See *id.* (revealing results of survey). One commentator notes that "[n]ew legal business is increasingly being snapped up by international accounting firms" such as Price Waterhouse, Andersen, and KPMG. *Id.* A principal of a Pennsylvania, U.S.-based management consultancy firm believes that the Big Six "present a significant threat to law firm practices — a threat that has yet to pierce the consciousness of many lawyers." See Ward Bower, *The New Competition: Time For A Wake-Up Call?*, AM. LAW., Oct. 1994, at 23. At least one commentator warns that Ontario's prohibition of MDPs is similar to the prohibition in U.S. jurisdictions: "If a Big-[Six] . . . firm can tiptoe through the regulatory tulips in Toronto, it's not hard to imagine them soon getting around similar bar impediments in the [United States] . . . as well." Smith, *One Stop Shopping*, *supra* note 6, at 3. An English reporter notes that "[t]hroughout . . . [London's] legal community, the realisation has dawned within the last week or two that there can be no possibility of mistaking the seriousness with which the big . . . [London] accountancy outfits intend to tackle legal services." Edward Fennell, *Birth of the Mega-Biz?*, TIMES (London), May 20, 1997, available in LEXIS, NEWS Library, TXTNWS File. One commentator believes that the Big Six's "master plan is to conquer the world first, then return home to the U[nited] S[tates]." *The Big Six Horns In*, AM. LAW., Dec. 1996, at 36.

14. See Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559, 560 (1992) (commenting on debate over law firm diversification).

15. See Abel, *supra* note 11, at 747 (discussing accounting firms' entry into legal services).

16. See *id.* (explaining European lawyers were slow to develop tax practices because they emphasized litigation).

vided by accountants and those provided by lawyers.<sup>17</sup> In addition, the legal market is attractive to accounting firms because it is larger than the tax market and there are strong synergies between tax, corporate finance, and law.<sup>18</sup>

In the United States, the Disciplinary Rules<sup>19</sup> ("DR") in the American Bar Association's<sup>20</sup> ("ABA") Model Code of Professional Responsibility<sup>21</sup> ("Model Code") and the ABA's Model Rules of Professional Conduct<sup>22</sup> ("Model Rules"), which have been adopted by the majority of states in some form,<sup>23</sup> have pre-

17. See Larry Smith, *New Adversaries: Big-6 Accounting Firms Encroach Foreign Legal Turf*, COUNSEL, Mar. 6, 1995, at 5-6 [hereinafter Smith, *New Adversaries*] (noting that Price Waterhouse's vice chairman of litigation support's view).

18. See *All the Rage*, *supra* note 3, at 11 (describing accounting firms' attraction to legal market). The Big Six should effectively sell any legal services they provide because they

have thousands of employees worldwide; they are leaders in the use of technology; they make significant investments in research and development. The Big Six enjoy brand name recognition. They invest multiples of what law firms spend on advertising, and have years of experience in marketing intangible professional services to individuals and businesses of means.

Bower, *supra* note 13, at 23.

19. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Pmbl. and Prelim. Statement (1981) [hereinafter MODEL CODE] (describing Disciplinary Rules). The Model Code of Professional Responsibility's ("Model Code") Preamble and Preliminary Statement explains that "[t]he Disciplinary Rules . . . are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.*

20. See GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 912 (2d ed. 1994) (describing American Bar Association). The American Bar Association ("ABA") is a voluntary, private organization of lawyers that controls its own membership, governs its affairs, and is not accountable to any public body for action the ABA might take on organizational or policy matters. *Id.* The ABA, in addition, "has long been recognized as the leading national organization of lawyers, and it has succeeded in convincing state courts, state legislatures, federal courts and federal agencies to adopt some form of its model codes, giving the codes, as so adopted, the effect of law." *Id.* at 13.

21. See *id.* (describing Model Code). The Model Code was adopted by the ABA in 1969 as a model code of regulation of the conduct of lawyers. See *id.* (discussing Model Code's purpose).

22. See *id.* at 15 (discussing Model Rules of Professional Conduct). The Model Rules of Professional Conduct ("Model Rules") were adopted by the ABA in 1983 to replace the Model Code. *Id.*

23. See *id.* at 13-16 (discussing adoption of Model Code and Model Rules by U.S. jurisdictions). The Model Code was adopted by almost every state and by most federal courts. *Id.* at 13. As of August 1993, the Model Rules were adopted in some form by 36 states and the District of Columbia while other states retained their versions of the Model Code. *Id.* at 15. The federal courts, including the Supreme Court, cite the Model Code and Model Rules as authority in decisions concerning lawyers' professional conduct. *Id.* at 16.

vented nonlawyers from providing legal services,<sup>24</sup> have limited the association of lawyers with nonlawyers,<sup>25</sup> and have controlled lawyers' nonlegal services.<sup>26</sup> The rules prohibiting lawyer-nonlawyer combinations from practicing law were implemented to guard against several potential ethics problems.<sup>27</sup> The restrictions in the Model Rules and Model Code have survived despite several years of discussions by state bar committees concerning multiprofessional offices.<sup>28</sup> Only Washington, D.C., through

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24. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1996) [hereinafter MODEL RULES] (fee-sharing, lawyer-nonlawyer partnership, and independent professional judgment); MODEL CODE, *supra* note 19, DR 3-102(A) (fee-sharing); *id.* DRs 3-103(A), 5-107(C) (lawyer-nonlawyer partnership); *id.* DR 5-107(B) (independent professional judgment); *see also* Munneke, *supra* note 14, at 566 (noting that in United States combination of ABA's Model Rules and DRs have "kept nonlawyers from providing legal services"). The ABA has consistently opposed lay investment in law practices. *See* David A. Kaplan, *Want to Invest in a Law Firm? Ethics Change in Works*, NAT'L L.J., Jan. 16, 1987, at 1 (describing ABA's position).

25. See MODEL RULES, *supra* note 24, Rule 1.6 (confidentiality); *id.* Rule 1.7 (conflicts of interest); *id.* Rule 2.1 (independent professional judgment); *id.* Rule 5.4 (fee-sharing, lawyer-nonlawyer partnership, and independent professional judgment); *id.* Rule 5.5 (unauthorized practice of law); *id.* Rule 5.7 (law-related services); *id.* Rule 7.2 (advertising); *id.* Rule 7.3 (client solicitation); MODEL CODE, *supra* note 19, DR 2-101(A) (advertising); *id.* DR 2-103(A), (B) (client solicitation); *id.* DR 3-101(A) (unauthorized practice of law); *id.* DR 3-102(A) (fee-sharing); *id.* DR 3-103(A), 5-107(C) (lawyer-nonlawyer partnership); *id.* DR 4-101 (confidentiality); *id.* DR 5-101(A), 5-104(B) (conflicts of interest); *id.* DR 5-107(B) (independent professional judgment). Commentators agree that ethics rules have prevented lawyers and nonlawyers from entering into joint business ventures to provide legal services. Munneke, *supra* note 14, at 566; HARRY J. HAYNSWORTH, MARKETING AND LEGAL ETHICS: THE RULES AND RISKS 120 (rev. ed. 1990); 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, 616, 622 (1989).

26. See MODEL RULES, *supra* note 24, Rule 5.7 (law-related services); *see also* Munneke, *supra* note 14, at 566 (stating that in United States combination of ABA's Model Rules and DRs in Model Code have kept lawyers out of nonlegal activities). Under current rules, law firms cannot themselves offer both legal and nonlegal services, except where the nonlegal services are ancillary to the practice of law. *See* Munneke, *supra*, at 573 (discussing ancillary businesses). Law firms may, however, operate subsidiaries to provide the nonlegal services. *See id.* (discussing ancillary activities under current regulatory scheme).

27. See 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 470-71 (1985) (explaining lawyer-nonlawyer law partnerships potentially create problems of unauthorized practice of law and interference with lawyers' professional judgment and with confidentiality and client solicitation).

28. See Munneke, *supra* note 14, at 573 n.71 (explaining although multiprofessional offices have been discussed for several years, chilling effect of ethics rules has prevented widespread experimentation with concept). At least one commentator notes, however, that the restrictive "regulations are now giving way to more permissive

Washington, D.C. Rules of Professional Conduct<sup>29</sup> ("D.C. Rules") Rule 5.4, permits nonlawyers to become partners in organizations that provide legal services,<sup>30</sup> so long as certain requirements are followed.<sup>31</sup> Nevertheless, true multiprofessional offices remain infeasible despite the appeal of organizations that can solve complex problems.<sup>32</sup>

In England, the Law Society of England and Wales'<sup>33</sup> ("Law Society") Solicitors' Practice Rules<sup>34</sup> ("Solicitors' Rules") forbid solicitors<sup>35</sup> from practicing law in partnership with non-solicitors through a rule forbidding solicitors from sharing legal fees with non-solicitors.<sup>36</sup> This prohibition prevents MDPs from being formed in England.<sup>37</sup> Prior to 1990, England had a statutory ban

rules governing joint lawyer-nonlawyer ventures, and [that] such activities appear to be evolving with or without the imprimatur of the organized bar." *Id.* at 566.

29. See WASHINGTON, D.C. RULES OF PROFESSIONAL CONDUCT Scope (1997) [hereinafter D.C. RULES] (explaining Washington, D.C. Rules of Professional Conduct ("D.C. Rules") provide basis for invoking disciplinary process against lawyers governed by D.C. Rules who fail to comply with obligation or prohibition imposed by Rule).

30. See *Practice Guide — Partnership with Non-Lawyers*, Laws. Man. on Prof. Conduct (ABA/BNA) No. 91, 401 (1995), available in Westlaw, ABA-BNA database [hereinafter *Partnership with Non-Lawyers*] (noting that Washington, D.C. is only U.S. jurisdiction that permits lawyers to join nonlawyers in partnerships or professional associations that practice law). Members of the ethics committee in Washington, D.C. believe the Model Rules are anticompetitive and cannot be defended. See Kaplan, *supra* note 24, at 1 (reporting on Washington, D.C. Rules of Professional Conduct Rule 5.4).

31. See D.C. RULES, *supra* note 29, Rule 5.4 (listing requirements for lawyers and nonlawyers to combine to practice law in Washington, D.C.).

32. See Munneke, *supra* note 14, at 573 (explaining present U.S. regulatory scheme does not permit true multiprofessional offices despite fundamental appeal of "concept of holistic problem solving centers").

33. See FRANCES SILVERMAN, HANDBOOK OF PROFESSIONAL CONDUCT FOR SOLICITORS 111-12 (2d ed. 1992) (describing Law Society of England and Wales). The Law Society of England and Wales ("Law Society"), formed by Royal Charter in 1825, is the governing body of the solicitors' profession and has the power promulgate rules and regulations governing the training and admission of solicitors, regulating practicing certificates, and controlling the conduct of professional practice and discipline. *See id.* (defining Law Society).

34. See Solicitors Act, 1974, ch. 47, § 31 (Eng.) [hereinafter Solicitors Act] (granting Law Society authority to promulgate Solicitors' Practice Rules ("Solicitors' Rules") to regulate professional practice and conduct and discipline of solicitors).

35. See BLACK'S LAW DICTIONARY, *supra* note 10, at 969 (defining English solicitors). Solicitors, in England, are attorneys who may practice in the Bankruptcy Court, county courts, petty sessions, certain proceedings in the Crown Court, most inferior courts, and in chambers of the Supreme Court. *Id.*

36. See SOLICITORS' PRACTICE RULES Rule 7(1) (1990) [hereinafter SOLICITORS' RULES] (governing fee-sharing).

37. See Jolyon Patten, UK: *In the Mix*, POST MAG., Dec. 19, 1996, at 27 (explaining

on MDPs,<sup>38</sup> but in 1990 England enacted the Courts and Legal Services Act<sup>39</sup> which repealed the statutory ban on MDPs.<sup>40</sup> The Law Society, however, has maintained the ban on solicitor-non-solicitor partnerships.<sup>41</sup>

This Note explores the controversy surrounding MDPs. Part I surveys the legal activities of the Big Six accounting firms. Part I then analyzes the current U.S. ethics rules governing law firm ownership, examines proposed U.S. ethics rules that were never adopted, and discusses other U.S. ethics rules related to the practice of MDPs. In addition, Part I studies England's treatment of law firm ownership and MDPs. Finally, Part I offers other reasons for the restrictive rules governing law firm ownership. Part II investigates the arguments in favor of and against MDPs. Part III argues that the current ethics rules permit lawyers to face problems similar to those encountered by lawyers practicing in MDPs. This Note concludes that MDPs should be permitted in the United States.

### I. CURRENT PRACTICES OF THE BIG SIX AND ETHICS RULES GOVERNING MDPs

The United States and England prohibit MDPs.<sup>42</sup> The ethics rules governing law firm ownership adopted by the majority of jurisdictions in the United States prevent, and numerous other ethics rules obstruct, lawyers and nonlawyers from entering into partnerships that practice law.<sup>43</sup> Similarly, ethics rules in England do not permit solicitors to practice law with nonlawyers.<sup>44</sup> Despite the restrictions in England, the Big Six accounting

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MDPs involving lawyers do not exist in United Kingdom because of Law Society's rules forbidding solicitors from engaging in partnerships with non-solicitors).

38. See Solicitors Act § 39 (repealed 1990) (forbidding solicitors from acting as agents for unqualified persons).

39. Courts and Legal Services Act, 1990, ch.41 (Eng.) [hereinafter Courts and Legal Services Act].

40. See Courts and Legal Services Act § 66(1) (repealing prohibition on solicitors from acting as unqualified persons' agent).

41. See SILVERMAN, *supra* note 33, at 131 (revealing that section 66 of Courts and Legal Services Act has not yet been brought into force); Waller, *supra* note 271, at 17 (noting Law Society has continued prohibiting MDPs).

42. See *supra* notes 9, 37 (discussing countries that prohibit MDPs).

43. See *supra* notes 25, 26 (listing rules forbidding lawyer-nonlawyer combinations for practice of law).

44. See *supra* notes 36, 37 and accompanying text (revealing that England prohibits MDPs).

firms have entered the legal services market in England as they have in other countries, through arrangements that circumvent the rules.<sup>45</sup>

### A. Current Legal Activities of the Big Six

The Big Six provide legal services in countries throughout the world.<sup>46</sup> Price Waterhouse L.L.P.<sup>47</sup> ("Price Waterhouse"), for example, operates a law firm in the United Kingdom called Arnheim & Co.<sup>48</sup> ("Arnheim") and has a network of law firms in Europe with 250 attorneys collectively.<sup>49</sup> Price Waterhouse's European legal practice performs tax work,<sup>50</sup> as well as work in commercial agreements,<sup>51</sup> mergers and acquisitions,<sup>52</sup> and capital markets,<sup>53</sup> areas traditionally handled by law firms.<sup>54</sup> The head of Price Waterhouse's European Union<sup>55</sup> law unit recently expressed that Price Waterhouse intends to expand and com-

45. See *supra* note 6 and accompanying text (describing accounting firms' legal activities in countries that prohibit MDPs).

46. See *supra* note 3 (detailing legal practices of Big Six).

47. See *supra* note 2 (discussing Price Waterhouse).

48. See *All the Rage*, *supra* note 3, at 11 (describing Price Waterhouse's legal activities in United Kingdom); Bassirian, *supra* note 3, at 2 (same); *Top Manchester Accountant*, *supra* note 3, at 8 (same). Arnheim & Co. ("Arnheim"), an affiliate of Price Waterhouse, is part of the accounting firm's network of European law firms, and shares office space and referrals with Price Waterhouse. See Barker, *supra* note 6, at 13 (describing Arnheim's relationship with Price Waterhouse). In 1996, Arnheim had only six lawyers. See Morris, *supra* note 3, at 5 (describing Arnheim). Arnheim, however, plans to expand to 20 attorneys by 1998 and to 50 by 2001. See Barker, *supra*, at 13 (discussing Arnheim's future plans).

49. See Klein, *supra* note 3, at A1 (discussing Price Waterhouse's network of lawyers in Europe); see also Barker, *supra* note 6, at 13 (noting that Price Waterhouse's European law firm network consisted of 19 law firms in 1996).

50. See Klein, *supra* note 3, at A1 (citing head of Price Waterhouse's European Union law unit in Brussels, Belgium).

51. See *id.* (citing head of Price Waterhouse's European Union law unit in Brussels, Belgium).

52. *Id.*

53. *Id.*

54. See Morris, *supra* note 3, at 5 (revealing that Price Waterhouse's head of its European legal affiliates notes that legal affiliates are obtaining work that American and English law firms might otherwise have performed). According to Price Waterhouse's head of European legal affiliates, the legal affiliates work on investments into Eastern Europe, loan and financial documentation for international banks in Spain, insurance policy documentation, and privatizations. See *id.* (describing work performed by Price Waterhouse's European legal affiliates).

55. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), as

pete with traditional law firms.<sup>56</sup>

Arthur Andersen L.L.P.<sup>57</sup> ("Andersen") operates a legal practice in the United Kingdom called Garrett & Co.<sup>58</sup> ("Garrett") with offices in seven cities,<sup>59</sup> including London, Reading, and Leeds, England<sup>60</sup> and in 1995 opened an office in Manchester, England, that competes with other law firms for high-profile corporate work.<sup>61</sup> In only three years, Garrett hired 130 fee-earners<sup>62</sup> and has successfully recruited lawyers that practice banking,<sup>63</sup> intellectual property,<sup>64</sup> and real estate<sup>65</sup> from another English firm.<sup>66</sup> Garrett's recruiting activities demonstrate Andersen's drive to provide a wide range of services.<sup>67</sup> Garrett

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*amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741, in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987)).*

56. See Klein, *supra* note 3, at A1 (quoting head of Price Waterhouse's European Union law unit). The head of Price Waterhouse's European Union law unit revealed: "Right now we're not a threat [to law firms], but the avowed intent is different." *Id.* Price Waterhouse's head of European legal affiliates added that Price Waterhouse is interested in competing with law firms for top work and that Price Waterhouse is "not aiming for the middle ground . . ." See Morris, *supra* note 3, at 5 (revealing Price Waterhouse's plans according to head of Price Waterhouse's European legal affiliates). According to a law firm and accounting firm consultant, accounting firms have already moved towards handling complex legal work and where European "clients used to divide up pieces of a deal between a Davis Polk [& Wardwell, a U.S.-based law firm,] and a Price Waterhouse . . . [n]ow they're giving a little more to Price Waterhouse . . . [and that] [s]omeday they may give it all to Price Waterhouse." See Smith, *New Adversaries*, *supra* note 17, at 7 (quoting Texas, U.S.-based consultant who works with law firms and accounting firms).

57. See *supra* note 2 (discussing Andersen).

58. See Bassirian, *supra* note 3, at 2 (discussing Garrett & Co. ("Garrett")); Patten, *supra* note 37, at 27 (same); Patrick Wilkins, *Surprise Defections By Tax Lawyers Threaten Coopers' Law Aspirations*, ACCT. AGE, Oct. 17, 1996, at 1 (same).

59. See Barker, *supra* note 6, at 13 (discussing Garrett's size).

60. See Smith, *New Adversaries*, *supra* note 17, at 6 (describing Garrett's offices).

61. See *Top Manchester Accountant*, *supra* note 3, at 8 (revealing activities of Garrett's Manchester, England office).

62. See Wilkins, *supra* note 58, at 1 (analyzing Garrett's size). Fee-earners are law firms' staff members who have client contact and whose work earns money for the firm, such as assistant solicitors, legal executives, clerks, and trainee solicitors. See SILVERMAN, *supra* note 33, at 177 (defining fee-earners).

63. See Smith, *New Adversaries*, *supra* note 17, at 7 (examining Garrett's practice areas).

64. See *id.* (describing Garrett's practice areas).

65. See *id.* (analyzing Garrett's practice areas).

66. See *id.* (describing Garrett's recruiting activities).

67. See *id.* (explaining Garrett's recruiting is indicative of Andersen's full-service strategy). A senior partner with England-based law firm Allen & Overy believes that although Garrett is not yet a threat to top firms, they will be: "Arthur Andersen never does anything in a half-assed way. I keep saying to my guys, you have to keep your eye

has continued to progress toward competing with established law firms for sophisticated corporate work,<sup>68</sup> handling major transactions.<sup>69</sup> In the Netherlands, Andersen has entered into a unique agreement with the Amsterdam bar association permitting Andersen to establish a law practice under the name Wouters Advocaten.<sup>70</sup> In Spain, Andersen's legal arm, Andersen ALT,<sup>71</sup> recently merged with a Spanish law firm to form J & A Garrigues Andersen y Cia.<sup>72</sup>

In 1992, Andersen acquired the Paris office of England-based law firm S.G. Archibald,<sup>73</sup> thus obtaining a developed corporate and intellectual property practice to complement its tax

in the rearview mirror. . . . Once they've established themselves, they're going to look at the big-ticket stuff." Morris, *supra* note 3, at 5.

68. See Smith, *New Adversaries*, *supra* note 17, at 7 (noting that Garrett seems to have already progressed towards becoming "top-of-the-market" law firm). Garrett's head explained: "Looking forward three years, there's no doubt that . . . [Garrett will] be handling major M[ergers] & A[cquisitions] transactions." See Morris, *supra* note 3, at 5 (quoting Garrett's head).

69. See Smith, *New Adversaries*, *supra* note 17, at 7 (noting that Garrett was part of major transactions when firm represented party in bankruptcy transaction and Boston, U.S.-based client in acquisition of English-based company). Among other work, Garrett represents U.S.-based Microsoft Corporation and Japan-based Sony Corporation in intellectual property matters like commercial contracts and licensing and has represented British Airways plc and Dresser Industries, Inc., in acquisitions, has had a lead role in the privatization of certain English bus companies, has formed funds to invest in Egypt and India, and conducts compensation and benefits work for a number of large English companies. See Morris, *supra* note 3, at 5 (discussing Garrett managing partner's description of firm's high-profile work).

70. See Bassirian, *supra* note 3, at 2 (examining Andersen managing partner for Netherlands' description of firm's law practice in Netherlands); *Andersen Appeals Dutch MDP Ban*, *LAWYER*, May 27, 1997, at 5 (describing Andersen's legal activities in Holland). Upon an attempt to open a second Wouters Advocaten Netherlands office in Rotterdam, however, Rotterdam's bar association refused to grant permission and the Dutch bar association, Nederlandse Ordre Van Advocaten ("NOVA"), supported the local bar's decision. See Bassirian, *supra*, at 2 (discussing Andersen's legal activities in Holland).

71. See Ferguson, *supra* note 3, at 38 (discussing Andersen ALT).

72. See *id.* at 38-39 (noting that merger occurred in January 1997). J & A Garrigues Andersen y Cia is the largest law firm in Spain with 505 lawyers and 17 offices throughout Spain. See *id.* at 39, 40 (describing size of J & A Garrigues Andersen y Cia). The firm is part of Andersen's worldwide network of law firms and practices in the areas of tax, corporate law, litigation, labor relations, administrative law, oil and gas, mines, telecommunications, environment, and maritime law. See *Law Firms in Spain*, INT'L FIN. L. REV., Oct. 1996, at 41, 45 (describing J & A Garrigues Andersen y Cia's practice).

73. See Klein, *supra* note 3, at A1 (describing Andersen's take over of S.G. Archibald's Paris office). The firm's name became Archibald Andersen Association d'Avocats ("Archibald Andersen"). See *id.* (discussing Andersen's take-over of S.G. Archibald's Paris office).

work.<sup>74</sup> The firm eventually grew from approximately fifty lawyers before the acquisition<sup>75</sup> to over 240 attorneys in 1996.<sup>76</sup>

Coopers & Lybrand L.L.P.<sup>77</sup> ("Coopers") also moved into the law firm arena when, in February 1997, the accounting firm established a law firm in the United Kingdom named Tite & Lewis<sup>78</sup> and transferred thirty staff into the new law firm.<sup>79</sup> Before establishing the law firm, Coopers had a tax and legal unit that practiced specialized corporate tax and finance-related work.<sup>80</sup>

KPMG Peat Marwick L.L.P.<sup>81</sup> ("KPMG") has a large legal and tax division in France named KPMG Fidal Peat International ("KPMG Fidal").<sup>82</sup> In 1991, KPMG Fidal had 760 lawyers<sup>83</sup> in 130 offices throughout France,<sup>84</sup> that practiced a variety of legal and tax work on behalf of small and medium-sized French companies.<sup>85</sup> That same year, sixty-one percent of KPMG Fidal's

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74. See *id.* (discussing Archibald Andersen's practice). Andersen's partner in charge of the Paris office explained that Archibald Andersen "provide[s] all the typical services of a business law firm" and added that Archibald Andersen could "combine various services for . . . [its] clients in a global manner, with the same quality everywhere in the world." See *id.* (quoting Andersen's partner in charge of the firm's Paris office).

75. See Smith, *New Adversaries*, *supra* note 17, at 6 (analyzing S.G. Archibald's Paris office).

76. See Klein, *supra* note 3, at A1 (noting Archibald Andersen's size).

77. See *supra* note 2 (discussing Coopers).

78. See *All the Rage*, *supra* note 3, at 11 (describing Coopers' legal activities in United Kingdom); *Top Manchester Accountant*, *supra* note 3, at 8 (same). The arrangement between Coopers and Tite & Lewis permits Tite & Lewis to receive work from Coopers' existing clients and Coopers to gain clients through Tite & Lewis. See Fennell, *supra* note 13 (describing arrangement between Tite & Lewis and Coopers).

79. See *Top Manchester Accountant*, *supra* note 3, at 8 (quoting Coopers spokesperson).

80. See Wilkins, *supra* note 58, at 1 (adding that Coopers' pioneering tax and legal unit conducted highly specialized corporate tax and finance-related work).

81. See *supra* note 2 (discussing KPMG).

82. See Dillon & Griffiths, *supra* note 3, at 26 (discussing KPMG's legal and tax activities in France). Fidal began as an independent organization in 1945 when it spun off from French accounting firm Fiduciare de France. See *id.* Fidal then joined accounting network Klynveld Main Gordeler ("KMG") in 1979 and KMG merged with accounting firm Peat Marwick in 1987. See Abel, *supra* note 11, at 783 (describing formation of KPMG Peat Marwick). Following the merger between KMG and Peat Marwick, Fidal became KPMG Fidal Peat International ("KPMG Fidal"). See Dillon & Griffiths, *supra*, at 26 (discussing KPMG Fidal).

83. See Dillon & Griffiths, *supra* note 3, at 26 (describing KPMG Fidal's size).

84. See *id.* (noting that KPMG Fidal's offices are located throughout France, from major cities like Paris to provincial towns such as Blois in Loire Valley).

85. See *id.* (explaining KPMG Fidal's offices handle wide variety of legal and tax work for thousands of small and medium sized French companies).

work was tax-related and thirty-nine percent legal.<sup>86</sup> KPMG Fidal's legal work included mergers and acquisitions, restructurings, joint ventures, and routine contract work.<sup>87</sup> Today, KPMG Fidal is the largest law firm in Europe.<sup>88</sup> KPMG also recently formed an alliance in Sweden with new law firm KPMG Wahlin Advokatbyrå.<sup>89</sup>

Deloitte & Touche L.L.P.<sup>90</sup> ("Deloitte & Touche") has been active in the Dutch legal market.<sup>91</sup> In February 1997, Deloitte & Touche formed a close alliance with Dutch law firm Van Anken Knuppe Damstra ("AKD").<sup>92</sup> Deloitte & Touche is seeking alliances with more Dutch law firms to establish a national network of law firms.<sup>93</sup>

Ernst & Young L.L.P.<sup>94</sup> ("Ernst & Young") has several cooperation agreements<sup>95</sup> with Dutch law firms<sup>96</sup> and has legal practices in Switzerland, Spain, Germany, and France.<sup>97</sup> Ernst &

86. See *id.* at 30 (examining KPMG Fidal's practice).

87. See *id.* at 30-31 (describing KPMG Fidal's practice).

88. See *id.* at 26 (explaining KPMG Fidal's public relations officer considers KPMG Fidal largest law firm on European Continent). Many practitioners, however, do not consider KPMG Fidal a law firm. See *id.* at 26 (adding that KPMG Fidal management is bemused by those who suggest that Fidal is not "real" law firm). In response, a partner of U.S.-based law firm Baker & McKenzie described KPMG Fidal as a competitor. See *id.* at 26 (examining debate over whether KPMG Fidal is law firm). Commentators note that although the majority of KPMG Fidal's competitors "dismiss [KPMG] Fidal out of hand, typically in snobbish terms[,] . . . no one seems willing to count [KPMG] Fidal out." *Id.* at 27.

89. See *New Swedish KPMG-Linked Firm Faces Bar Limits*, INT'L FIN. L. REV., Oct. 1997, at 5-6 (explaining new Swedish law firm is member of KPMG-aligned international network of law firms and has cooperation agreement with KPMG).

90. See *supra* note 2 (discussing Deloitte & Touche).

91. See *Deloitte & Touche in Deal*, *supra* note 3 (explaining Deloitte & Touche formed close alliance with Dutch law firm and is "seeking links with a further two or three law firms to establish a national network").

92. See *id.* (commenting on alliance between Deloitte & Touche and Dutch firm of lawyers and notaries, Van Anken Knuppe Damstra ("AKD")). The terms of the alliance comply with the Netherlands' strict rules governing the independence of accountants and tax advisors. See *id.* (discussing alliance).

93. See *id.* (discussing Deloitte & Touche's plans).

94. See *supra* note 2 (discussing Ernst & Young).

95. See *Dutch Veto 'One-Stop Shops'*, *supra* note 3, at 8 (discussing Ernst & Young's cooperation agreements). According to the chairman of Ernst & Young's tax group, under the cooperation agreement there is "pooling" of some profits, but the tax firm remains independent of the accounting firm. *Id.*

96. See *id.* (analyzing Ernst & Young's alliance with Dutch law firms Van Benthem & Keulem and Banning Van Kemenade & Holland).

97. See *Accountants on the Brink*, *supra* note 3, at 7 (discussing Ernst & Young's legal activities in Europe).

Young, in addition, has links to a Canadian law firm<sup>98</sup> and, according to a commentator, is preparing to establish an MDP in Canada in case the prohibition against MDPs is lifted.<sup>99</sup> Ernst & Young is also deciding whether to establish a legal practice in the United Kingdom.<sup>100</sup>

### B. Ethics Rules Governing MDPs

Numerous Model Rules and Model Code provisions govern the association between lawyers and nonlawyers.<sup>101</sup> The majority of U.S. jurisdictions have adopted the Model Rules or Model Code provisions forbidding law partnerships between lawyers and nonlawyers.<sup>102</sup> One jurisdiction, however, permits lawyer-nonlawyer law partnerships under certain circumstances<sup>103</sup> while another jurisdiction had a similar rule rejected by its supreme court.<sup>104</sup> In England, the government in the past prevented solicitors from practicing in MDPs.<sup>105</sup> Despite the law's repeal, the Law Society's Solicitors' Rules generally continue to forbid MDPs<sup>106</sup> by not permitting solicitors to share legal fees with non-solicitors.<sup>107</sup>

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98. See Smith, *One Stop Shopping*, *supra* note 6, at 3 (noting Toronto, Canada-based law firm Donahue & Associates became part of Ernst & Young in January 1997); *E&Y In One-Stop Shop Threat*, *supra* note 3, at 5 (same).

99. *E&Y In One-Stop Shop Threat*, *supra* note 3, at 5.

100. See *Accountants on the Brink*, *supra* note 3, at 7 (explaining Ernst & Young spokeswoman stated that firm is still deciding whether to establish law practice in United Kingdom); Barker, *supra* note 6, at 13 (noting that Ernst & Young is close to opening law firm in England).

101. See *supra* notes 25, 26 (discussing ethics rules governing lawyer-nonlawyer combinations).

102. See *Partnership with Non-Lawyers*, *supra* note 30 (examining rules governing lawyer-nonlawyer combinations in U.S. jurisdictions).

103. See *supra* note 30 and accompanying text (discussing D.C. Rule permitting MDPs).

104. See THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 538 (6th ed. 1995) (explaining North Dakota Supreme Court rejected rule similar to D.C. Rule 5.4).

105. See *supra* note 38 and accompanying text (noting English government's prohibition against MDPs).

106. See *supra* note 38 and accompanying text (discussing MDPs in England).

107. See *supra* note 41 and accompanying text (discussing Law Society's rule prohibiting fee-sharing).

## 1. Discussion of U.S. Rules Governing Law Firm Ownership

The Model Rules and Model Code prohibit MDPs.<sup>108</sup> The District of Columbia is the only U.S. jurisdiction that permits lawyers and nonlawyers to enter into partnerships to, or share ownership of, other organizational forms that provide legal services, when certain requirements are satisfied.<sup>109</sup> North Dakota considered a rule to permit lawyers to practice law in association with nonlawyers, but the proposal was rejected by the state's Supreme Court.<sup>110</sup>

### a. The Majority Rule

In the United States, the Model Rules and the Model Code prohibit nonlawyers from holding an ownership interest in legal practices.<sup>111</sup> All United States jurisdictions, except the District of Columbia, have adopted the ABA's position.<sup>112</sup> The Model Code forbids a lawyer from entering into a partnership with a nonlawyer if the partnership intends to practice law.<sup>113</sup> In addition, the Model Code does not permit a lawyer to practice in an organization authorized to practice law for a profit if a nonlawyer holds a financial interest in the organization, a nonlawyer is an officer of the organization, or a nonlawyer has the right to direct a lawyer's professional judgment.<sup>114</sup>

The provisions in the Model Rules governing the interac-

108. See *supra* note 24 (listing Model Rules and Model Code provisions that prevent lawyers and nonlawyers from forming MDPs).

109. See *supra* note 30 and accompanying text (discussing lawyer-nonlawyer combinations in Washington, D.C.).

110. See *supra* note 104 and accompanying text (discussing North Dakota's proposed rule).

111. MODEL RULES, *supra* note 24, Rule 5.4; MODEL CODE, *supra* 19, DRs 3-102(A), 3-103(A), 5-107(B), 5-107(C).

112. See Andrews, *supra* note 25, at 597 (stating that "ABA rules governing the association of lawyers and nonlawyers effectively have been made the governing law, either directly or indirectly, in most states")

113. MODEL CODE, *supra* note 19, DR 3-103. DR 3-103(A) states: "A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." *Id.*

114. *Id.* DR 5-107(C). DR 5-107(C) provides:

- (C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
  - (1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
  - (2) A non-lawyer is a corporate director or officer thereof; or

tion between lawyers and nonlawyers are substantially identical to the applicable Model Code disciplinary rules.<sup>115</sup> Model Rule 5.4 prohibits lawyers from sharing fees for legal services and forming partnerships to provide legal services with nonlawyers.<sup>116</sup> In addition, Model Rule 5.4 forbids lawyers from practicing law in an organization practicing for profit if a nonlawyer owns an interest, is a corporate officer, or has the right to direct lawyers' professional judgment.<sup>117</sup>

Model Rule 5.4 preserves the prohibitions against law firm ownership by nonlawyers first codified in the 1928 addition of Canons 33<sup>118</sup> and 34<sup>119</sup> to the 1908 ABA Canons of Professional

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- (3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

*Id.*

115. See MODEL RULES, *supra* note 24, Rule 5.4 Model Code comparison (describing Model Rule 5.4 as substantially identical to Model Code DR 3-102(A), DR 3-103(A), DR 5-107(B), and DR 5-107(C)).

116. *Id.* Rule 5.4. Model Rule 5.4 states in part:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

*Id.*

117. *Id.* Rule 5.4(d). Model Rule 5.4(d) states:

A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
- (2) a nonlawyer is a corporate director or officer thereof; or
- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

*Id.*

118. CANONS OF PROFESSIONAL ETHICS Canon 33 (1928). Canon 33 provides: In the formation of partnerships for the practice of law, no person shall be admitted or held out as a practitioner or member who is not a member of the

Ethics<sup>120</sup> and continued in the Model Code.<sup>121</sup> The Model Code Ethical Considerations<sup>122</sup> (“EC”) explain that lawyers should not practice law in association with a nonlawyer because lawyers should not assist or encourage nonlawyers to practice law.<sup>123</sup> The comment to Model Rule 5.4 adds that the limitations expressed in the rule serve to protect lawyers’ independent professional judgment.<sup>124</sup> The ABA elected to prohibit nonlawyers from managing legal service providers because the ABA presumed nonlawyer managers or owners would be tempted more than lawyers to interfere with the professional relationships of employed lawyers when profitable to do so.<sup>125</sup>

Nevertheless, the Model Rules recognize that legal advice often involves extralegal elements.<sup>126</sup> Model Rule 2.1 permits

legal profession duly authorized to practice, and amenable to professional discipline. . . .

Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership’s employment consists of the practice of law.

*Id.*

119. *Id.* Canon 34. Canon 34 warns that “[n]o division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.” *Id.*

120. See HAZARD, JR. ET AL., *supra* note 20, at 13 (explaining Canons of Professional Ethics were adopted in 1908 by ABA as model code for regulating conduct of lawyers).

121. See MODEL CODE, *supra* note 19, DRs 3-102(A), 3-103(A), 5-107(B), 5-107(C) (preserving prohibition of law partnerships between lawyers and nonlawyers); MODEL RULES, *supra* note 24, Rule 5.4 Model Code comparison (describing Model Rule 5.4 as substantially identical to Model Code provisions governing lawyer-nonlawyer combinations). The comment to D.C. Rule 5.4 notes that “[t]raditionally, the canons of legal ethics and disciplinary rules prohibited lawyers from practicing law in a partnership that includes nonlawyers or in any other organization where a nonlawyer is a shareholder, director, or officer.” D.C. RULES, *supra* note 29, Rule 5.4 cmt.

122. See MODEL CODE, *supra* note 19, Pmb. and Prelim. Statement (discussing Ethical Considerations). The Model Code Preamble and Preliminary Statement explains:

The Ethical Considerations are aspirational in character and represent the objectives towards which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

*Id.*

123. See *id.* EC 3-8 (commenting on lawyer-nonlawyer law partnerships). EC 3-8 states that “[s]ince a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman . . . .” *Id.*

124. MODEL RULES, *supra* note 24, Rule 5.4 cmt.

125. See HAZARD, JR. ET AL., *supra* note 20, at 982-83 (examining ABA’s motive for restricting lawyer-nonlawyer combinations). Model Rule 5.4 assumes that the threat of influence of a nonlawyer manager over lawyers in the same organization “is so serious that a prophylactic rule prohibiting lay management is necessary.” *Id.*

126. See MODEL RULES, *supra* note 24, Rule 2.1 (stating that “[i]n rendering advice,

lawyers to consider moral, economic, social, political, and other factors, when relevant to clients' needs.<sup>127</sup> The Model Code also recognizes that lawyers may consider additional extralegal factors and advises that lawyers may advise clients beyond legal considerations.<sup>128</sup>

### b. The Minority Rule

Washington, D.C. remains the only jurisdiction in the United States that has not fully adopted the ABA's restrictive position on law firm ownership.<sup>129</sup> The Washington, D.C. Rules of Professional Conduct allow nonlawyer professionals to work with lawyers in providing legal services without restricting the nonlawyer to the role of employee.<sup>130</sup> D.C. Rule 5.4 allows a nonlawyer

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a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation"); Munneke, *supra* note 14, at 561 n.7 (explaining Model Rule 2.1 acknowledges that "legal advice incorporates extralegal elements[,] . . . that legal problems are seldom purely legal problems, and that the resolution of complex issues usually requires more than purely legal advice"). At least one Federal judge has noted that "the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others." *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) (Friendly, J.).

127. MODEL RULES, *supra* note 24, Rule 2.1. Model Rule 2.1 states that "in rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." *Id.* The comment to Model Rule 2.1 adds:

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field in itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

*Id.* Rule 2.1 cmt.

128. See MODEL CODE, *supra* note 19, EC 7-8 (stating that "[a]dvice of a lawyer to his client need not be confined to purely legal considerations").

129. See *supra* note 30 (examining U.S. jurisdictions' rules governing law firm ownership); D.C. RULES, *supra* note 29, Rule 5.4 (stating that nonlawyers may have financial interest in organization that provides legal services under certain circumstances).

130. See D.C. RULES, *supra* note 29, Rule 5.4(b) ("A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients . . ."). The comment to D.C. Rule 5.4 states:

[T]he purpose of liberalizing the rules regarding the possession of a financial interest or the exercise of management authority by a nonlawyer is to permit

to hold a financial interest or exercise managerial authority in a partnership or other form of organization for the practice of law if the nonlawyer performs professional services that assist the organization in providing legal services to clients.<sup>131</sup> Such a combination, however, may only occur if the sole purpose of the partnership or organization is to provide legal services,<sup>132</sup> if all those with a financial interest or managerial authority commit to abide by the rules of professional conduct,<sup>133</sup> if the lawyers with a financial interest or managerial authority assume the same responsibility over nonlawyers as if the nonlawyers were lawyers,<sup>134</sup>

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nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of employee. For example, the Rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all these situations, the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of [D.C. Rule 5.4(c)] are met.

*Id.* Rule 5.4 cmt.

131. *Id.* Rule 5.4. D.C. Rule 5.4(b) provides:

A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients . . . .

*Id.*

132. *Id.* Rule 5.4(b)(1). D.C. Rule 5.4(b)(1) requires that “[t]he partnership or organization has as its sole purpose providing legal services to clients . . . .” *Id.*

133. *Id.* Rule 5.4(b)(2). D.C. Rule 5.4(b)(2) requires that “[a]ll persons having such managerial authority or holding a financial interest undertake to abide by [the D.C. Rules] . . . .” *Id.*

134. *Id.* Rule 5.4(b)(3). D.C. Rule 5.4(b)(3) requires that “[t]he lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under [D.C.] Rule 5.1 . . . .” *Id.* D.C. Rule 5.1 states:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer has direct supervisory authority over the other lawyer or is a partner in the law firm in which the other lawyer practices, and knows

and if these requirements are in writing.<sup>135</sup>

D.C. Rule 5.4 recognizes that clients increasingly demand a broad range of professional services from a single provider<sup>136</sup> and merges this demand with the traditional limitations on fee-sharing between lawyers and nonlawyers aimed at protecting lawyers' professional independence of judgment.<sup>137</sup> The rule allows lawyers and nonlawyers to combine in order to provide services so long as all other D.C. Rules ethical requirements are met by the organization combining lawyers and nonlawyers.<sup>138</sup> The D.C. Rules permit fee-sharing in those entities satisfying Rule 5.4's conditions<sup>139</sup> but does not allow an individual or entity to acquire all or part of a law practice organization for investment

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or reasonably should know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

*Id.* Rule 5.1.

135. *Id.* Rule 5.4(b)(4). D.C. Rule 5.4(b)(4) requires that the conditions of D.C. Rule 5.4(b)(1) through D.C. Rule 5.4(b)(3) are set forth in writing. *Id.* The writing requirement "helps ensure that these important conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers enjoy an ownership or managerial role equivalent to that of a partner in a traditional law firm. *Id.* Rule 5.4 cmt.

136. *See id.* (addressing demand for broad range of services). The comment to D.C. Rule 5.4 provides in part:

As the demand increased for a broad range of professional services from a single source, lawyers employed professionals from other disciplines to work for them. So long as the nonlawyers remained employees of the lawyers, these relationships did not violate the disciplinary rules. However, when lawyers and nonlawyers considered forming partnerships and professional corporations to provide a combination of legal and other services to the public, they faced serious obstacles under the former rules.

*Id.*

137. *See id.* (describing traditional limitations on fee-sharing).

138. *Id.* The comment to D.C. Rule 5.4 states in part:

This Rule rejects an absolute prohibition against lawyers and nonlawyers joining together to provide collaborative services, but continues to impose traditional ethical requirements with respect to the organization thus created. Thus, a lawyer may practice law in an organization where nonlawyers hold a financial interest or exercise managerial authority, but only if the conditions set forth in subparagraphs (b)(1), (b)(2), and (b)(3) are satisfied, and pursuant to subparagraph (b)(4).

*Id.*; *see supra* notes 132-35 (listing requirements of D.C. Rule 5.4(b)(1), (2), (3), and (4)).

139. *See D.C. RULES, supra* note 29, Rule 5.4(a)(4) (stating that "[s]haring of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b)"); *see also id.* Rule 5.4 cmt. (explaining sharing of fees in organizations permitted by D.C. Rule 5.4(b) is likely to occur and that D.C. Rule 5.4(a)(4) "makes it clear that such fee sharing is not prohibited").

or other purposes.<sup>140</sup> In addition, the rule imposes the same standard of liability on financially interested lawyers and lawyers with managerial authority for the ethical misconduct of nonlawyer participants as is imposed on lawyers for the ethical misconduct of lawyers under their direct supervisory authority.<sup>141</sup>

### c. Previously Proposed Rules

The movement in favor of law firm diversification dates back to 1980, when the ABA Commission on Evaluation of Professional Standards<sup>142</sup> ("Kutak Commission") proposed a rule that permitted nonlawyers to hold an ownership interest in a law firm provided that certain ethical requirements were satisfied.<sup>143</sup>

140. *See id.* (commenting on nonlawyers' involvement with law firms). D.C. Rule 5.4's comment states that D.C. Rule 5.4(b)

does not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes. It thus does not permit a corporation, an investment banking firm, an investor, or any other person or entity to entitle itself to all or any portion of the income or profits of a law firm or other similar organization[,] . . . [s]ince such an investor would not be an individual performing professional services within the law firm or other organization.

*Id.*

141. *See id.* Rule 5.4(b)(3) (describing lawyers' liability for nonlawyer participants). Within an organization that satisfies the condition of D.C. Rule 5.4,

lawyers with financial interests or managerial authority are held responsible for ethical misconduct by nonlawyer participants about which the lawyers know or reasonably should know. This is the same standard of liability contemplated by Rule 5.1, regarding the responsibilities of lawyers with direct supervisory authority over other lawyers.

*Id.* Rule 5.4 cmt. In contrast, liability for the ethical misconduct of nonlawyer assistants is imposed on lawyers having direct supervisory authority over nonlawyer assistants only if the lawyer actually knows of the misconduct. *Id.*

142. *See HAZARD, JR. ET AL., supra* note 20, at 15 (explaining ABA president appointed Commission on Evaluation of Professional Standards ("Kutak Commission") in 1977 to recommend changes to Model Code). The ABA Commission on Evaluation of Professional Standards was also called the Kutak Commission, named after its chairman Robert J. Kutak. *See id.* at 15 (discussing ABA Commission on Evaluation of Professional Standards).

143. *See* Munneke, *supra* note 14, at 579 & n.116 (discussing Kutak Commission's proposal). The text of Kutak Commission's proposed Model Rule 5.4 stated:

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if the terms of the relationship provide in writing that:

- (a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;

The Kutak Commission's proposal represented a more liberal approach to lawyer-nonlawyer interactions than the existing Model Code permitted.<sup>144</sup> The Kutak Commission recognized that limiting organizational forms could not solve ethical problems with client-lawyer relationships.<sup>145</sup> The Kutak Commission's proposed Rule 5.4 permitted any organization delivering legal services, owned or managed in whole or in part by a nonlawyer, to employ an attorney if the organization respected the attorney's professional judgment,<sup>146</sup> protected a client's confidential information,<sup>147</sup> avoided impermissible advertising and client solicitation,<sup>148</sup> and charged reasonable fees.<sup>149</sup>

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- (b) information relating to representation of a client is protected as required by Rule 1.6;
  - (c) the arrangement does not involve advertising or personal contact with prospective clients prohibited by Rules 7.2 and 7.3; and
  - (d) the arrangement does not result in charging a fee that violates Rule 1.5.

*Report of the Commission on Evaluation of Professional Standards*, 107 A.B.A. Rpt. 828, 886-87 (1982) [hereinafter *Report of the Kutak Commission*]. Although the movement in favor of law firm diversification dates back to 1980, support for MDPs was already visible in the 1920s. See *Report of the Special Committee on Supplements to the Canons of Professional Ethics*, 52 A.B.A. Rpt. 372, 378 (1927) (noting that "there is substantial difference of view in the profession respecting its recommendations as to partnerships . . . [and] division of fees."); *Minority Report of F.W. Grinnell, Member of the Special Committee on Supplementing the Canons of Professional Ethics*, 52 A.B.A. Rpt. 387, 388 (1927) (expressing that "aside from professional policy, I think there is nothing inherently 'unethical' in the formation of partnerships between lawyers largely engaged in certain kinds of work and an expert engineer, student of finance, or some other form of expert.").

144. See Munneke, *supra* note 14, at 579-80 (comparing Kutak Commission's proposal to Model Code).

145. See *Kutak Commission Report*, *supra* note 143, at 887 (commenting on Kutak Commission's proposal). The comment to the Kutak Commission's proposed Rule 5.4 noted that "[g]iven the complex variety of modern legal services, it is impractical to define broad organizational forms that uniquely can guarantee compliance with the Rules of Professional Conduct" including problems concerning the client-lawyer relationship. *Id.*

146. See *id.* at 886 (discussing Kutak Commission's proposed Rule 5.4(a)).

147. See *id.* at 886-87 (discussing Kutak Commission's proposed Rule 5.4(b)). Model Rule 1.6 forbids a lawyer from revealing information relating to the representation of a client unless the client consents, the information is revealed to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or the information is revealed by the lawyer to establish a claim or defense in a controversy with the client, to establish a defense to a criminal charge or civil claim against the lawyer based on the client's conduct, or to respond to allegations over the lawyer's representation of the client. See *MODEL RULES*, *supra* note 24, Rule 1.6 (governing confidentiality of information).

148. See *Kutak Commission Report*, *supra* note 143, at 887 (discussing Kutak Commission's proposed Rule 5.4(c)). Model Rule 7.2 permits a lawyer to advertise services

The ABA House of Delegates<sup>150</sup> dropped the draft proposal after several objections were raised.<sup>151</sup> One objection was that the proposal would permit organizations like Sears, Roebuck and Co., Montgomery Ward & Co., Inc., H&R Block, Inc., and the Big Six accounting firms to open offices to compete with traditional law firms.<sup>152</sup> Another objection was that nonlawyer ownership of law firms would interfere with lawyers' professional independence.<sup>153</sup> A third objection was that nonlawyer law firm

through public media but does not allow a lawyer to give anything of value to a person for recommending the lawyer's services except that a lawyer may pay the reasonable costs of advertisements or communications permitted by the Rule and pay the charges of a not-for-profit lawyer referral service or legal service organization. *See MODEL RULES, supra* note 24, Rule 7.2 (governing lawyer advertising). Model Rule 7.3 places restrictions on a lawyer to solicit clients in-person or by telephone when a significant motive for the solicitation is pecuniary gain, as well as additional limits on client solicitation through written, recorded, in-person, and telephone communications. *See id.* Rule 7.3 (governing client solicitation).

149. *See Kutak Commission Report, supra* note 143, at 887 (discussing Kutak Commission's proposed Rule 5.4(d)). Model Rule 1.5 requires that a lawyer's fees be reasonable, requires that the lawyer's fee rate be told to the client within a reasonable time, limits when fees may be charged on a contingency basis, and restricts the division of fees between lawyers who are not in the same firm. *See MODEL RULES, supra* note 24, Rule 1.5 (governing attorney fees).

150. *See HAZARD, JR. ET AL., supra* note 20, at 912 (explaining ABA House of Delegates ("House of Delegates") is ABA's chief legislative arm and primarily consists of "lawyers appointed from several sections or other parts of the ABA or elected from state and local bar associations that, in turn, exercise varying degrees of control over local lawyers").

151. *See Midyear Meeting — House of Delegates — Fourth Session, 108 A.B.A. Rpt. 332, 352-55 (1983) [hereinafter Fourth Session]* (summarizing debate surrounding adoption of Model Rule 5.4); HAZARD, JR. ET AL., *supra* note 20, at 982 (explaining House of Delegates "dropped" Kutak Commission's draft proposal "at the last minute"); Munnike, *supra* note 14, at 580 (stating that "[i]n the initial skirmish, supporters of the traditional rules prohibiting lawyers from becoming entangled with nonlegal entities successfully prevented the adoption of proposed Rule 7.5"). Professor Hazard, the reporter for the Kutak Commission, revealed that during the debate before the ABA House of Delegates "someone asked if . . . [the Kutak] proposal would allow Sears Roebuck to open a law office. When they found out it would, that was the end of the debate." *See Kaplan, supra* note 24, at 1 (quoting Professor Geoffrey C. Hazard, Jr.).

152. *See Fourth Session, supra* note 151, at 352 (noting that someone "asked whether the proposed rule would permit a business corporation such as Sears or H&R Block to open law offices staffed by salaried lawyers in shopping centers across the country, and Professor Hazard responded that it would"); Andrews, *supra* note 25, at 595 (explaining Kutak Commission's proposed Model Rule 5.4 successfully opposed in part because it would permit Sears, Montgomery Ward, H&R Block, or Big Six accounting firms to establish law practices to compete with law firms).

153. *See Fourth Session, supra* note 151, at 353 (revealing that someone "suggested that lay partnerships would ultimately interfere with the exercise of a lawyer's independent professional judgment"); Andrews, *supra* note 25, at 595 (noting that Kutak

ownership would destroy lawyers' ability to be professional.<sup>154</sup> A fourth objection was that the proposal would have an unknown but fundamental effect on the legal profession.<sup>155</sup>

In 1986, the North Dakota bar also proposed a more permissive rule governing joint ventures between lawyers and nonlawyers to provide legal services.<sup>156</sup> The North Dakota bar's proposed rule would have permitted fee-sharing and partnerships between lawyers and nonlawyers, while maintaining ethical safeguards,<sup>157</sup> similar to those in D.C. Rule 5.4.<sup>158</sup> The North Dakota Supreme Court, however, rejected the proposal in 1987.<sup>159</sup>

## 2. Additional U.S. Ethics Rules Bearing on the Existence of MDPs

The Model Rules and Model Code contain other rules that would apply to MDPs.<sup>160</sup> Some of these rules are directed at lawyers' nonlegal activities,<sup>161</sup> other rules directly limit nonlawyers'

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Commission's proposed Model Rule 5.4 successfully opposed, in part because nonlawyer ownership of law firms would interfere with lawyers' professional independence).

154. See Andrews, *supra* note 25, at 595 (describing objection to Kutak Commission's proposed Model Rule 5.4 that rule would destroy lawyers' ability to be professional).

155. See *id.* (discussing objection to Kutak Commission's proposed Model Rule 5.4 that rule would fundamentally change legal profession).

156. See D.C., *North Dakota Bars Recommend New Ethics Rules*, 2 Laws. Man. on Prof. Conduct (ABA/BNA) No. 23, 449, 463 (Dec. 10, 1986) [hereinafter *New Ethics Rules*] (discussing North Dakota Rules of Professional Conduct ("North Dakota Rules") proposed Rule 5.4); see also Munneke, *supra* note 14, at 566 & n.40 (commenting that restrictive regulations governing joint lawyer-nonlawyer ventures are being replaced with more permissive rules such as 1986 North Dakota Rules of Professional Conduct proposed Rule 5.4).

157. See *New Ethics Rules*, *supra* note 156, at 463 (describing North Dakota proposed Rule 5.4). The North Dakota bar's proposed Rule 5.4 would permit MDPs if:

[T]here is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship, confidential information is protected, the association does not result in communications about the lawyer or the lawyer's services in violation of the ethics rules, and the association does not result in the client being charged a fee in violation of the ethical rules.

*Id.*

158. See MORGAN & ROTUNDA, *supra* note 104, at 538 (comparing North Dakota proposed Rule 5.4 to D.C. Rule 5.4).

159. See *id.* (discussing North Dakota proposed Rule 5.4).

160. See *supra* notes 25, 26 (listing rules that would apply to joint lawyer-nonlawyer law activities).

161. See, e.g., MODEL RULES, *supra* note 24, Rule 5.7 (law-related services).

activities,<sup>162</sup> and a few rules address the potential confusion clients of MDPs would face.<sup>163</sup> The rest of these rules control the interaction between lawyers and nonlawyers.<sup>164</sup>

#### a. Dual Practice

Dual practice results when a single lawyer or legal services provider also provides nonlegal services, and thus practices law and another field.<sup>165</sup> Dual practice, thus, occurs within MDPs when lawyers and nonlawyers form partnerships to provide legal and other services and also may occur in traditional law firms.<sup>166</sup> Within the framework of a traditional law firm, dual practice may occur when lawyers engage in joint practice, such as when a lawyer qualified in a field besides law practices both to resolve a client's problem.<sup>167</sup> Thus, a lawyer who is also a certified public accountant may counsel a client on legal or accounting matters, or both.<sup>168</sup> Historically, many bar members feared joint practices because it enabled lawyers to improperly refer nonlegal clients to the law practice.<sup>169</sup> Despite this fear, some jurisdictions

162. See, e.g., *id.* Rule 5.4(d) (law firm management); *id.* Rule 5.5(b) (unauthorized practice of law); MODEL CODE, *supra* note 19, DR 5-107(C) (law firm management); *id.* DR 3-101(A) (unauthorized practice of law).

163. See, e.g., MODEL RULES, *supra* note 24, Rule 1.6 (confidences); MODEL CODE, *supra* note 19, DR 4-101 (same).

164. See, e.g., MODEL RULES, *supra* note 24, Rules 1.7(b), 1.8(a) (conflicts of interest); *id.* Rule 7.2(c) (client referrals); *id.* Rule 7.3 (client solicitation); *id.* Rule 5.4 (fee-sharing); MODEL CODE, *supra* note 19, DRs 5-101(A), 5-104(A) (conflicts of interest); *id.* DR 2-103(B) (client referrals); *id.* DR 2-101(B) (client solicitation); *id.* DR 3-102(A) (fee-sharing).

165. See HAZARD, JR. ET AL., *supra* note 20, at 983 (defining dual practice). Dual practice occurs when "(1) a lawyer, who is also qualified in accounting, engineering or some other field, holds herself out as practicing in a dual capacity, and (2) a lawyer forms a partnership with a nonlawyer such as an accountant." *Id.*

166. See *id.* (examining dual practice).

167. See *id.* (defining lawyers also qualified in another profession who hold themselves out in dual capacity as engaging in dual practice); Munneke, *supra* note 14, at 571 (describing joint practice as situation where "lawyer . . . is certified in another field such as accounting, real estate or medicine . . . [and] in the course of an interview with one client, the lawyer may simply change hats, or vice versa.").

168. See Levinson, *supra* note 5, at 241 ("A person licensed . . . both as a lawyer and a certified public accountant (CPA) may appropriately provide accounting advice in support of the law firm's rendition of legal services and may supervise nonlawyer CPAs who provide similar accounting advice.").

169. See Munneke, *supra* note 14, at 571 (noting that while "dual training permits a lawyer to provide a broader range of services, traditionally it was feared that a dual practice would allow lawyers to improperly funnel nonlegal clients to the law practice.").

replaced the earlier restraints on dual practices with more permissive policies.<sup>170</sup>

Dual practice also occurs within the traditional law firm structure when law firms or lawyers own ancillary businesses,<sup>171</sup> such as when law firms open affiliated organizations that employ nonlawyers and that provide nonlegal services.<sup>172</sup> For example, a law firm that owns an organization that employs nonlawyers to provide financial and regulatory assistance to real estate developers has an ancillary business.<sup>173</sup> The key element of an ancillary business is that the lawyer can control the policy or management of the nonlegal business, either because the lawyer is actually in the management of the nonlegal business or because of the lawyer's financial investment.<sup>174</sup>

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170. See, e.g., N.Y. State Bar Ass'n Op. 549 (1983) (permitting attorney to represent clients of debt-collection agency in which attorney has financial interest); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1482 (1982) (allowing patent lawyer to practice law and operate branch office of company that assists investors to obtain and market patents). Dean Harry J. Haynsworth notes that "[s]ome states . . . in recent years have issued opinions that downplay the lay control, unauthorized practice and confidentiality aspects and, at the same time, fashion workable rules with respect to the solicitation and conflict-of-interest issues." HAYNSWORTH, *supra* note 25, at 121. The 1969 Model Code's DR 2-102(E) prohibited a lawyer "engaged both in the practice of law and another profession" from indicating the dual qualifications on a letterhead or sign. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(E) (1969) (amended 1981). In 1977, however, the U.S. Supreme Court, in *Bates v. Arizona*, held that the First Amendment to the U.S. Constitution protected truthful advertising. 433 U.S. 350, 384 (1977). In 1980, the ABA repealed the prohibition. See HAZARD, JR. ET AL., *supra* note 20, at 983 (discussing advertising dual qualifications).

171. See HAZARD, JR. ET AL., *supra* note 20, at 983 (noting that topic of dual practice "has become a controversial one within the organized bar under the rubric of 'ancillary business.'"). The nonlegal business does not have to operate in conjunction with the law business to qualify as an ancillary business. See Munneke, *supra* note 14, at 570 (describing ancillary businesses).

172. See HAZARD, JR. ET AL., *supra* note 20, at 983 (explaining controversy over ancillary businesses surrounds law firms that have created affiliated organizations that employ nonlawyers in consulting activities). The proponents of ancillary businesses assert that ancillary businesses "serve the needs of clients in the most efficient and cost-effective manner." See Stephanie B. Goldberg, *More than the Law: Ancillary Business Growth Continues*, A.B.A. J., Mar. 1992, at 54 (stating that "white paper" signed by 25 law firms favoring ancillary businesses explained that "these associations of lawyers and non-lawyers have arisen . . . to serve the needs of clients in the most efficient and cost-effective manner.").

173. See HAZARD, JR. ET AL., *supra* note 20, at 983 (stating that number of major law firms have ancillary businesses "that employ nonlawyers in various consulting activities").

174. See Munneke, *supra* note 14, at 570 (discussing ancillary businesses). A "mere financial investment in a company, such as the purchase of non-controlling shares of

A number of law firms operate ancillary businesses that employ nonlawyers to provide consulting and other nonlegal services.<sup>175</sup> Washington, D.C.-based law firm Arnold & Porter, for example, also provided general consulting services<sup>176</sup> and currently participates in real estate development<sup>177</sup> and financial services.<sup>178</sup> Other areas in which law firms have established affiliated businesses that offer consulting and other services include economics, education, management, energy, international business, employee benefits, and advertising.<sup>179</sup>

The ABA first considered the ancillary business issue in 1986 when the ABA Commission on Professionalism<sup>180</sup> ("Stanley

stock, would not fall within the scope of [the] . . . definition [of ancillary businesses]."  
*Id.* at 570 n.56.

175. See HAZARD, JR. ET AL., *supra* note 11, at 983 (discussing law firms with ancillary businesses); Munneke, *supra* note 14, at 560 (noting that "movement launched by a significant number of law firms to provide ancillary business services in conjunction with traditional legal services"). Despite ethics rules that present obstacles to ancillary businesses, law firms have increasingly engaged in such businesses. See Goldberg, *supra* note 172, at 54, 55 (describing 1991 survey that identified 80 to 85 ancillary businesses operated by law firms compared to 65 in 1989). Many Washington, D.C. law firms entered the ancillary business market partly because clients in D.C. "frequently required services that transcended the bounds of traditional law practice." Munneke, *supra*, at 578 & n.111. Although most ancillary businesses are in Washington, D.C., they have also spread throughout the East and West Coast. See Goldberg, *supra*, at 54 (revealing that in 1991 31 ancillary businesses were located in Washington, D.C., 17 in Mid-Atlantic, 10 in Northeast, and 14 on West Coast). Ancillary businesses are not unique to urban centers, as their use is also common in rural areas. See Munneke, *supra*, at 578 n.111 (discussing ancillary businesses).

176. See James F. Fitzpatrick, *Legal Future Shock: The Role of Large Law Firms by the End of the Century*, 64 IND. L.J. 461, 468-69 (1989) (explaining Arnold & Porter's affiliated entity, APCO Associates, is general consulting firm that handles legislative projects and general business consulting). Arnold & Porter sold APCO in 1991. See Goldberg, *supra* note 172, at 54 (discussing APCO).

177. See Fitzpatrick, *supra* note 176, at 468 (explaining Arnold & Porter's affiliated entity, MPC Associates, is real estate development consulting firm).

178. See *id.* at 467-68 (explaining Arnold & Porter's affiliated entity Secura Group is consulting firm for financial industry).

179. See Andrews, *supra* note 25, at 625 (surveying law firm ancillary businesses); see also Goldberg, *supra* note 172, at 54 (adding that some law firms have ancillary businesses that conduct environmental consulting and labor relations and public affairs work).

180. See Munneke, *supra* note 14, at 580 (explaining ABA Commission on Professionalism was popularly known as Stanley Commission in recognition of former ABA president Justin Stanley). The ABA Commission on Professionalism ("Stanley Commission") was formed in 1985 to study the question of professionalism in the bar. See *Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association: . . . In the Spirit of Public Service: A Blueprint for the Rekindling of*

Commission") investigated the question.<sup>181</sup> Following the investigation, the Stanley Commission issued a report expressing its disturbance with the increase in ancillary business activities, because it was less likely that lawyers could discharge the obligations imposed by the legal profession.<sup>182</sup> The ABA then created a Special Coordinating Committee on Professionalism<sup>183</sup> ("Special Committee") to consider, among other items, lawyer-non-lawyer business affiliations.<sup>184</sup> The Special Committee concluded that law firm diversification should be regulated but not prohibited because there was no evidence that diversification actually harmed clients, the public, or the profession.<sup>185</sup>

The ABA Litigation Section<sup>186</sup> ("Litigation Section"), however, advanced the opposite position and presented the ABA House of Delegates with recommendations prohibiting ancillary business activities, describing them as contrary to the tenets of professionalism.<sup>187</sup> The Litigation Section reported that ancil-

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*Lawyer Professionalism*, 112 F.R.D. 243, 248 (1986) [hereinafter *Stanley Commission Report*] (describing Stanley Commission's purpose).

181. See Munneke, *supra* note 14, at 580 (noting that "first real salvo of present battle was sounded in 1986" by Stanley Commission).

182. *Stanley Commission Report*, *supra* note 180, at 280. The Stanley Commission reported that it was "disturbed by what it perceives to be an increasing participation by lawyers in business activities." *Id.* The Stanley Commission added:

It seems clear to the Commission that the greater the participation by lawyers in activities other than the practice of law, the less likely it is that the lawyer can capably discharge the obligations which our profession demands. The Commission views the trend as disturbing and urges the American Bar Association to initiate a study to see what, if any, controls or prohibitions should be imposed.

*Id.* at 281.

183. See *Joint Recommendation and Report to the ABA House of Delegates from the Standing Committee on Ethics and Professional Responsibility and the Special Coordinating Committee on Professionalism* 5 (1990) [hereinafter *Joint Recommendation*] (explaining Special Coordinating Committee on Professionalism ("Special Committee") created to coordinate ABA's efforts to maintain lawyer professionalism).

184. See *id.* at 5-9 (describing Special Committee's mission).

185. See *Working Group on Ancillary Business Activities Interim Report to the Special Coordinating Committee on Professionalism* 1, 8 (1990) [hereinafter *Working Group Report*] (discussing Special Committee's recommendations); Munneke, *supra* note 14, at 581 (explaining Special Committee conducted hearings, published newsletter, and discussed issue and general consensus was that law firm diversification should be regulated but not prohibited).

186. See HAZARD, JR. ET AL., *supra* note 20, at 912 (describing ABA Sections). The ABA "operates primarily through sections that are devoted to many fields of law or law practice[.]" such as litigation. *Id.*

187. *American Bar Association Litigation Section Report to the House of Delegates* 1-2 (1990) [hereinafter *Litigation Section Report*]; see Munneke, *supra* note 14, at 581 (analyz-

lary businesses compromise lawyers' independent judgement and create conflicts of interest,<sup>188</sup> threaten the quality of legal work<sup>189</sup> and the reputation of the legal profession,<sup>190</sup> and contribute to the potential loss of the legal profession's self-regulation.<sup>191</sup>

In August 1990, the House of Delegates referred the issue to

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ing Litigation Section's report on ancillary businesses). The Litigation Section's Recommendations stated:

1. A lawyer shall not practice law in a law firm (which shall mean an association of two or more attorneys, a partnership or a corporation engaged in the practice of law), which owns a controlling interest in, or operates, an entity which provides non-legal services which are ancillary to the practice of law, or otherwise provides such ancillary non-legal services, except as provided in Paragraph 4.
2. One or more lawyers who engage in the practice of law in a law firm shall neither own a controlling interest in, nor operate, an entity which provides non-legal services which are ancillary to the practice of law, nor otherwise provide such ancillary non-legal services.
3. Two or more lawyers who engage in the practice of law in separate law firms shall neither own a controlling interest in, nor operate, an entity which provides non-legal services which are ancillary to the practice of law, nor otherwise provide such ancillary services.
4. A lawyer may practice law in a law firm which provides non-legal services which are ancillary to the practice of law if:
  - (1) The ancillary services are provided solely to clients of the law firm and are incidental to, in connection with and concurrent to, the provision of legal services by the law firm to such clients;
  - (2) Such ancillary services are provided solely by employees of the law firm itself and not by a subsidiary or other affiliate of the law firm;
  - (3) The law firm makes appropriate disclosure in writing to its clients; and
  - (4) The law firm does not hold itself out as engaging in any non-legal activities except in conjunction with the provision of legal services, as provided in this rule.
5. An individual engaged in the solo practice of law may provide non-legal services which are ancillary to the practice of law, subject to appropriate disclosure requirements.

*Litigation Section Report, supra*, at 1-2.

188. See *Litigation Section Report, supra* note 187, at 8-10 (asserting that uniting different professional services in one entity compromises lawyers' professional judgment and creates conflicts of interests because there are economic incentives to recommend law firms' other services to clients and not to criticize the providers of those services).

189. See *id.* at 11-13 (arguing that lawyers providing ancillary services are distracted from and have less time to devote to law practice).

190. See *id.* at 13-14 (explaining problems that arise with lawyers' ancillary services negatively impact reputation of legal profession).

191. See *id.* at 15 (asserting that law firm diversification may justify governmental regulation of legal profession if lawyers become more like other service providers and less like professionals with special obligations to society).

the ABA Standing Committee on Ethics and Professional Responsibility ("Ethics Committee").<sup>192</sup> In 1991, the Ethics Committee issued a draft proposal for a new Model Rule 5.7 that would allow law firm subsidiaries to provide ancillary services to nonclients as long as the lawyers fulfill their professional obligations toward clients.<sup>193</sup> The Ethics Committee's proposal permitted a law firm to operate an ancillary consulting business or to hire consultants as firm employees, provided that the consultants were not made partners and that they did not receive a share of the fees, except through qualifying compensation plans.<sup>194</sup> The Ethics Committee noted that ancillary businesses raise issues concerning confidentiality, conflicts of interest, and interference with lawyers' professional judgment.<sup>195</sup> The Ethics Committee added, however, that ancillary business activities should not be prohibited because there was no evidence of actual harm to clients, the public, or the profession resulting from such activities, that lawyers' professional judgment was not necessarily compromised from ancillary business activities, and that a complete prohibition against ancillary activities could be un-

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192. See Munneke, *supra* note 14, at 581-82 (explaining House of Delegates declined to adopt Litigation Section's recommendations and instead referred question to Standing Committee on Ethics and Professional Responsibility in August 1990). The Standing Committee on Ethics and Professional Responsibility ("Ethics Committee") was asked to develop necessary amendments to the Model Rules to govern lawyers offering ancillary services. See *Joint Recommendation*, *supra* note 183, at 1 (stating Ethics Committee's duty).

193. See *ABA Rejects Ancillary Business, Inroads on Client Confidences*, 60 U.S.L.W. 2121 (Aug. 20, 1991), available in LEXIS, BNA Library, USLW File [hereinafter *ABA Rejects Ancillary Business*] (revealing that Ethics Committee's proposal would allow law firm subsidiaries to provide ancillary services to non-clients, subject to regulations designed to ensure that lawyers' professional obligations toward clients would not be impaired). The Ethics Committee's proposal required an ancillary business to inform customers in writing of the business' relationship to the law firm and that the customer's relationship with the business is not that of lawyer-client and required a lawyer supervising ancillary activities to make reasonable efforts to assure that the ancillary business' employees' conduct is compatible with the professional obligations of the lawyer. See *id.* (discussing Ethics Committee's proposed Model Rule 5.7).

194. See Munneke, *supra* note 14, at 582 (commenting on Ethics Committee's draft proposal of Model Rule 5.7). One commentator noted that most observers believed lawyers could already operate ancillary businesses under the Model Rules and Model Code and that the Ethics Committee's proposal failed to address the issues of fee splitting and lawyer-nonlawyer partnerships. *Id.* at 581.

195. See *id.* at 583 (noting Ethics Committee's warning of potential ethics problems with ancillary business activities).

constitutional.<sup>196</sup> A commentator described the Ethics Committee's proposal as protecting the economic interests of lawyers while failing to protect the economic interests of nonlawyer consultants wishing to engage in joint ventures with lawyers because nonlawyers would not be permitted to become partners in the law firm or to directly share fees with the lawyers.<sup>197</sup>

In 1991, the Litigation Section offered an alternative proposal,<sup>198</sup> eventually adopted by the ABA House of Delegates as Model Rule 5.7.<sup>199</sup> The Litigation Section's new proposal prohibited a firm from providing ancillary services unless the law firm employees provided the services to firm clients in connection with the provision of legal services.<sup>200</sup>

In August 1992, the ABA repealed Model Rule 5.7.<sup>201</sup> The repeal occurred before the rule was adopted by any jurisdiction.<sup>202</sup> The ABA repealed Model Rule 5.7 after general practitioners in smaller cities perceived that the rule might prohibit their long-standing practice of combining law with other activities such as title search companies, service on companies' boards of directors, and real estate development.<sup>203</sup>

196. See *ABA Rejects Ancillary Business*, *supra* note 193 (citing Ethics Committee spokesperson).

197. See Munneke, *supra* note 14, at 582-83 (describing Ethics Committee's proposal as accomplishing anomalous result by protecting economic interests of lawyers but not protecting "economic interests of nonlawyer consultants, who were prevented from maximizing the value of their services in the marketplace if they wished to engage in joint ventures with lawyers" because proposal failed "to address the issues of fee splitting or nonlawyer partnerships . . . [and thus] fell short of permitting nonlawyer investment in legal services.").

198. See *id.* at 583 (explaining Litigation Section proposed rule prohibiting law firms from offering ancillary services, in whatever form, to anyone not already client of law firm).

199. See *ABA Rejects Ancillary Business*, *supra* note 193 (noting that House of Delegates rejected Ethics Committee proposal and adopted Litigation Section's version of Model Rule governing ancillary businesses, in most controversial issue of House of Delegates agenda).

200. See *id.* (describing Litigation Section proposal). The Litigation Section's rule "would effectively close the door to most external ancillary businesses, and severely restrict in-house provision of ancillary services." Munneke, *supra* note 14, at 583. The Litigation Section's new proposal also eliminated an exception for solo-practitioners under which they could operate ancillary businesses. *Id.* at 583 n.133.

201. See Randall Samborn & Victoria Slind-Flor, *ABA '92: Feminism is Theme*, NAT'L L.J., Aug. 24, 1992, at 1, 34 (explaining Model Rule 5.7 repealed by seven votes at 1992 ABA annual meeting).

202. See Munneke, *supra* note 14, at 584 (analyzing Model Rule 5.7's repeal).

203. See HAZARD, JR. ET AL., *supra* note 20, at 985 (describing opposition to Model Rule 5.7). The Litigation Section's original recommendations against ancillary business

In 1994, the ABA adopted the current version of Model Rule 5.7<sup>204</sup> to address law-related services.<sup>205</sup> Rule 5.7 subjects lawyers involved with the provision of law-related services to the Model Rules when the law-related services are provided by the lawyer in conjunction with legal services.<sup>206</sup> A lawyer is also subject to the Model Rules with respect to the provision of law-related services if the law-related services are provided by a separate entity controlled by the lawyer when the lawyer does not take reasonable steps to assure that a person obtaining the law-related services is informed that the law-related services are not legal services and are not protected by the attorney-client relationship.<sup>207</sup>

States have disciplined some lawyers who have used ancillary

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activities contained an exception for small towns because the "practice was so entrenched." Munneke, *supra* note 14, at 568 n.45. Small town lawyers have, for some time, engaged in ancillary business activities that have often been operated out of the same office as the legal business or they have had office sharing arrangements with nonlegal businesses and have shared clients and fees. *See id.* at 568 (discussing practices of small town lawyers). For example, small town lawyers operate ancillary businesses such as real estate or insurance agencies, accounting practices, or title companies. *See id.* at 568 n.45 (discussing ancillary businesses). Small town lawyers have also entered into office sharing arrangements with real estate and insurance agencies, sharing office space, support staff, and other overhead expenses. *See id.* (discussing office sharing arrangements).

204. *See* MORGAN & ROTUNDA, *supra* note 104, at 540 (commenting on current version of Model Rule 5.7).

205. MODEL RULES, *supra* note 24, Rule 5.7. Model Rule 5.7 defines law-related services 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." *Id.* Rule 5.7(b). Examples of law-related services are: title insurance, financial planning, accounting, trust, real estate counseling, legislative lobbying, economic analysis, social work, psychological consulting, tax return preparation, patent consulting, medical consulting, and environmental consulting services. *See id.* Rule 5.7 cmt. (commenting on law-related services).

206. *Id.* Rule 5.7(a)(1). Rule 5.7(a)(1) states: "A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services . . . if the law-related services are provided . . . by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients . . ." *Id.*

207. *See id.* Rule 5.7(a)(2) (governing disclosure in connection with law-related services). Model Rule 5.7(a)(2) states:

"A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services . . . if the law-related services are provided: . . . by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist."

*Id.*

businesses as a source of clients.<sup>208</sup> Disciplinary officials, however, have often ignored the practice of referring ancillary business clients to the law practice as long as lawyers' conduct was not egregious.<sup>209</sup> The relaxation of the rules surrounding ancillary business has served a practical purpose in small towns where there may not be enough legal work to sustain lawyers full-time.<sup>210</sup> Without the relaxed rules, lawyers would not settle in these areas and access to legal services would diminish.<sup>211</sup> The rules, however, have been enforced in urban areas because the above justification does not exist.<sup>212</sup> The result has been a double standard of enforcement of the rules governing ancillary business activities.<sup>213</sup>

Opponents of ancillary business activities argue that ancillary businesses raise ethical concerns.<sup>214</sup> These opponents claim that ancillary businesses compromise lawyers' independent judg-

208. See, e.g., *In re Cornelius*, 520 P.2d 76, 79, 86 (Alaska 1974) (affirming suspension of attorney suspended in part because used ancillary business organized to act as agent in obtaining oil and gas leases as source of clients for legal practice); Florida Bar v. Curry, 211 So. 2d 169, 170, 172 (Fla. 1968) (affirming recommendation of suspension of attorney/accountant for soliciting for legal work clients advised on tax matters); *In re Miller*, 131 N.E.2d 91, 95, 97 (Ill. 1955) (affirming recommendation of suspension of attorney who used trademark search service to solicit clients for legal practice).

209. See Munneke, *supra* note 14, at 568 (explaining disciplinary officials' response to practice of referring ancillary business clients to law practice).

210. See HAYNSWORTH, *supra* note 25, at 80 (explaining supplementing law practice income with ancillary business may be "necessary for survival, particularly in small towns and rural areas where law practice is economically marginal").

211. See Munneke, *supra* note 14, at 568 (stating that permitting lawyers to supplement law practice income by engaging in ancillary businesses with nonlawyers has made legal services available to people who otherwise would not have access to lawyers).

212. See *id.* at 568-69 (noting that in larger communities there is enough legal work to sustain full-time law practices).

213. See *id.* (explaining result of disparate enforcement of rules governing ancillary business activities). One commentator notes that

[i]ronically, the same ethical considerations confront both the sole practitioner and the large law firm partner. Problems involving loyalty, confidentiality, and solicitation apply with equal force to the small and large firm. The only distinctions between the two lie in the economic stakes. If small firms and sole practitioners are able to engage in ancillary business activities without violating the Rules of Professional Conduct, then large firms should be able to do the same.

*Id.* at 569.

214. See *id.* at 576 (stating that opponents of ancillary businesses denounce them as threatening legal profession's traditional values); HAZARD, JR. ET AL., *supra* note 20, at 983 (explaining opponents of ancillary businesses "charge that these activities raise serious professionalism concerns").

ment,<sup>215</sup> endanger confidentiality,<sup>216</sup> create conflicts of interests,<sup>217</sup> and generally produce opportunities for lawyers to violate ethics rules.<sup>218</sup> In addition, the opponents of ancillary business activities fear that permitting these activities will lead to nonlawyer influence over, control, or even ownership of law firms,<sup>219</sup> will sidetrack lawyers from their professional responsibilities,<sup>220</sup> will motivate nonlawyer enterprises to lobby for permission to offer legal services,<sup>221</sup> will exert pressure on clients to

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215. See HAZARD, JR. ET AL., *supra* note 20, at 983 (exploring debate over whether ancillary businesses compromise lawyers' independent judgment). A law firm that makes an economic commitment to nonlaw personnel may lose its "objectivity in advising the client (a) whether a nonlaw expert is needed, (b) if so, who that expert should be, and (c) if an expert is retained, whether the person is rendering satisfactory services at a fair price . . . ." Levinson, *supra* note 5, at 242. The potential negative effect on objectivity may lead third parties to reject or doubt the law firm's work product. *See id.* (analyzing potential effects of compromising lawyers' independent judgment).

216. See HAZARD, JR. ET AL., *supra* note 20, at 983 (discussing controversy over whether ancillary businesses endanger confidentiality). There is a risk that "the conduct of nonlawyers will not be governed by coherent, enforceable standards which are compatible with lawyers' standards on . . . confidentiality . . . ." Levinson, *supra* note 5, at 242.

217. See HAZARD, JR. ET AL., *supra* note 20, at 983 (examining disagreement over whether ancillary businesses endanger confidentiality). There is a risk that "the conduct of nonlawyers will not be governed by coherent, enforceable standards which are compatible with lawyers' standards on . . . conflicts of interest . . . ." Levinson, *supra* note 5, at 242.

218. See Munneke, *supra* note 14, at 571 (explaining ancillary businesses pose potential threat "to the integrity of the legal profession because it exposes lawyers to an opportunity to violate their professional ethics[,] such as transgressing rules concerning unauthorized practice of law, conflicts of interest, confidentiality, and client solicitation").

219. See HAZARD, JR. ET AL., *supra* note 20, at 983 (explaining fear that ancillary businesses pave way for "nonlawyer ownership of or participation in law firms."); Lawrence J. Fox, *Restraint is Good in Trade; Ancillary Business for Lawyers Needs Limits*, NAT'L L.J., Apr. 29, 1991, at 17 (explaining "ancillary business movement introduces non-lawyers into positions of influence and control of the profession" because "those who come to prominence and success in the operations of the ancillary business will end up with real power in the governance of the overall enterprise.").

220. See HAZARD, JR. ET AL., *supra* note 20, at 983 (analyzing debate over whether ancillary businesses "distract lawyers from their professional responsibilities as lawyers."); Fox, *supra* note 219, at 17 (stating that in today's complex legal world "it is all lawyers can do to maintain our level of competence by devoting full time to the practice of law."). The risk that the law firm or the lawyers will be distracted from the practice of law creates a risk of "impaired competence and diligence of lawyers . . . ." Levinson, *supra* note 5, at 242.

221. See Fox, *supra* note 219, at 17 (explaining "if lawyers enter other fields of endeavor, non-lawyer enterprises such as Household Finance, Coldwell Banker, American Express and WalMart are likely to wish to add legal services to their array of consumer products.").

use the firm's ancillary services,<sup>222</sup> and will eventually lead to an end to the legal profession's self-regulation.<sup>223</sup> At least one opponent believes that law firms establish ancillary businesses as a source of profits.<sup>224</sup>

Proponents of ancillary business activities answer that these activities are not different from those traditionally engaged in by lawyers,<sup>225</sup> that clients benefit in many ways from the additional services,<sup>226</sup> and that dangers with confidentiality and conflicts of

222. *See id.* (stating that power inherent in lawyer-client relationship would pressure client to use lawyer's firm's ancillary services because client "(a) will not want to offend his or her lawyer; (b) will be concerned he or she will become a second-class citizen at the law firm if the law firm's consultant is not hired; and (c) will be overwhelmingly influenced by the confidence the client wants to place in his or her attorney."). One commentator notes that 60% of the customers of Washington, D.C.-based law firm Arnold & Porter's ancillary business, Secura Group, "have become clients of the firm." *Id.*

223. *See HAZARD, JR. ET AL., supra* note 20, at 983 ("Opponents of ancillary business activity fear that this 'business' activity will . . . ultimately lead to a displacement of self-regulation."); Stanley L. Chauvin, Jr., *A Conscientious Conclusion: Ancillary Business too Risky for Clients and Lawyers* 76 A.B.A. J. 8, 8-9 (1990) (stating that "mixing of law practice with non-law businesses could open the flood gates for outside regulation of the profession."). Short of the legal profession losing its self-regulating powers, there is a risk "that society will perceive the legal profession as moving into nonlaw businesses through unfair use of its privileged position (including use of information received in confidence from clients) and that society will react by revoking some privileges or otherwise curtailing the independence of the legal profession;" or a risk "that society will perceive the legal profession as neglecting the practice of law despite a huge unmet need for legal services and that society will react by revoking some privileges such as our monopoly over the rendition of legal services . . ." Levinson, *supra* note 5, at 243. One opponent of ancillary services states:

The assertion that lawyers should be self-regulating because anything else would undermine their ability to protect the individual from the potential oppressiveness of the government carries precious little force when it appears that a more important goal is protecting the individual from the potential abuses inherent in the law firm conglomerate peddling insurance or financial investment advisory services to its client-customers.

Fox, *supra* note 219, at 17.

224. *See Chauvin, Jr., supra* note 223, at 9 (commenting on ancillary businesses). The former ABA President wrote: "I truly doubt that the lawyers who create ancillary businesses are motivated by a desire to serve clients or the public more effectively and at a lower cost. The risk of putting the lawyer-client relationship in jeopardy appears more likely to be motivated by profit." *Id.*

225. *See HAZARD, JR. ET AL., supra* note 20, at 984 (listing arguments in defense of ancillary businesses).

226. *See id.* (explaining benefits derived by clients of law firms with ancillary businesses). One commentator explains that the benefits to the clients of firms that provide nonlegal services in conjunction with the practice of law include:

(1) [T]he convenience of one-stop shopping, (2) the intellectual benefit of an ongoing relationship between the lawyers and nonlaw experts in the firm, (3)

interests are adequately protected by professional rules.<sup>227</sup> At least one proponent of ancillary services asserts that the problems arising from the use of in-house nonlawyer specialists are the same as those that arise from the use of specialists from outside the law firm.<sup>228</sup> Some commentators argue that rules restricting ancillary businesses are a form of economic protectionism<sup>229</sup> and that lawyers oppose ancillary business activities be-

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the ease and speed in selecting nonlaw experts, (4) the possible fee savings if the nonlaw experts provide brief consultations without having to be called in from the outside, and (5) the possible fee savings and maximization of quality resulting from the operation of a freely competitive market.

Levinson, *supra* note 5, at 242. A proponent of ancillary services adds that

the use of in-house specialists is preferable because it is more cost-effective for the client and often more efficient. But equally important, . . . the regular day-to-day interaction and coordination between lawyers and non-lawyer professionals tend to generate better business solutions to complex problems than either group could develop on its own. In many situations, their joint efforts produce better arguments, richer analysis and sounder advice.

James W. Jones, *Law Firm Diversification: Is it the Wave of the Future?*, A.B.A. J., Sept. 1989, at 52.

227. See HAZARD, JR. ET AL., *supra* note 20, at 984 (listing arguments in defense of ancillary businesses). The managing partner of Arnold & Porter and proponent of ancillary activities asserts that:

The practice of law . . . has become far more complex and diverse in recent years than could have been imagined even 20 years ago.

The growing complexity of both the law and the economic and social activities that the law attempts to regulate increasingly requires lawyers, in the course of representation, to understand and apply the precepts of other disciplines.

These demands have led to the use of non-lawyer professionals, working in tandem with (and often at the direction of) lawyers in analyzing client problems, structuring transactions and managing litigation. . . .

In the past 10 years or so, law firms of all sizes with practice areas requiring interdisciplinary collaboration have begun to bring these services in-house by hiring non-lawyer professionals in areas ranging from economics and international trade to engineering and health care, from accounting and social work to lobbying and family counseling.

Sometimes, these lawyers have been hired as employees of the law firms; in other cases, the firms have established separate companies to make these services available. But in all cases the motivation has been to improve the quality of service to clients by assuring that complex matters requiring interdisciplinary skills can be handled efficiently and economically.

Jones, *supra* note 226, at 52.

228. See Jones, *supra* note 226, at 52 (arguing in favor of ancillary businesses). Mr. Jones adds that "when undertaken with the informed consent of the client and with due regard for conflicts of interest and other ethical issues, the use of in-house specialists actually enhances the caliber of the service that lawyers render." *Id.*

229. See Munneke, *supra* note 14, at 577 & n.100 (stating that important basis for

cause they are in direct competition with law firms that have ancillary businesses.<sup>230</sup>

### b. Conflicts of Interest

Lawyers practicing in MDPs face potential conflicts of interest problems.<sup>231</sup> For example, a lawyer in an MDP may feel pressure to refer a client to other professionals in the same firm although the client may be better served by someone outside the firm.<sup>232</sup> The Model Rules prohibit a lawyer from representing a client if the client's representation may be materially limited by the lawyer's interests or by the lawyer's responsibilities to others, unless the client consents and the lawyer reasonably believes the representation of the client will not be adversely affected.<sup>233</sup> In addition, the Model Rules forbid a lawyer from transacting business with a client or acquiring an adverse ownership, possessory, security, or other pecuniary interest to that of a client unless the transaction is fair and reasonable to the client and the lawyer discloses the information to the client.<sup>234</sup> Similarly, the Model

rules restricting ancillary businesses is economic protectionism); *see also* Andrews, *supra* note 25, at 622 (noting "economic protectionism . . . undoubtedly has played an important role in practice in preserving the business restrictions on lay involvement").

230. *See* Munneke, *supra* note 14, at 577 (explaining perhaps issue in dispute with ancillary business activities is economic, because law firms without ancillary businesses compete directly with firms that have "pursued more aggressive policies of attracting and servicing clients").

231. *See* HAZARD, JR. & HODES, *supra* note 27, at 471 (revealing potential ethics problems with lawyer-nonlawyer law partnerships).

232. *See* *Litigation Section Report*, *supra* note 187, at 9 (discussing conflicts of interests faced by lawyers practicing law in partnerships with nonlawyers). With respect to MDPs that practice accounting and law, some practitioners claim there are potentially serious conflicts of interest problems. *See* Dillon & Griffiths, *supra* note 3, at 27 (examining conflicts of interest implications of auditing firm routinely handling clients' legal and tax work).

233. MODEL RULES, *supra* note 24, Rule 1.7(b). Model Rule 1.7(b) states:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

*Id.*

234. *Id.* Rule 1.8(a). Model Rule 1.8(a) provides:

A lawyer shall not enter into a business transaction with a client or knowingly

Code forbids a lawyer from representing a client, absent full disclosure and the client's consent, if the lawyer's financial, business, property, or personal interests will or reasonably may affect the lawyer's professional judgment.<sup>235</sup> In addition, the Model Code instructs a lawyer not to enter into a business transaction with a client if they will hold differing interests and the client expects the lawyer to represent the client in that transaction, unless the lawyer fully discloses the lawyer's position to the client and the client consents.<sup>236</sup>

### c. Client Referrals and Solicitation

Another potential ethics problem with MDPs consists of law-

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acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

*Id.* Lawyers may serve on the boards of directors of clients, although a variety of problems may arise. *See* Levinson, *supra* note 5, at 252 (explaining “[l]awyers who serve as officers or directors of their corporate clients cause numerous difficulties and uncertainties.”). Lawyers who serve as officers or directors of their corporate clients create a risk that other board members

may not know if the lawyer-director is speaking as lawyer or director; the lawyer-director may be called as a material witness to matters in which that person participated as a director, and may consequently be disqualified from continuing to serve as a lawyer; in corporate takeover situations, the loyalties of the lawyer-director may be divided between the old management and the corporation which may benefit from a change in management. The lawyer-director may also deprive the corporation of participation in a free market for legal services by depriving other law firms of fair access to the opportunity to render legal services to those clients. And as a practical matter, the law firm itself incurs a high level of exposure to disqualification from litigation, discharge by the client, and civil liability arising from its members' involvement in the business of the client.

*Id.* at 253.

235. MODEL CODE, *supra* note 19, DR 5-101(A). Model Code DR 5-101(A) states that “[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.” *Id.*

236. *Id.* DR 5-104(A). DR 5-104(A) states: “A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.” *Id.*

yers using nonlawyer partners to solicit clients in attempts to circumvent rules restricting in-person solicitation of clients.<sup>237</sup> Model Rule 7.3 generally prohibits lawyers from soliciting prospective clients in-person or by telephone.<sup>238</sup> Rule 7.2 forbids a lawyer from paying anyone to refer clients to the lawyer, except through not-for-profit lawyer referral services or legal service organizations.<sup>239</sup>

Under the Model Code, lawyers may not recommend their firms to laypersons unless the laypersons first seek advice regarding employment of a lawyer from the lawyer.<sup>240</sup> The Model Code, in addition, forbids a lawyer from compensating a person

237. See *Litigation Section Report*, *supra* note 187, at 34 (analyzing problems with nonlawyer client solicitation in MDPs); HAZARD, JR. & HODES, *supra* note 27, at 471 (examining improper solicitation of clients); Munneke, *supra* note 14, at 566 (explaining ethics rules restricting in-person solicitation of business limits lawyers' dealings with nonlawyers). Nonlawyer partners of MDPs could potentially initiate contacts with prospective clients with the intent to solicit business for the ancillary business and the law practice. *Litigation Section Report*, *supra*, at 34.

238. MODEL RULES, *supra* note 24, Rule 7.3. Model Rule 7.3 states:

- (a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.
- (b) A lawyer shall not solicit professional employment from a prospective client by . . . in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:
  - . . . ;
  - (2) the solicitation involves coercion, duress or harassment.

*Id.*

239. *Id.* Rule 7.2(c). Model Rule 7.2(c) provides that “[a] lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may . . . pay the usual charges of a not-for-profit lawyer referral service or legal service organization . . . .” *Id.* Model Rule 7.2(c) generally prohibits a lawyer from paying “another person for channeling professional work.” *Id.* Rule 7.2 cmt. The rule, however,

does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs.

*Id.*

240. See MODEL CODE, *supra* note 19, DR 2-103(A) (governing recommendation of professional employment). Model Code DR 2-103(A) explains that “[a] lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer.” *Id.* DR 2-101(B) permits a lawyer to publish or broadcast certain information “in print media distributed or over television or radio broadcast” in specified geographic areas. *Id.* DR 2-101(B).

or organization for referring clients to the lawyer.<sup>241</sup> The lawyer may, however, pay legal aid or other legal services organizations for referrals.<sup>242</sup>

#### d. Confidences

Multi-discipline practices threaten confidentiality because there is a serious risk that nonlawyers will learn client confidences<sup>243</sup> or that nonlawyer partners subject to confidentiality rules will inadvertently waive the attorney-client privilege.<sup>244</sup> Model Rule 1.6 generally forbids lawyers from revealing client confidences unless authorized by the client or necessary for representation of the client.<sup>245</sup> Model Code DR 4-101 also generally prohibits a lawyer from revealing the client's confidences or secrets.<sup>246</sup>

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241. See *id.* DR 2-103(B) (governing recommendation of professional employment). DR 2-103(B) states in part: "A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client . . ." *Id.*

242. See *id.* DR 2-103(B), (D) (governing recommendation of professional employment). DR 2-103(B) does permit a lawyer to "pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D)." *Id.* DR 2-103(B). DR 2-103(D) permits a lawyer to be recommended by organizations that promote the lawyer's services if there is no interference with the lawyer's exercise of independent professional judgment, such as legal aid offices, lawyer referral services associated with bar associations and other legal-referral services or prepaid legal services plans. *Id.* DR 2-103(D).

243. See HAZARD, JR. & HODES, *supra* note 27, at 470 (discussing potential problem with breaches of confidentiality in MDPs); Munneke, *supra* note 14, at 566 (explaining rules protecting client confidences necessarily limit lawyers' dealings with nonlawyers).

244. See *Litigation Section Report*, *supra* note 187, at 32 (discussing inadvertent waiver of attorney-client privilege by nonlawyer partners). Nonlawyer partners "may in effect make judgments concerning privilege issues without realizing the precise issues and implications involved." *Id.* In fact, the attorney-client privilege issues are difficult "even for experienced lawyers with professional training in legal ethics and with years of legal practice behind them . . ." *Id.*

245. MODEL RULES, *supra* note 24, Rule 1.6. Model Rule 1.6(a) states that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . ." *Id.* Rule 1.6(a). The comment adds that "[l]awyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers." *Id.* Rule 1.6 cmt.

246. MODEL CODE, *supra* note 19, DR 4-101. DR 4-101 defines "confidence" as "information protected by the attorney-client privilege under applicable law" and defines "secret" as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would

### e. Unauthorized Practice of Law

Multi-discipline practices potentially increase nonlawyers' violations of unauthorized practice of law rules and place their lawyer counterparts at risk of assisting the violation.<sup>247</sup> For example, clients of MDPs may ask nonlawyer partners for advice that neither may realize constitutes legal advice.<sup>248</sup> The Model Rules prohibit lawyers from assisting nonlawyers to practice law.<sup>249</sup> The Model Code's restrictions are similar to those contained in the Model Rules.<sup>250</sup>

The prohibition against aiding nonlawyers to practice law was promulgated to protect the public from unqualified persons.<sup>251</sup> The definition of practice of law, however, is determined by law and thus differs across jurisdictions.<sup>252</sup> State bar associations have developed broad definitions of practice of law so that nonlawyers are left with a very small sphere of activity.<sup>253</sup>

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be likely to be detrimental to the client." *Id.* DR 4-101(A). DR 4-101 states that "a lawyer shall not knowingly . . . [r]eveal a confidence or secret of his client[;] . . . [u]se a confidence or secret of his client to the disadvantage of the client[;] . . . [or] [u]se a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure." *Id.* DR 4-101(B). A lawyer, however, "may reveal . . . [c]onfidences or secrets with the consent of the client or clients affected, but only after full disclosure to them." *Id.* DR 4-101(C)(1). Finally, "[a] lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client . . ." *Id.* DR 4-101(D).

247. See HAZARD, JR. & HODES, *supra* note 27, at 470 (commenting on unauthorized practice of law risks in lawyer-nonlawyer law partnerships); Munneke, *supra* note 14, at 566 (explaining prohibitions on unauthorized practice of law, among other restrictions, have prevented nonlawyers from providing legal services).

248. See *Litigation Section Report*, *supra* note 187, at 31 (discussing potential unauthorized practice of law violations in MDPs).

249. See MODEL RULES, *supra* note 24, Rule 5.5 (governing unauthorized practice of law). Model Rule 5.5 states that "[a] lawyer shall not: . . . assist a person who is not a member of the bar in the . . . unauthorized practice of law." *Id.* Rule 5.5(b).

250. See MODEL CODE, *supra* note 19, DR 3-101(A) (governing unauthorized practice of law). Model Code DR 3-101(A) provides that a "lawyer shall not aid a non-lawyer in the unauthorized practice of law." *Id.* The prohibition against aiding nonlawyers in the practice of law originated in ABA Canon 47. See CANONS OF PROFESSIONAL ETHICS, *supra* note 118, Canon 47 (stating that "[n]o lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any law agency, personal or corporate").

251. See MODEL RULES, *supra* note 24, Rule 5.5 cmt. (explaining limit on practice of law to members of bar protects public from rendition of legal services by unqualified persons).

252. See *id.* (commenting on unauthorized practice of law).

253. See Kelly C. Crabb, Note, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUM. L. REV. 1767, 1781 (1983) (explaining in

#### f. Fee-Sharing

Rules governing the sharing of fees received for legal services between lawyers and nonlawyers affect MDPs.<sup>254</sup> Model Rule 5.4 generally prohibits lawyers from sharing fees for legal services with nonlawyers.<sup>255</sup> The Model Code also generally prohibits a lawyer or law firm from sharing legal fees with a nonlawyer, except in specified situations.<sup>256</sup> One commentator, however, does not believe that fee-sharing with nonlawyers impairs the independence of the law firm and urges that fee-sharing be permitted so long as nonlawyers are not given equity interest or a managerial role in the law firm.<sup>257</sup>

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United States state bar associations have influenced development of broad definition of practice of law, leaving narrow scope of activity for nonlawyers).

254. See, e.g., MODEL RULES, *supra* note 24, Rule 5.4(a) (prohibiting fee-sharing between lawyers and nonlawyers).

255. *Id.* Model Rule 5.4(a) states:

A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

*Id.*

256. See MODEL CODE, *supra* note 19, DR 3-102(A) (governing sharing of legal fees). DR 3-102(A) generally provides:

A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

- (1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.
- (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.
- (3) A lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement providing such plan does not circumvent another disciplinary rule.

*Id.*

257. Levinson, *supra* note 5, at 241. Professor Levinson adds that "the existing rules tend . . . to discourage the employment of nonlawyer experts by prohibiting lawyers from sharing fees with nonlawyers." *Id.*

### g. Law Firm Management

Finally, ethics rules addressing the management of law firms by nonlawyers impact MDPs as Model Rule 5.4(d) forbids lawyers from practicing in organizations that have nonlawyer corporate directors or officers, or that give nonlawyers the right to direct or control lawyers' professional judgment.<sup>258</sup> The Model Code has the same restrictions as the Model Rules.<sup>259</sup> The restrictions are designed to prevent nonlawyers from interfering with lawyers' professional judgment.<sup>260</sup> Despite these restrictions, some law firms that recognize the value of professional management have hired nonlawyers as office managers.<sup>261</sup> The nonlawyer office managers' authority, however, is limited by the ethical restrictions on nonlawyer involvement.<sup>262</sup> One commentator warns that nonlawyer managers inevitably obtain control over important firm policy decisions.<sup>263</sup>

### 3. Discussion of England's Rules Governing Law Firm Ownership and MDPs

In Great Britain, the Law Society's Solicitors' Rules Rule 7 does not permit solicitors to practice law in partnership with non-solicitors.<sup>264</sup> Solicitors' Rules Rule 7 prevents practitioners from forming MDPs by governing the sharing of fees.<sup>265</sup> Rule 7 generally prohibits solicitors from sharing their professional fees with non-solicitors.<sup>266</sup> The Law Society's Rules, however, permit

258. MODEL RULES, *supra* note 24, Rule 5.4(d).

259. See MODEL CODE, *supra* note 19, DR 5-107(c); (governing law firm management).

260. See Andrews, *supra* note 25, at 629 (describing reason for restriction).

261. See *id.* at 628 (discussing law firm management by nonlawyers).

262. See *id.* at 629 (explaining Model Rule 5.4(d) limits nonlawyer office managers' scope of management). The restrictions on law firm management by nonlawyers seem to "preclude a nonlawyer from having any real authority over decisions that matter to the firm's financial well-being." *Id.*

263. Munneke, *supra* note 14, at 573. Professor Munneke warns that control over law firms' policy decisions "may constitute control over the lawyers' independent professional judgment." *Id.*

264. See SILVERMAN, *supra* note 33, at 130 (stating that "[a] solicitor is not permitted to practice in partnership with a person who is not a solicitor[;] . . . [t]o do so would involve the solicitor in a breach of Rule 7 Solicitors' Practice Rules 1990"); Godfrey & Damerell, *supra* note 4, at 72 (explaining professional rules promulgated by Law Society do not permit MDPs).

265. SOLICITORS' RULES, *supra* note 36, Rule 7(1).

266. See *id.* (governing sharing of legal fees); SILVERMAN, *supra* note 33, at 75 (explaining Solicitors' Rules Rule 7 "prevents a solicitor from entering into partnership

solicitors to establish profit-sharing schemes for employees.<sup>267</sup>

In 1990, section sixty-six of the Courts and Legal Services Act<sup>268</sup> repealed section thirty-nine of the Solicitors Act 1974,<sup>269</sup> which had prohibited MDPs by forbidding solicitors from acting as agents for unqualified persons.<sup>270</sup> The Courts and Legal Services Act, in addition, transferred rulemaking authority in this area to the Law Society.<sup>271</sup> Under the Courts and Legal Services

with any person except another qualified solicitor or registered lawyer since he may not share his fees with such a person"). Solicitors' Rules Rule 7(1) prohibits solicitors from sharing or agreeing to share their professional fees with any person other than:

- (a) a solicitor;
- (b) a person who is entitled to practise as a lawyer in any country other than England and Wales and has not been struck off or suspended from the register of foreign lawyers;
- (c) the solicitor's bona fide employee, which provision shall not permit a partnership with a non-solicitor under the cloak of employment; or
- (d) a retired partner or predecessor of the solicitor or the dependents or personal representatives of the deceased partner or predecessor.

SOLICITORS' RULES, *supra*, Rule 7(1).

267. See SOLICITORS' RULES, *supra* note 6, Rule 7(1)(c) (governing profit-sharing schemes for employees); SILVERMAN, *supra* note 33, at 75 (noting that exceptions contained in Solicitors' Rules Rule 7 "allow solicitors to maintain profit-sharing or bonus schemes for their employees").

268. Courts and Legal Services Act § 66.

269. Solicitors Act § 39.

270. See Solicitors Act § 39 (governing solicitors acting as agents). The repealed act stated in part:

- (1) No solicitor shall willfully or knowingly—
  - (a) act as agent for an unqualified person in any action or in any matter in bankruptcy;
  - (b) permit his name to be made use of in any action or in any matter in bankruptcy upon the account or for the profit of an unqualified person;
  - ...;
  - (d) do any other act enabling an unqualified person to appear, act or practise in any respect as a solicitor in any action or in any matter in bankruptcy.
- ... .
- ... .
- (4) For the avoidance of doubt it is hereby declared that in subsection (1) references to an unqualified person include references to a body corporate.

Solicitors Act § 39. An 'unqualified person' is someone who does not meet the qualifications of section 1 Solicitors Act 1974, which states: "No person shall be qualified to act as a solicitor unless — (a) he has been admitted as a solicitor, and (b) his name is on the roll, and (c) he has in force a certificate issued by the Society . . . authorising him to practise as a solicitor . . . ." Solicitors Act § 1.

271. See Courts and Legal Services Act § 66(2) (transferring authority to Law Society); David Waller, *Growing Places*, LEGAL BUS., July/Aug. 1991, 15, 17 (stating that

Act, therefore, the Law Society is authorized to promulgate rules that permit solicitors to enter into partnerships with non-solicitors.<sup>272</sup> Despite the permissive Courts and Legal Services Act, the Law Society has not eliminated the ban on MDPs.<sup>273</sup> As a result of the Law Society's restrictions, in England solicitors may not enter into partnerships with accountants, insurers, or other professionals to provide services.<sup>274</sup> The restriction persists despite a number of solicitors favoring rules that would permit MDPs.<sup>275</sup>

The Law Society and some solicitors oppose MDPs on the grounds that MDPs are not in the public interest.<sup>276</sup> The restriction was created to protect clients and consumers of legal services.<sup>277</sup> Solicitors' Rules Rule 7 is intended to preserve solicitors'

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Courts and Legal Services Act allowed Law Society to set its own rules). Section 66(2) of the Courts and Legal Services Act states: "Nothing in subsection (1) prevents the Law Society making rules which prohibit solicitors from entering into any unincorporated association with persons who are not solicitors, or restrict the circumstances in which they may do so." *Id.* The Lord Chancellor, involved in enacting the Courts and Legal Services Act, while addressing the Law Society's authority to eliminate the ban on MDPs, explained: "We are not encouraging the Law Society in any way but merely making clear that it has this power and that it is for the Society to decide in its professional judgment to decide what is right . . ." *See Way Cleared for MDPs*, L. Soc'y's GAZETTE, Feb. 7, 1990, at 7 (quoting Lord Chancellor's remarks that Courts and Legal Services Act authorizes Law Society to eliminate prohibition against MDPs).

272. *See SILVERMAN, supra* note 33, at 131 (noting that section 66 of Courts and Legal Services Act permits Law Society to make rules that allow solicitors to enter into unincorporated association with non-solicitors). Similar provisions authorize the governing bodies for notaries and barristers to promulgate rules that allow notaries and barristers to enter into unincorporated association with non-notaries and non-barristers, respectively. *See Courts and Legal Services Act §§ 66(4)-(6).*

273. *See SILVERMAN, supra* note 33, at 131 (explaining Courts and Legal Services Act section 66 "has not yet been brought into force"); Waller, *supra* note 271, at 17 (noting that Law Society has continued prohibiting MDPs).

274. *See Patten, supra* note 37, at 27 (discussing Law Society's prohibition of MDPs).

275. *See Godfrey & Damerell, supra* note 4, at 73 (revealing that recent survey indicated that 54% of solicitors who responded to survey favored relaxation of ban on MDPs). The solicitors in favor of relaxing the ban on MDPs thought it "advantageous to obtain under the same roof the services of other professionals such as accountants, surveyors, barristers, patent agents and foreign lawyers." *Id.* Another recent survey of 579 law firms by the Law Society revealed that more than a third of the firms surveyed had discussed the issue of MDPs at the partnership level and over 70% of those firms were in favor of MDPs. *See Editorial, MDP-minded*, L. Soc'y's GUARDIAN GAZETTE, Dec. 13, 1996, at 15 [hereinafter *MDP-Minded*] (detailing results of Law Society survey on MDPs).

276. *See Frank E. Maher, Practising in Partnership*, L. Soc'y's GAZETTE, Sept. 18, 1991, at 2 (examining opposition to MDPs).

277. *See A Full Quota of Challenge and Excitement: President's Address to the 1988 Na-*

independence and to sustain their ability to offer their clients impartial advice.<sup>278</sup> The prohibition against MDPs, in addition, continues because of concerns involving the solicitor-client relationship, conflicts of interests, legal privilege, and the practice of law by unqualified persons.<sup>279</sup> The Government, however, eliminated the statutory ban on MDPs with the Courts and Legal Services Act because there no longer existed strong public interest justifications for the restriction.<sup>280</sup> Furthermore, at least one commentator asserts that the opposition from the legal profession is generated by fear.<sup>281</sup>

In May 1991, Great Britain's Department of Trade and Industry proposed lifting the ban on partnerships of more than twenty people.<sup>282</sup> At least one commentator and some members of accounting firms believe the Law Society is on the verge of allowing MDPs.<sup>283</sup> If the Law Society fails to relax the rules prohibiting MDPs, the Law Society may have to prove to the Government that the restrictions are not anticompetitive.<sup>284</sup> The Law Society established a steering group to address the concerns

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tional Conference, L. Soc'y's GAZETTE, Oct. 20, 1988, at 2 (quoting president of Law Society saying that debate over MDPs "is an issue of client and consumer protection").

278. See Godfrey & Damerell, *supra* note 4, at 73 (revealing purposes behind Rule(7)); SILVERMAN, *supra* note 33, at 131 ("The existence of this prohibition stems from the profession's concern to maintain the independence of solicitors.").

279. See SILVERMAN, *supra* note 33, at 131 (analyzing reasons ban on MDPs has continued in England).

280. See *Green Papers — Legal Profession Faces Radical Revamp: Work, Education and Organization*, L. Soc'y's GAZETTE, Feb. 1, 1989, at 4 [hereinafter *Legal Profession Faces Radical Revamp*] (explaining Green Paper argues that "[t]here are no strong public interest reasons justifying such restrictions any longer.").

281. See Maher, *supra* note 276, at 2 (discussing motives behind lawyers' opposition to MDPs).

282. See Waller, *supra* note 271, at 17 (discussing Department of Trade and Industry's proposal to permit partnerships of more than twenty people to form MDPs).

283. See, e.g. *All the Rage*, *supra* note 3, at 11 (noting that with "the previously obstructive Law Society about to relent, multi-disciplinary partnerships may well be the coming thing for some enterprising accountants."); Bassirian, *supra* note 3, at 2 (explaining Big Six firms have begun recruiting lawyers directly out of school "in anticipation of possible changes to current rules barring MDPs.").

284. See *Legal Profession Faces Radical Revamp*, *supra* note 280, at 4 (explaining Lord Chancellor's green paper provides that once statutory restriction against MDPs has been removed Law Society must satisfy competition authority that remaining restrictions are "not unnecessarily anti-competitive."); Waller, *supra* note 271, at 17 (explaining "in due course . . . [the Law Society] will have to satisfy the government that the rules are not anticompetitive.").

surrounding MDPs.<sup>285</sup> In 1996, the Law Society began reviewing the feasibility of MDPs and their implications on control, confidentiality, and conflicts of interest.<sup>286</sup>

### C. Another Reason For Prohibiting MDPs

Jurisdictions adopted restrictive rules governing law firm ownership and MDPs to preserve the independent judgment of lawyers by preventing nonlawyer influences on members of the bar.<sup>287</sup> At least one commentator notes, however, that these rules were not only intended to prevent lay persons and other professionals from influencing lawyers, but also to bar nonlawyers from usurping lawyers' work.<sup>288</sup> Other commentators believe that restrictive rules aimed at nonlawyers exist to protect lawyers' economic interests.<sup>289</sup> In fact, some commentators assert that the ABA excludes nonlawyers from the legal profession altogether as a form of economic protectionism.<sup>290</sup> This justifi-

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285. See Bassirian, *supra* note 3, at 2 (discussing Law Society's special steering group on MDPs).

286. See *MDP-Minded*, *supra* note 275, at 15 (discussing review of potential problems with MDPs).

287. See Kenneth S. Kilimnik, *Lawyers Abroad: New Rules for Practice in a Global Economy*, 12 DICK. J. INT'L L. 269, 319 (1994) (analyzing purpose of rules prohibiting lawyers from forming partnerships to practice law with nonlawyers).

288. See *id.* (noting additional motives behind rules prohibiting lawyers from forming partnerships with nonlawyers to practice law).

289. See, e.g., Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3 (1981) (questioning bar's stated motive of protecting public behind bar's campaign against unauthorized practice of law); Kaplan, *supra* note 24, at 1 (explaining Professor Hazard believes that real purpose of ABA Model Rule on lay investment is to "insulate the small law firm from competition for legal services."); Levinson, *supra* note 5, at 233 ("The motivation for preserving the domain of the [legal] profession may be, in part, the profession's concern for its own well-being and survival . . ."). By 1976, 96% of U.S. states' bar associations had developed unauthorized practice committees to monitor the activities of nonlegal ventures and to ensure such ventures did not encroach on the domain of practicing lawyers. See Rhode, *supra*, at 15 (examining unauthorized practice of law restrictions); Munneke, *supra* note 14, at 562 & n.14 (explaining unauthorized practice committees were created to monitor activities of nonlegal organizations that "have encroached upon the domain of practicing lawyers" and that ABA formulated "Statement of Principles" describing numerous nonlegal professions' permissible activities in relation to legal activities "to ensure that nonlawyers did not practice law"). These committees, however, have fallen into disfavor because of legal setbacks, antitrust concerns, and "the increasingly unclear distinction between the practice of law and the pursuit of related fields[,] and in their wake, "a more laissez-faire, free market environment has evolved." Munneke, *supra*, at 563-64.

290. See, e.g., Andrews, *supra* note 25, at 616 (explaining "economic protectionism often can be read between the lines of the justifications given for excluding nonlawyers

cation surfaced during the debates surrounding the Kutak Commission's proposals for Model Rule 5.4.<sup>291</sup> The official legislative history of the rules, however, does not mention economic protectionism as a reason for rejecting the Kutak Commission's proposal.<sup>292</sup>

Commentators frequently explain that the Big Six's legal activities increase competition for traditional law firms.<sup>293</sup> Several lawyers openly fear the increased competition that the repeal of restrictive ownership rules would create.<sup>294</sup> For example, in response to a proposed Hong Kong law permitting MDPs, a partner of a U.S.-based law firm's Hong Kong office explained that lawyers in Hong Kong fear the proposed law because the entry of accounting firms in the legal services market threatens to usurp

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from the business of law."). Professors Hazard and Hodes identify economic protectionism as the hidden and illegitimate rationale behind the canons excluding nonlawyers from the legal profession. *See HAZARD, JR. & HODES, supra* note 27, at 471 (analyzing reasons for prohibition against nonlawyer partners in law firms).

291. *See* Andrews, *supra* note 25, at 616 (analyzing debates concerning Model Rule forbidding nonlawyers from forming partnerships with lawyers). One ABA delegate, during the debates, asked: "How will you explain to the sole practitioner who finds himself with competition with [sic] Sears why you voted for this? How will you explain to the man in the mid-size firm who is being put out of business by the [B]ig [Six] . . . firms?" *Id.* (citing Unedited Transcript of ABA House of Delegates Session 28, at 48-49 (Feb. 8, 1983)) (quoting Al Conant).

292. *See THE LEGISLATIVE HISTORY OF THE MODEL RULES: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES* 160 (1987) (stating legislative history of Model Rule 5.4); *see also* Andrews, *supra* note 25, at 616 n.208 (examining legislative history of Model Rules).

293. *See, e.g.*, Smith, *New Adversaries*, *supra* note 17, at 6 (explaining Big Six legal practices impose competitive burdens on traditional law firms worldwide because of their size). For example, some commentators believe KPMG Fidal cannot be ignored because of its size, its presence throughout France, and its affiliations with KPMG's international network. Dillon & Griffiths, *supra* note 3, at 27. KPMG Fidal competes with French and Anglo-American law firms and with the legal divisions of other Big Six accounting firms and may eventually dominate them according to Dillon and Griffiths. *See id.* (adding that "[KPMG] Fidal may be a slumbering giant — poised to awaken to its own enormous potential"). A partner of an England-based law firm's Paris office warns that KPMG Fidal's size, organizational structure, and combination of different professions makes it a threat to traditional law firms. *See id.* at 27-28 (citing partner of England-based law firm Clifford Chance's Paris office).

294. *See, e.g.*, Klein, *supra* note 3, at A1 (noting reactions of several practitioners to permitting MDPs). One professor notes that European lawyers resent the Big Six's practice of law because of the competition it provides. Abel, *supra* note 11, at 747. In England, the chairman of the National Committee of the Young Solicitors Group stated that opposition to Big Six entering the legal arena from solicitors "is doubtless generated by fear." Maher, *supra* note 276, at 2.

law firms' less sophisticated work.<sup>295</sup> A partner of another U.S.-based law firm added that accounting firms would likely expand their practice to high-end transactions.<sup>296</sup> At least one legal expert believes that accountants are already stealing high-end legal business from law firms.<sup>297</sup> The expert adds that the Big Six accounting firms are moving toward a legal practice that in the future may compete with the top U.S. law firms.<sup>298</sup>

## II. ISSUES REGARDING MDPS: PROS AND CONS

It is generally accepted that lawyers often require a number of services to represent clients.<sup>299</sup> Lawyers, however, have debated the form of practices that lawyers may establish to best provide these services.<sup>300</sup> One side asserts that MDPs should be per-

295. See Klein, *supra* note 3, at A1 (quoting partner of Cleveland, U.S.-based law firm Jones, Day, Reavis & Pogue's Hong Kong). The Jones, Day, Reavis & Pogue partner observed that the proposal to permit MDPs in Hong Kong "strikes terror in the hearts of lawyers . . . [because] [i]t attacks our bread and butter. The fear is that accounting firms would take away lower-end business, without which most law firms can't survive." *Id.*

296. See *id.* (revealing that partner of U.S.-based law firm White & Case is worried because he has "never known anyone but Woolworth's that's entered at the low end of the market and stayed there"). A senior partner with U.S.-based law firm Shearman & Sterling acknowledged that the Big Six accounting firms can give law firms competition in any given deal. See Smith, *New Adversaries*, *supra* note 17, at 7 (citing Shearman & Sterling senior partner).

297. See Smith, *New Adversaries*, *supra* note 17, at 7 (citing Texas, U.S.-based consultant to lawyers and accountants). The consultant explained that "clients [in Europe] used to divide up pieces of a deal between a Davis Polk [& Wardwell, a U.S.-based law firm,] and a Price Waterhouse[,] . . . [n]ow they're giving a little more to Price Waterhouse. Someday they may give it all to Price Waterhouse." *Id.*

298. See *id.* (citing Texas, U.S.-based consultant to lawyers and accountants).

299. See *supra* note 126 (recognizing that lawyers generally require additional services to assist clients); see also David Lauter, 'Outsiders' Who Work For Firms; Using Non-Lawyers, NAT'L L.J., Feb. 6, 1984, at 1 (stating that "law is increasingly multi-disciplinary . . . requiring a range of services to represent a client. Economists[,] . . . [accountants, lobbyists, and engineers] . . . were always brought in on an ad hoc basis, but if you're an integral part of the firm, it adds another dimension"); Waller, *supra* note 271, at 17 (explaining England's Department of Trade and Industry acknowledged that MDPs "might help the large professional practices meet the increasing demand from their clients for a wider range of specialised services and enable them to recruit and retain the necessary staff to provide these services"). The head of Andersen's English law firm, Garrett, asserts that clients' positive response to Garrett's association with Andersen confirms that many client want "integrated, multidisciplinary business-advice services." See Fennell, *supra* note 13 (citing head of Garrett).

300. See, e.g., *supra* notes 143-55 and accompanying text (examining debate surrounding law firm ownership by nonlawyers).

mitted because MDPs offer a variety of benefits to clients.<sup>301</sup> Opponents of MDPs respond that combining legal services with other activities would detrimentally affect the legal profession and the general public.<sup>302</sup>

### A. Efficiency

Proponents of MDPs argue that MDPs benefit clients because the ability to retain an organization whose staff can handle all of the legal and extralegal issues involved in a client's representation increases efficiency.<sup>303</sup> The proponents argue that MDPs cause clients to need only one firm and, thus, reduce clients' costs because there is only one company to instruct, communication between members of the same firm is better, there is a better liaison between advisors, and projects are streamlined.<sup>304</sup>

At least one opponent of MDPs argues that achieving an efficient market for legal services creates a problem.<sup>305</sup> The opponent argues that an efficient market for legal services would redistribute nonlegal and legal personnel into the most profitable practice area and geographical location.<sup>306</sup> This would create a shortage of legal services in less profitable areas.<sup>307</sup>

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301. See, e.g., Patten, *supra* note 37, at 27 (facilitate efficiency of legal services); Munneke, *supra* note 14, at 568 (benefit law firms); Nigel Page, *Taxing Times: Quality vs Quantity?*, *LEGAL Bus.*, July/Aug. 1991, at 18, 21 (foster client comfort and confidence). An Arnold & Porter partner explained that MDPs could combine the talents of people from different professions and "have as their mission the broader goal of problem solving." Fitzpatrick, *supra* note 176, at 465. Mr. Fitzpatrick added the result would be an organization that best supported clients' overall needs. *Id.*

302. See, e.g., Levinson, *supra* note 5, at 243, 247 (fee increases); *id.* (pressure to refer work to other members of MDP ("intra-firm referrals")); *id.* at 242, 247 (professional independence); *id.* (conflicts of interest); *id.* (confidentiality); Maher, *supra* note 276, at 2 (attorney-client privilege); Levinson, *supra*, at 242, 247 (distract lawyers from practice of law); Dillon & Griffiths, *supra* note 3, at 29 (stifle creative and innovative legal approaches).

303. See Patten, *supra* note 37, at 27 (discussing arguments made by proponents of MDPs that MDPs are more efficient than traditional law firms).

304. See *id.* (describing proponents of MDPs' arguments that MDPs are efficient).

305. See Levinson, *supra* note 5, at 243, 247 (warning of problems with efficient legal services market).

306. *Id.*

307. See *id.* (explaining efficient legal market creates risk of shortages of legal service providers in less profitable practice and geographical areas).

### B. Effects of Competition

Proponents of MDPs assert that, generally, any rules limiting access to the domestic legal market will result in higher prices and less services.<sup>308</sup> Government regulation of legal services typically produces a cartel<sup>309</sup> in the domestic legal services market,<sup>310</sup> thereby increasing consumer prices and reducing services as compared to the prices and services in competitive markets.<sup>311</sup> At least one commentator argues that Model Rule 5.4's prohibition of MDPs harms consumers of legal services by suppressing competition in the supply of services and thereby increasing the price for the services.<sup>312</sup> Additionally, some pro-

308. See Michael J. Chapman & Paul J. Tauber, Note, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services*, 16 MICH. J. INT'L L. 941, 955 (1995) (describing effects of government regulation on market activities). Chapman & Tauber explain that

[t]he most visible effect of governmental regulation of legal services is that it typically results in the establishment of a cartel in the domestic legal services market . . . . In cartelized markets, prices paid by consumers tend to be higher and fewer goods or services tend to be provided than in competitive markets.

*Id.* at 954 (footnotes omitted). A study of the deregulation of legal services in housing conveyances in Great Britain revealed the potential benefits of ending cartels in legal services markets:

The study demonstrated that price discrimination became more difficult and costs to consumers decreased by about one-third as competition increased. In addition, the authors suggested that the quality of service increased at all price levels due to deregulation. Although the study was narrow in scope, it is important evidence that both commercial entities and individuals could benefit substantially from the increased competition in the legal services industry.

*Id.* at 955 (footnotes omitted). A cartel is a group of sellers of a product who join together to control the product's production, sale, and price in the hope of obtaining the advantages of a monopoly. See WILLIAM J. BAUMOL & ALAN S. BLINDER, ECONOMICS, PRINCIPAL AND POLICY: MICROECONOMICS 235 (4th ed. 1988) (defining cartel). A monopoly is "an industry in which there is only one supplier of a product for which there are no close substitutes, and in which it is very hard or impossible for another firm to coexist." BAUMOL & BLINDER, *supra* note 308, at 214. With respect to lawyers, a monopoly is "the exclusive right of lawyers to do for the public those things that have been legislatively or judicially defined as 'the practice of law' . . . ." See Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors-or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 160 (1980) (discussing unauthorized practice of law).

309. See *supra* note 308 (defining cartel).

310. See Chapman & Tauber, *supra* note 308, at 954 (noting governmental regulation of legal services usually results in cartelizing domestic legal services market).

311. See *id.* (comparing cartelized markets to competitive markets).

312. See Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 268 (1985) (stating that Model Rule 5.4 "suppresses competition on the supply side. The fewer the consumer alternatives, the more lawyer-employers can charge for their employees's time").

ponents of MDPs suggest that the legal services market would benefit from the increased competition and investment that would result from allowing banks, retailers, and insurance companies to expand into legal services.<sup>313</sup> Liberalizing law firm ownership rules and the increased competition that would result would enable lawyers to seek the most efficient organizational structure in which to provide legal services.<sup>314</sup> One commentator believes that such changes might actually help law firms survive in the future.<sup>315</sup>

Opponents of MDPs argue that if the U.S. legal services market was opened to MDPs, the Big Six would immediately dominate because of their advantage in size, diversity, resources, and client base.<sup>316</sup> Some commentators assert that the Big Six domination would reduce the number of MDPs consumers could choose from as the size of the consumers' projects increases because only the Big Six would have the size and resources to handle large projects.<sup>317</sup> The opponents argue that the resulting Big Six MDPs' oligopoly<sup>318</sup> would undermine any efficiency gained from economies of scale<sup>319</sup> achieved by the Big Six MDPs<sup>320</sup> and, thus, lead to fee increases.<sup>321</sup> At least one MDP

313. See HAZARD, JR. ET AL., *supra* note 20, at 982 (revealing arguments made by proponents of MDPs surrounding effects of MDPs). One commentator added: "We have long thought that many of the strictures that the 'establishment' arm of the [legal] profession placed were stifling — not only to the growth of legal practices, but also to the delivery of legal services to consumers." Editorial, *What Now, the Dow?*, NAT'L L.J., Jan. 19, 1987, at 12.

314. See Munneke, *supra* note 14, at 568 (explaining that "a removal of the economic restrictions resulting from the current rules could allow lawyers to compete more effectively in the free market environment of today's business world.").

315. See *id.* (discussing effects on law firms of liberalizing law firm ownership rules). Removing the current law firm ownership restrictions "might actually help law firms survive in the coming decades." *Id.*

316. See Patten, *supra* note 37, at 27 (discussing potential advantages of Big Six MDPs).

317. See *id.* (analyzing problem of decreasing choice with large projects); see also Levinson, *supra* note 5, at 243, 247 (stating that MDPs create risk that "the market . . . will concentrate nonlegal as well as legal services in a small number of large firms.").

318. See BAUMOL & BLINDER, *supra* note 308, at 233 (defining oligopoly). An oligopoly is "a market dominated by a few sellers at least several of which are large enough relative to the total market to be able to influence the market price." *Id.*

319. See *id.* at 295 (defining economies of scale). Economies of scale "are savings that are acquired through increases in quantities produced." *Id.*

320. See Patten, *supra* note 37, at 27 (noting that "[t]he theoretical economies of scale may be offset by a quasi-monopolistic tendency to increase prices.").

321. See Levinson, *supra* note 5, at 243, 247 (warning that concentrating work among small number of large firms would lead to fee increases).

opponent, moreover, notes that larger firms are not necessarily less costly because of their elevated fixed costs.<sup>322</sup>

### C. Pressures and Quality Control

Opponents of MDPs assert that consumers' freedom to obtain the best services would be curtailed by MDPs because consumers would be pressured by MDPs to choose a single firm to provide a variety of services.<sup>323</sup> The opponents argue that this presents problems because an MDP may deliver top service in one area but not in others, thereby causing a client to receive great services in some areas but not in other areas.<sup>324</sup> Opponents of MDPs also assert that in MDPs there is pressure to use nonlawyer personnel when advising clients even when unnecessary and to bill the client for the nonlegal services because of the financial commitment MDPs make to the nonlawyer personnel.<sup>325</sup> Opponents of MDPs further argue that large, global firms raise quality control problems because work would be automatically referred to other members of the practice, despite the possibility that there are better qualified professionals at other firms to better handle that work.<sup>326</sup> For example, a former Coopers partner explained that Coopers' audit unit in France would strongly suggest to clients that they work with Coopers' in-house tax and legal division in France, and that this was problematic because Coopers in France was not always the best in a particular area.<sup>327</sup>

Proponents of MDPs note, however, that MDP clients always retain the freedom to choose different counsel from another MDP or a traditional law firm.<sup>328</sup> The proponents also assert

322. See Patten, *supra* note 37, at 27 (discussing large firms). A fixed cost is "the cost of the inputs which the firm needs to produce any output at all." See BAUMOL & BLINDER, *supra* note 308, at 122 (defining fixed cost).

323. See Patten, *supra* note 37, at 27 (explaining MDP clients will be pressured to be serviced by MDP in all areas MDP practices).

324. See *id.* (noting that "any given company may be stronger in some aspects of its business than others, especially at particular times, and the client will be obliged to take the rough with the smooth.").

325. See, e.g., Levinson, *supra* note 5, at 242, 247 (discussing pressures in MDPs).

326. See Page, *supra* note 301, at 21-22 (explaining worldwide accounting firms obliged to refer work to their offices in other jurisdictions though they may not be best in that jurisdiction); Dillon & Griffiths, *supra* note 3, at 29-30 (discussing pressure to refer work intra-firm).

327. See Dillon & Griffiths, *supra* note 3, at 29-30 (citing former Coopers partner).

328. See, e.g., *id.* at 30 (explaining KPMG Fidal client Meridien Group only used

that the pressure to refer work intra-firm does not necessarily exist.<sup>329</sup> Another proponent of MDPs argues that any internal pressure to refer work intra-firm that does exist in Big Six firms may not be as great as some opponents of MDPs believe because the Big Six are not global partnerships but merely individual partnerships in each jurisdiction so they are not necessarily obligated to refer work to their counterparts in other jurisdictions.<sup>330</sup> Moreover, the same concern over pressure to refer work intra-firm currently exists within law firms.<sup>331</sup> A partner in one department of a firm, such as the corporate department, is not restricted by ethics rules from advising a client to award its other legal business, such as litigation work, to the firm's litigation department if the litigation department can handle the work.<sup>332</sup>

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firm for routine legal matters, while retaining a competitor for complex matters and that "no sensible client would really pay for the services of lawyers that couldn't do the job").

329. See, e.g., *id.* at 28 (analyzing pressure to refer work intra-firm). For example, a KPMG Fidal partner explained that KPMG Fidal "functions entirely separately from its auditing counterpart and that there is no overt — or even subtle — pressure from the auditing side to do things in a particular way." *See id.* (citing KPMG Fidal partner). A consultant for professional services firms noted that although the majority of MDPs advise clients to use other services of the firm, "remarkably, few of these firms (if any) have made cross-selling a normal part of daily behavior. Individuals are more likely to focus on improving the profitability of their own group than on assisting other groups to penetrate 'their' clientele." David H. Maister, *Creating the Collaborative Firm*, AM. LAW., Oct. 1991, at 31.

330. See Page, *supra* note 301, at 21 (analyzing structure of Big Six). A tax partner with England-based law firm Linklaters & Paines maintains that "clients are becoming more aware: . . . they realize that global networks are not necessarily a real asset." *Id.* A member of England-based law firm Slaughter and May's tax department continues:

Size does not matter . . . . My experience would be that the large accountancy firms are very useful for a large international group setting up, for example, leasing operations in Europe, when a generalised overview of the position in a number of jurisdictions is needed. But if you are working on a major international deal, you need to be able to go [sic] the people who have the best expertise to do that particular job.

*Id.* at 21-22.

331. See *In the Hot Seat*, LEGAL BUS., July/Aug. 1991, 38, 39 (citing accountant and barrister partner of England-based accounting firm Brebner Allen & Trapp).

332. *See id.* (discussing intra-firm referrals in law firms). The accountant and barrister partner of Brebner Allen & Trapp opined that "no commercial law partner will say to a client that he should take his litigation to another firm instead of to his own litigation partner." *See id.* (citing Brebner Allen & Trapp partner).

#### D. *Familiarity and Comfort*

Proponents of MDPs state that MDPs nurture client comfort and confidence with legal representation.<sup>333</sup> Big Six accounting firms maintain that their worldwide offices enable them to satisfy the needs of multinational corporate and financial business consulting clients.<sup>334</sup> The accountants continue that a Big Six firm's client involved in deals in countries where that Big Six firm has a presence, will be confident and comfortable with the knowledge that the Big Six firm's personnel familiar to the client's accountant will be assisting with transactions and will be confident because the work will not be referred to someone the accountant does not know.<sup>335</sup>

#### E. *Distraction from the Practice of Law, Professional Independence, Conflicts of Interest, and the Attorney-Client Privilege*

Opponents of MDPs argue that MDPs introduce problems with the independence of lawyers, conflicts of interest,<sup>336</sup> and the attorney-client privilege,<sup>337</sup> and that MDPs generally distract

<sup>333.</sup> See Page, *supra* note 301, at 21 (discussing feelings of consumers of MDPs towards MDPs).

<sup>334.</sup> See *id.* (explaining "accountants argue that their worldwide offices equip them to service the needs of the emerging multinational corporate and financial players"). Messrs. Tite, and Lewis, partners of Tite & Lewis, note that the largest corporate clients want global services and that Coopers "can already provide them on a scale bigger than the largest . . . [London] law firms can offer and that is where the accountants have the edge." See Fennell, *supra* note 13 (quoting Messrs. Tite and Lewis).

<sup>335.</sup> See Page, *supra* note 301, at 21 (citing Price Waterhouse tax partner). A tax partner of Price Waterhouse in England believes the accounting firm's international presence is advantageous because, for example, prospective clients making acquisitions in Italy and Hong Kong will be at ease because they will be referred to Price Waterhouse partners in those jurisdictions and they will not have to refer work to someone unfamiliar to their accountant. See *id.* (citing Price Waterhouse tax partner). A commentator notes that "[t]here can be no doubt of the significant clout which [Price Waterhouse's worldwide presence] gives them in pitching for multinational clients." *Id.*

<sup>336.</sup> See *Top Manchester Accountant*, *supra* note 3, at 8 (according to managing partner of England-based accounting firm Clark Whitehill, "[t]he supermarket approach will quite clearly hit dedicated legal firms and introduce all sorts of questions about independence and conflicts of interest."); *All the Rage*, *supra* note 3, at 11 (citing U.S. Securities and Exchange Commission's severe guidelines on auditor/lawyer independence as proof of conflicts of interest resulting from combining accounting and legal professions).

<sup>337.</sup> See Maher, *supra* note 276, at 2 (discussing MDPs' implications on attorney-client privilege).

lawyers from the practice of law.<sup>338</sup> First, an opponent of MDPs notes that MDPs jeopardize confidentiality and give rise to conflicts of interest because nonlawyers in MDPs are not governed by lawyers' ethics standards.<sup>339</sup> In addition, another commentator believes that professionals of the same firm may resist criticizing each others' performance, while attorneys practicing separately from professionals in other fields would be more likely to disclose to the client their criticism of the other professional's work.<sup>340</sup> Furthermore, a commentator argues that MDPs pose a risk that nonlawyers will unduly influence the firm in several matters that require lawyer independence.<sup>341</sup> First, nonlawyers may influence decisions regarding law firm management, such as whether to accept certain clients.<sup>342</sup> Second, nonlawyers may influence decisions concerning the firm's participation in the activities of the legal profession, such as commenting on proposed new rules of ethics.<sup>343</sup> Finally, nonlawyers may unduly influence decisions affecting the performance of the public role of lawyers,<sup>344</sup> such as bringing legal issues to society's attention, initiating law reforms, and confronting governmental arbitrariness.<sup>345</sup> Moreover, opponents of MDPs argue that the enormous size of Big Six accounting firms limits the kind of work they may perform because of conflicts.<sup>346</sup> Opponents also argue that MDPs

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338. See Levinson, *supra* note 5, at 242, 247 (commenting on distraction to lawyers caused by nonlegal services).

339. *Id.*

340. See Patten, *supra* note 37, at 27 (asking whether "members of the same firm would be just as willing to criticise inadequate performance by one part of the multi-disciplinary team as outsiders[,] while under the current rules "experienced solicitors may draw a client's attention to concern over some aspect of an accountant's performance and vice versa.").

341. Levinson, *supra* note 5, at 242, 247.

342. *See id.* (explaining risk that nonlawyers in MDPs will "unduly influence" law-related decisions, such as whether to accept unpopular clients).

343. *See id.* (noting potential influence of nonlawyers over decisions regarding participation in activities of legal profession).

344. *See id.* (discussing public role of legal profession).

345. *See id.* at 236 (offering examples of lawyers' public role).

346. *See* Smith, *New Adversaries*, *supra* note 17, at 11 (discussing conflicts of interest in Big Six). Mr. Smith states:

The Big-Six are also naturally limited by their enormous size in the kind of work they can do. . . . [M]ajor transactions as well as litigation generate what could be unmanageable conflict problems. That's why . . . [sophisticated] transactions like [Mergers and Acquisitions] seem more practicable in the context of a law firm that has hundreds, not thousands, of partners and associates.

are problematic because criminal clients may reveal their cases to non-attorneys instead of lawyers, and thus lose the attorney-client privilege.<sup>347</sup> Finally, at least one opponent of MDPs fears that lawyers in MDPs would be distracted from the practice of law and thus jeopardize lawyers' competence and diligence.<sup>348</sup>

A practitioner responds that conflicts will not arise because the legal profession and the accounting profession each must follow specified regulations.<sup>349</sup> In addition, a professor notes that many of the potential attacks on professional independence are already faced by lawyers that are employed by corporations and other organizations that do not offer legal services.<sup>350</sup> Another proponent of MDPs explains that criminal clients today may enter a traditional law firm and reveal their cases to nonlawyers such as clerks, and thus lose the attorney-client privilege.<sup>351</sup>

#### *F. Innovative Services*

Opponents of MDPs also assert that combining law firms and accounting firms stifles creative and innovative legal and tax

*Id.*

347. See Maher, *supra* note 276, at 2 (describing attorney-client privilege issues surrounding MDPs).

348. Levinson, *supra* note 5, at 242, 247.

349. See Dillon & Griffiths, *supra* note 3, at 28 (citing President of KPMG Fidal). The President of KPMG Fidal instructs that although KPMG Fidal has a number of joint clients with KPMG, conflicts do not arise because the legal profession and the accounting profession each must follow specified regulations. *See id.* (citing President of KPMG Fidal).

350. See Kaplan, *supra* note 24, at 1 (quoting Professor Geoffrey C. Hazard, Jr.). Professor Hazard states: "The ostensible justification for the ABA's rule [forbidding nonlawyers from owning law firms] has been as a prophylactic to prevent lawyers being supervised by non-lawyers. But given that that can happen in a corporate law department and in other permissible forms, it's not a very coherent rule." *See id.* (quoting Professor Hazard). Model Rule 1.13 generally governs the responsibilities of lawyers employed by organizations. MODEL RULES, *supra* note 24, Rule 1.13. Although the Model Code does not have a specific DR aimed at lawyers employed by organizations, EC 5-18 offers general principles that lawyers employed by organizations should follow. *See id.* Rule 1.13 Model Code Comparison (examining Model Code provisions directed at lawyers employed by organizations).

351. See Maher, *supra* note 276, at 2 (comparing MDPs to law firms). Mr. Maher observes that concerns that nonlawyers in MDPs may create problems for the attorney-client privilege are no different from nonlawyer personnel in law firms, because a client may speak with a solicitor's clerk who is not a solicitor but who sees clients as an agent of the solicitor." *Id.*

approaches.<sup>352</sup> For example, auditors are careful to avoid mistakes and, thus, are unlikely to encourage tax or legal personnel to develop innovative solutions.<sup>353</sup> Clients of one Big Six MDP, however, state that the firm develops innovative solutions when appropriate.<sup>354</sup>

### III. UNITED STATES JURISDICTIONS SHOULD PERMIT MDPS

Commentators, practitioners, and others involved in the debate over MDPs assert either that the prohibition against MDPs should be preserved, that the prohibition should be modified to permit regulated MDPs, or that MDPs should be permitted and that there is no need to regulate the association between lawyers and nonlawyers.<sup>355</sup> Based on the evidence and arguments surrounding the debate over MDPs, all U.S. jurisdictions should permit regulated MDPs. The practices under the present ethics rules, the evidence strongly indicating that current restrictions are in part a form of economic protectionism, and the developments in England support the arguments of MDP proponents. The arguments advanced by the opponents of MDPs, instead, are generally undermined by current practices.

#### A. Practices Under the Present U.S. Ethics Rules Support MDP Proponents

The ban on MDPs should be removed in the United States because the current U.S. ethics rules, the Model Rules, and the Model Code permit lawyers to face many of the ethical challenges that MDP opponents argue will plague MDPs. First, the current rules permit lawyers to own ancillary businesses although ancillary businesses interfere with lawyers' ability to fulfill profes-

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352. See, e.g., Dillon & Griffiths, *supra* note 3, at 29 (noting that several of KPMG Fidal's competitors "assert that the relationship with the accountancy firm is also bound to stifle creative or more innovative approaches to the legal or tax practice.").

353. *See id.* (describing auditors' lack of innovativeness). Auditors are unlikely to "encourage cutting-edge solutions by the legal or tax team working with them." *Id.*

354. *See id.* (noting that several of KPMG Fidal's clients are "satisfied that [KPMG] Fidal is suggesting innovative solutions when appropriate."). The executive vice president of finance for hotel industry Meridien Group explained that "[t]he partner we work with [at KPMG Fidal] knows us very well, and he knows we like creative propositions." *Id.* KPMG Fidal's literature states: "[KPMG] Fidal offers a dynamic and creative way of looking at problems which is productive for the company." *See id.* (quoting from KPMG Fidal brochure).

355. *See* Abel, *supra* note 11, at 763 (outlining views on MDPs).

sional obligations, give rise to problems with confidentiality, conflicts of interest, interference with lawyers' professional judgment, nonlawyer influence or control of law firms, and pressure on clients.<sup>356</sup> Second, the Model Rules and Model Code permit lawyers to serve on the boards of directors of clients and to transact business with clients although these activities challenge lawyers' independent judgment and create dangerous conflicts of interest.<sup>357</sup> Finally, the current ethics rules arguably permit lawyers to practice law in organizational structures that are very similar to MDPs and that raise the same ethical challenges for lawyers. For example, under the ethics rules a law firm and an accounting firm may enter into an office-sharing arrangement, where the legal and nonlegal activities are independently owned and operated but the law firm shares office space with the accounting firm.<sup>358</sup> The law firm may primarily practice business planning matters while the accounting firm employs a number of certified accountants and engages in audit services. Although each firm operates under its own lease, they may share an overlapping management team that provides common support services such as word processing, reception, and billing.<sup>359</sup> Under the Model Rules and Model Code there would probably be no ethical violations if the law firm and the accounting firm informally refer clients to each other, or if the law firm uses accountants employed by the accounting firm as experts in its cases.<sup>360</sup> Similarly, the law firm is permitted under the Model Rules and Model Code to hold an economic or controlling interest in the accounting group as long as the law firm does not violate any ethical rules, particularly those covering dealings with nonlawyers.<sup>361</sup> In addition, the law firm would be permitted to hire the accountants as employees of the firm to do work in conjunction

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356. See *supra* notes 181-230 and accompanying text (analyzing debate surrounding ancillary businesses).

357. See *supra* notes 234-36 and accompanying text (discussing lawyer-client business transactions and lawyer service on clients' boards of directors). Professor Hazard notes that lawyers serving on the boards of directors of corporations represented by the lawyer's firm or lawyers conducting business transactions with clients, raise "equal or greater interference" with independent professional judgment than ancillary businesses. HAZARD, JR. ET AL., *supra* note 20, at 985.

358. See Munneke, *supra* note 14, at 573 (discussing office-sharing arrangements).

359. See *id.* (discussing office-sharing arrangements).

360. See *id.* (analyzing office-sharing arrangements under Model Rules and Model Code provisions governing referrals).

361. See *id.* at 572-73 (commenting on lawyer ownership of other businesses).

with the firm's cases, and could even share profits with the accountants through qualified pension or profit sharing plans.<sup>362</sup> Because these arrangements are permissible under the U.S. ethics rules although they closely resemble MDPs, the ban on MDPs should be removed.

### B. Other Evidence Supports MDP Proponents

Multi-discipline practices should be permitted in the United States because many of the problems that opponents of MDPs argue will occur with MDPs, can be undermined. First, generally today, only the larger law firms have the size and resources to handle large projects. This directly undermines the argument made by MDP opponents that the Big Six MDPs would dominate legal practice and, thus, reduce the number of firms for consumers to choose from as the size of consumers' projects increase because only the Big Six MDPs would have the size and resources to handle large projects.<sup>363</sup> In addition, the law firms that now handle large projects would be capable of competing with the Big Six MDPs for large projects. Furthermore, the increased competition could trigger modifications in law firms that would permit them to compete more effectively in the free market environment of today's world and offer consumers lower rates.<sup>364</sup> Second, pressure to refer work intra-firm already exists in law firms and, in some instances, may not exist or be as strong as believed in MDPs.<sup>365</sup> Third, MDPs should not be banned simply because Big Six MDPs may stifle innovative legal approaches. Not only is this argument limited to MDPs with large numbers of accountants, but at least one Big Six firm's client has noted that the firm's legal department develops innovative legal solutions.<sup>366</sup>

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362. See *id.* at 573 (analyzing Model Rules and Model Code provisions governing nonlawyer employees).

363. See *supra* note 317 and accompanying text (discussing effects of Big Six's size and resources).

364. See *supra* notes 313-14 and accompanying text (examining benefits to law firms of increased competition).

365. See *supra* notes 329-32 and accompanying text (discussing pressure for intra-firm referrals).

366. See *supra* note 354 and accompanying text (revealing reaction of KPMG Fidal client).

### C. Nonlawyers may Practice Tax Law

The prohibition against MDPs should be removed because nonlawyers are already permitted to advise clients in certain practice areas. Certified Public Accountants can represent clients before the Internal Revenue Service and other government agencies may permit nonlawyers to practice before them.<sup>367</sup> Permitting nonlawyers to practice law, although only in limited circumstances, is potentially more dangerous to the public than allowing MDPs, yet it is permitted.

### D. Current Rules Protect Lawyers' Economic Interests

Multi-discipline practices should be permitted because the inconsistencies in the Model Rules and Model Code and the comments of practitioners and commentators strongly support the proposition that a major reason for the prohibitive rules today is to protect lawyers' economic interests.<sup>368</sup> Many practitioners fear the competition that Big Six firms would provide if permitted to practice law.<sup>369</sup> The Big Six, however, cannot dominate unless consumers shift their business to Big Six MDPs. Consumers probably will not shift their business until the Big Six's legal services are well regarded. Indeed, the Big Six MDPs may never gain enough competence to attract clients away from established law firms.

Model Rule 5.7, permitting lawyers to compete with businesses through ancillary businesses, and the double standard of enforcement of the rule are representative of the evidence that supports the accusation of economic protectionism. Although lawyers may own ancillary businesses that offer nonlegal services in conjunction with the practice of law, nonlawyers are not allowed to participate in the legal profession as financial stakeholders.<sup>370</sup>

367. See *supra* note 10 (noting that federal law permits CPAs to practice before Internal Revenue Service and permits government agencies to allow other nonlawyers to represent clients before agency).

368. See *supra* notes 288-98 (examining whether U.S. ethics rules protect lawyers' economic interests).

369. See *supra* notes 293-98 and accompanying text (noting lawyers' fears of increased competition).

370. See *supra* notes 111, 205-07 and accompanying text (discussing rules governing ancillary businesses and law firm ownership).

*E. England Eliminated the Statutory Ban on MDPs Because it No Longer Served the Public Interest*

United States jurisdictions should follow the English government and permit MDPs. Although the Law Society has maintained the restriction against MDPs,<sup>371</sup> the English government eliminated the statutory ban in 1990 because it believes there are no longer any strong public interest reasons for the restrictions.<sup>372</sup> In addition, the Law Society is expected to have to prove that the restriction is not anticompetitive,<sup>373</sup> a demonstration that continues to become more difficult for U.S. jurisdictions to make as the practice of law increases in complexity.

*E. MDPs Can be Regulated Under Several Schemes*

Multi-disciplines practices in the United States could operate under the current regulatory structure or under a new scheme. Under the current regulatory program, Model Rule 5.4 could be modified to permit MDPs and to impose liability on lawyers for the unethical conduct of nonlawyer-members of the firm, as Washington, D.C.'s Rules of Professional Conduct Rule 5.4 stipulates.<sup>374</sup> Alternatively, professional nonlawyer owners of MDPs could be made to face the loss of their professional license for violations of legal ethics code or their own profession's ethics codes.<sup>375</sup> Enacting such rules, however, would require the action of every U.S. jurisdiction.

The second option would be to create a new regulatory scheme to govern MDPs. An independent regulatory body for MDPs, composed of members from different professions, could attempt to promulgate an ethics code for MDPs, binding anyone, lawyer or nonlawyer, with a financial interest in an MDP. This option, however, would take a significant amount of time to implement.

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371. See *supra* note 41 (discussing Law Society's rules).

372. See *supra* note 280 and accompanying text (giving English government's reason for eliminating statutory prohibition against MDPs).

373. See *supra* note 284 and accompanying text (discussing Law Society's continued ban on MDPs).

374. See *supra* note 141 and accompanying text (examining liability under D.C. Rule 5.4(b)(3)).

375. See, e.g. Maher, *supra* note 276, at 2 (detailing plan to regulate MDPs that would make professionals answerable to their own professional body "for not only their own professional standards but those of their partners").

### **CONCLUSION**

Today, it is widely accepted that legal matters often contain extralegal elements. In addition, clients increasingly seek multiple professional services from one source. The ABA Canons of Professional Ethics' prohibition against nonlawyer ownership of law firms justifiably protected the independence of lawyers. Similar provisions in the Model Code and Model Rules were generally defended on the basis that nonlawyer involvement in law firms created problems with conflicts of interest, confidentiality, and client solicitation and threatened the autonomy of the legal profession. At the end of the twentieth century, however, the prohibition, preserved in the Model Rules and Model Code, in large part serves the interests of the legal profession and not the public. As the work that lawyers confront has steadily grown in sophistication over time, both lawyers' and clients' needs have changed. Preserving the century-old restriction does not satisfy lawyers' or clients' needs. As the legal profession enters a new century, it is pivotal that ethics guidelines prohibiting nonlawyer ownership of legal service providers give way to provisions permitting and regulating MDPs so that U.S. firms may best serve clients and compete with foreign firms.