Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century

John S. Dzienkowski

Robert J. Peroni

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MULTIDISCIPLINARY PRACTICE AND THE AMERICAN LEGAL PROFESSION: A MARKET APPROACH TO REGULATING THE DELIVERY OF LEGAL SERVICES IN THE TWENTY-FIRST CENTURY*

John S. Dzienkowski" & Robert J. Peroni"'

INTRODUCTION

The modern American legal profession has long maintained that lawyers must control the practice of law.1 Only lawyers can directly profit from the practice of law,2 hold ownership interests in law firms,3 or collect referral fees.4 Rules barring the unauthorized practice of law prohibit non-lawyers from practicing law, and also prohibit lawyers from practicing law in a jurisdiction in which they are not admitted.5 The organized bar's ethical rules prohibit lawyers from

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" Professor of Law and the John Redditt Professor of State & Local Government, University of Texas at Austin. B.B.A., 1980, University of Miami; J.D., 1983, University of Texas.


2. See Model Rules Rule 5.4(a); Model Code DR 3-102(A); Canon 34; 2 Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering § 5.4:200 (2d ed. 1998).

3. See Model Rules Rule 5.4(b), (d); Model Code DR 3-103(A), DR 5-107(C); Canon 33; 2 Hazard & Hodes, supra note 2, §§ 5.4:300, 5.4:500.

4. See Model Rules Rule 5.4(a); Model Code DR 3-102(A); Canon 34; 2 Hazard & Hodes, supra note 2, § 5.4:200.

assisting non-lawyers in the unauthorized practice of law and from practicing law in a jurisdiction in which they are not admitted. In the American legal profession, to the extent that non-lawyers are allowed to participate in the delivery of legal services, they must do so as employees or independent contractors under the supervision of lawyers.

As the legal profession in this country has continued to embrace these longstanding principles, lawyers and non-lawyers in other countries have begun to offer multidisciplinary services to clients because the regulatory structures in those countries do not prohibit non-lawyers from partnering with lawyers. The Big Five accounting firms have led the effort of non-lawyers to partner with lawyers in various European nations. In fact, one of these accounting firms,
Arthur Andersen, through its law network of over 2,700 lawyers, has become one of the three largest providers of legal services in the world.\textsuperscript{12}

In 1998, the then president of the American Bar Association ("ABA"), Phillip Anderson, created a commission to study multidisciplinary services in the United States.\textsuperscript{13} For a one-year period, the Commission on Multidisciplinary Practice (the "Commission") gathered information and considered arguments about how multidisciplinary services should be integrated into the current system for regulating lawyers.\textsuperscript{14} In June of 1999, the members of the Commission unanimously issued a series of recommendations for consideration by the ABA House of Delegates at its August 1999 meeting.\textsuperscript{15}

The Commission generally recommended that the legal profession allow lawyers and non-lawyers to offer multidisciplinary services to the public.\textsuperscript{16} The Commission also recommended, however, that the

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\item <http://www.abanet.org/cpr/mdpappendixc.html>; Edward Brodsky, ABA Endorsement of Multidisciplinary Practices, N.Y. L.J., July 14, 1999, at 3 (PricewaterhouseCoopers employs over 1600 nontax lawyers in foreign countries); Dianne Molvig, Multidisciplinary Practices: Service Package of the Future?, 72 Wis. Law. 10, 44 (Apr. 1999) ("All combined, [the Big Five accounting firms] employ more than 5,500 nontax attorneys worldwide . . . . PricewaterhouseCoopers leads the way with more than 1,600 lawyers in 39 countries.").
\item See ABA, News Release, ABA President Philip S. Anderson Appoints Commission on Multidisciplinary Practice (Aug. 4, 1998) [hereinafter ABA News Release] ("The Commission is directed to study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public.").
\item The best chronicle of the activities of the Commission is contained on the Commission’s web site. See Commission on Multidisciplinary Practice (visited July 22, 2000) <http://www.abanet.org/cpr/multicom.html>. Essentially, the Commission held one hearing in 1998 and then issued a background paper on issues and developments relating to multidisciplinary practice. See ABA Commission on Multidisciplinary Practice, Background Paper on Multidisciplinary Practice: Issues and Development (Jan. 22, 1999) [hereinafter ABA Commission, Background Paper] (available at <http://www.abanet.org/cpr/multicomreport0199.html>). This background paper asked five questions, all directed at how multidisciplinary practices should be integrated into the current system of delivering legal services in this country while maintaining the legal profession’s core values of confidentiality, loyalty, and independence. See id. This shaped the Commission’s work for the next two years. For a more detailed account of the Commission’s activities, see infra Part III.B.
\item See ABA Commission, 1999 Final Report, supra note 8.
\item See id. The Commission’s report was very positive on the development of multidisciplinary services and their benefits. Overall, it strongly suggested that the market for professional services be allowed to function and, accordingly, that clients and professional service providers be allowed to determine the best vehicles for delivery of multidisciplinary services. See id. First, the Commission recommended that Model Rule 5.4 be amended to allow lawyers to share legal fees with non-lawyers who provide services to clients. See id. Second, the Commission recommended that Model Rule 5.4(b) and (d) be amended to allow non-lawyers to become partners or
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bar impose new burdensome regulation on non-lawyer controlled providers of multidisciplinary services. The ABA House of Delegates rejected the Commission’s Recommendations and instead adopted a Florida State Bar proposal not to change the rules to accommodate MDPs until additional study demonstrated that such a change would be in the public interest. Thus, the ABA Board of Governors extended the Commission’s mandate to study the proposal for another year.

At the February 2000 ABA Meeting, the House of Delegates adopted an Ohio State Bar resolution to encourage state and local bars to investigate and prosecute unauthorized-practice-of-law claims. In May of 2000, the Commission issued a recommendation to the House of Delegates that approved the concept of lawyer controlled MDPs and left the details of the implementation up to the states. This recommendation approved the concept of MDPs and fee-sharing, but it urged strong regulation to protect the core values of the legal profession. In July of 2000, the ABA House of Delegates by a resounding margin voted to reject all efforts to accommodate the shareholders with lawyers in an entity providing multidisciplinary services. See id. Finally, it opened all areas of practice, both litigation and non-litigation, to MDPs. See id.

17. See id. The Commission’s recommendations made a marked distinction between lawyer and non-lawyer controlled MDPs. First, the Commission recommended that non-lawyer controlled MDPs be subject to an annual state bar audit to ensure that the non-lawyers are not improperly interfering with the delivery of legal services. See id. Second, the Commission attempted to expand dramatically the definition of the practice of law so as to bring within the ambit of bar regulation any entity that employs lawyers who offer clients services involving the interpretation of legal rules. See id. Non-lawyer controlled entities that hire lawyers to perform activities falling within the Commission’s broadened definition of the practice of law would thus be left with a difficult choice: subject themselves to state bar regulation, or require that any lawyers they employ either give up their law licenses or stop holding themselves out as being legally trained.

18. See Stratton, Unauthorized Practice Saber, supra note 9, at 1057 ("Nonetheless, the perception of most state and local bars looking at the MDP issue is that current professional rules need to be enforced rather than relaxed," Cheryl Niro [president of the Illinois State Bar Association] said at the MDP Commission meeting."). The resolution also required the ABA to set up a national reporting mechanism for MDPs for the state bars to access. See ABA Commission, 1999 Final Report, supra note 8.


20. See id. The Commission recommended that: "Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services." Id. The recommendation does limit the type of non-lawyer professional who may participate in such a multidisciplinary practice to "members of recognized professions or other disciplines that are governed by ethical standards." Id.
participation of lawyers in multidisciplinary practice in this country and discharged the Commission from any further activities.21

The current debate over multidisciplinary practice raises many issues that have divided the American legal profession over the past 20 years.22 In 1983, the ABA House of Delegates expressly rejected the recommendation of the Kutak Commission's Report that lawyers be permitted to share legal fees with non-lawyers.23 Throughout the 1980s, the ABA vigorously lobbied against the District of Columbia Bar's consideration of a rule that would allow non-lawyers to become partners in law firms.24 Nonetheless, in 1991 the ABA adopted its own, alternative version of the District of Columbia rule, which allowed lawyers to work with non-lawyers in delivering to clients ancillary, law-related business services, but did not allow non-lawyers to become partners in law firms.25 One year later, however, the ABA withdrew its rule and, in 1994, replaced it with one far less focused.26

21. See generally Sheryl Stratton & Lee A. Sheppard, American Bar Association Says No to Multidisciplinary Practice, 88 Tax Notes 311 (2000). With its actions at the July 2000 annual meeting, the ABA has ended its formal study of multidisciplinary practice services. The future development of rules relating to MDPs will likely take place at the state level, with the ABA's input "done through the ABA sections acting as clearing houses for information regarding what the states are doing." Id. at 316 (quoting ABA House of Delegates member Robert Keatinge).

22. For an excellent review of this background, see New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation, Report: Preserving the Core Values of the American Legal Profession—The Place of Multidisciplinary Practice in the Law Governing Lawyers (2000) [hereinafter New York State Bar Association Special Committee, Report].


26. See Model Rules Rule 5.7. Specifically, the 1994 rule focuses on whether lawyers providing law-related services will be subject to the rules of professional conduct, rather than on what services could be provided. See 2 Hazard & Hodes,
The emergence of multidisciplinary practice has placed great stress on the organized bar structure. On one hand, some bar leaders would prefer to bury their heads in the sand and return to the imagined golden years, when the practice of law was viewed as a profession, rather than a business, even if this vision of the legal profession probably never reflected economic reality. On the other hand, the role of the global economy has forced the organized bar to recognize that regardless of what it does, multidisciplinary practices are inevitable.

The rush of the ABA to study the subject was due in part to the justified fear that if the American legal profession does not accommodate multidisciplinary services, it is very likely that such services will move abroad. Moreover, there was legitimate concern that if the ABA did not soon develop a reasonable regulatory scheme regarding the ethical rules relating to lawyers practicing in MDPs, the movement toward multidisciplinary practice would continue, and lawyers working in unlicensed, non-law entities would not be subject supra note 2, § 5.7:101.


29. See John S. Dzienkowski & Robert J. Peroni, “Golden Age” is Over, Legal Times, Aug. 2, 1999, at 27 [hereinafter Dzienkowski & Peroni, “Golden Age” is Over] (“The MDP naysayers have ignored the fundamental changes occurring in the ways that goods and services are produced, distributed, and delivered to consumers around the world... Participating in the global marketplace is not just a goal for most corporations, but rather a necessary economic reality.”); E. Leigh Dance, How to Compete with MDPs, 13 Marketing for Lawyers 3 (1999) (describing client demand for cross-border legal services); Eaglesham, supra note 12, at 3 (“Other lawyers counter that the trend is irresistible, and the profession should seize the chance to influence how such partnerships are structured and regulated. 'My personal view on MDPs echoes what Groucho Marx said about sex—it's definitely here to stay,' said Elisabet Fura-Sandstrom, president of the Swedish Bar Association.”); see also Mostafavipour, supra note 25 (arguing that in today's business climate, law firms must respond by offering non-law business services to their clients).

30. See Dzienkowski & Peroni, “Golden Age” is Over, supra note 29, at 28 (“If the ABA chooses to slow down or stop the development of multidisciplinary practices, we predict that Europe will become the 21st century hub of legal commerce as multinational companies, including U.S. corporations, turn to law firms and international professional service firms with offices in London, Frankfurt, and Geneva.”).
to any bar regulation. Stated differently, the ABA had a window of opportunity, which it has now chosen to abruptly slam shut, to play a constructive role in helping develop reasonable ethical rules tailored to lawyers engaged in multidisciplinary practice. Instead, the state bars will now have to develop those rules on their own without any formal input at the national level by the ABA.

This Article posits that the American legal profession must abandon its past practices of self-interest and accommodate the provision of legal services in a multidisciplinary practice setting. The organized bar "must set aside the financial interests of the profession and ensure that the public interest is served." Economic protectionism has no place in the regulation of professional services in the twenty-first century. States should modify their legal ethics rules to permit the sharing of fees between lawyers and non-lawyers who are delivering services to clients. In addition, the legal profession should allow lawyers and non-lawyers to become partners in an MDP. Ideally, states should permit fully integrated MDPs and tailor ethical rules applicable to MDPs in order to protect the core values of the legal profession. A "joint venture" model of MDP, however, may be more politically and practically acceptable from the perspective of enforcing the ethical rules of the profession. Adoption of the "joint venture" model of MDP would be a considerable improvement over the status quo if the organized bar cannot bring itself to embrace the concept of the fully integrated MDP.

This Article examines the debate over multidisciplinary services in the American legal profession. Part I presents a brief history underlying the debate over multidisciplinary services. This part also examines the different approaches to integrating such services into the legal profession. Part II discusses the benefits of and demands for

31. The legal profession is not the only profession wary of the desirability of multidisciplinary services. University of Texas Accounting Professor Edward Summers has conducted an empirical study of lawyers, accountants, and MBA students and their attitudes and beliefs about MDPs. See Edward L. Summers, Multidisciplinary Professional Partnerships: The Future of the Professions? (2000) (unpublished manuscript, on file with authors). Professor Summers has found that a majority of lawyers and accountants do not want MDPs and they do not believe that the formation of MDPs is in the public interest. See id. Younger lawyers and accountants were more receptive to the idea of MDPs, but they still opposed their formation. See id.

32. ABA News Release, supra note 13, at 1 (statement of then ABA President Philip S. Anderson charging the Commission to set aside the self-interest of the profession in evaluating multidisciplinary practice).

33. For an economic analysis of MDPs and their role in the American legal profession, see Daniel R. Fischel, Multidisciplinary Practice, 55 Bus. Law. 951, 974 (2000) [hereinafter Fischel, MDPs] (concluding that "[a]lthough defenders of the ban on fee-sharing have attempted to cloak their arguments in the rhetoric of 'professionalism,' 'lawyer's independence,' and the 'public interest,' their goals are no different from any other trade union or interest group pursuing economic protectionism.").
multidisciplinary services. Part III summarizes and critiques the ABA Commission's recommendations to the House of Delegates, and discusses state bar attempts at dealing with the issues surrounding multidisciplinary services. It also discusses the arguments against MDPs. Part IV examines the various models for allowing lawyers to participate in the delivery of multidisciplinary services and the professional responsibility issues raised by each model. This part then offers the authors' model for integrating multidisciplinary services into the American legal profession and discusses various issues relating to that model. Finally, this part provides suggestions for changes to the legal profession's rules of professional responsibility that would accommodate lawyers' participation in MDPs, while still preserving the core values of the legal profession relating to confidentiality, conflicts of interest, competence, and professional independence.

This Article concludes that the legal profession's regulation of MDPs should be designed under an efficient-regulation model. A narrowly tailored system of regulation of MDPs will accomplish the important goals of satisfying client demand for multidisciplinary services while protecting the legitimate interests of the legal profession in preserving its core values. Regardless of whether state bars adopt the changes suggested in this Article, MDPs are here to stay. The only question is whether the organized bar will play a constructive role in regulating MDPs or face losing control over the delivery of legal services by U.S. lawyers both domestically and abroad.

I. A BRIEF HISTORY OF THE DEBATE OVER MULTIDISCIPLINARY SERVICES

A. Non-Lawyer Involvement in the Practice of Law in the United States

1. Unauthorized Practice of Law and Ethics Rules

An examination of the role of lawyers in the delivery of legal services in the United States requires study of both the case law and statutory rules dealing with the unauthorized practice of law and the legal ethics rules. In each of the fifty states and the District of Columbia, the practice of law is reserved solely for licensed professionals. Until the 1930s, the state bars rarely invoked

unauthorized-practice-of-law claims against non-lawyers. The economic pressure of the post-Depression society led state bars to form unauthorized-practice-of-law committees and to enforce the unauthorized-practice laws against non-lawyers. Today, the unauthorized-practice-of-law rules are enforced in a number of different ways, although in recent years enforcement of these rules in actual practice seems to have increasingly declined.

In many states, misdemeanor statutes prohibit the unauthorized practice of law. Although these statutes do impose criminal penalties, in most cases, prosecutors do not pursue cases against practicing non-lawyers. Often, however, state bar authorities will seek injunctions against those engaged in the unauthorized practice of law to prevent them from practicing law in the jurisdiction. Additionally, clients receiving services from a person who violates unauthorized-practice-of-law rules may seek to assert the fact that the person was not licensed to offer legal services as a ground for nonpayment of the fee.

35. See Christensen, supra note 5, at 159; Rhode, Unauthorized Practice, supra note 5, at 7-9. New York was the exception to this general statement. New York County appointed an unauthorized-practice-of-law committee and investigated allegations against corporations. See Rhode, Unauthorized Practice, supra note 5, at 7 (citing early New York case law on unauthorized practice of law).

36. See Rhode, Unauthorized Practice, supra note 5, at 7-8. The ABA led the way by appointing its first committee addressing the topic of unauthorized practice of law, which offered guidance to state and local bars and other authorities investigating unauthorized-practice-of-law complaints. See id. at 8; see also Abel, American Lawyers, supra note 1, at 112-13 (discussing the efforts by the organized bar to encourage states to enact unauthorized-practice-of-law statutes).


39. See, e.g., Rhode, Unauthorized Practice, supra note 5, at 11 n.39 (citing 37 jurisdictions with criminal penalties for unauthorized practice).


41. See, e.g., Ranta v. McCarney, 391 N.W.2d 161 (N.D. 1986) (successful effort to deny payment of a fee to lawyer who was not licensed in state where legal services
law will also be able to hold the layperson to the standard of care of a lawyer in a malpractice action. Finally, lawyers who assist non-lawyers in the unauthorized practice of law are subject to disciplinary action.

The stated purpose of the unauthorized-practice-of-law rules is to protect the public. The theory is that a non-lawyer delivering legal services will make errors in legal work that a lawyer would not make, and will thereby harm the consumer of the legal services. In addition, as the theory goes, because non-lawyers are not bound by the ethical rules of the legal profession and are not subject to the discipline of the courts and bar authorities, their clients do not obtain the benefit of receiving services performed by a disinterested and loyal professional. Thus, the bar wants to ensure that persons providing legal services are qualified and competent to do so.

On one basic level, these statutes mirror the state regulation of businesses in general. Various types of businesses must be licensed by the state, and the state promulgates rules and regulations for the licensing procedure. In that sense, the licensing of lawyers is based on goals similar to those served by the licensing of electricians and plumbers. On another, less public-spirited level, the unauthorized-practice-of-law rules were provided).

42. See, e.g., Persche v. Jones, 387 N.W.2d 32 (S.D. 1986) (bank employee who drafted invalid will for client sued by intended beneficiaries and held to the standard of care of a lawyer).

43. See Model Rules Rule 5.5(b); Model Code DR 3-101(A).

44. See generally Roger Hunter & Robert Klonoff, A Dialogue on the Unauthorized Practice of Law, 25 Vill. L. Rev. 6 (1979-80). This article quotes the ABA's 1941 position on potential harm to the public caused by the unauthorized practice of law:

The public, far more than lawyers, suffers injury from the unauthorized practice of law. The fight to stop it is the public's fight. No man is required to employ a lawyer if he does not wish to. But every man is entitled to receive legal advice from men skilled in law, qualified by character, sworn to maintain a high standard of professional ethics, and subject to the control and discipline of the court. Not only this, he must be served disinterestedly by a lawyer who is his lawyer, not motivated or controlled by a divided or outside allegiance.

Id. at 6-7 (citing Standing Committee on Unauthorized Practice of Law, Report, 66 A.B.A. Rep. 268 (1941) (emphasis in original)).

45. Professor Rhode's empirical study identified the following concerns through her interviews with bar personnel. See Rhode, Unauthorized Practice, supra note 5, at 37-39. The organized bar wanted to ensure that consumers received competent advice from professionals who were not "fly-by-night operations." Id. at 37. Bar personnel were concerned that non-lawyers were giving clients bad advice concerning legal matters, offering clients advice informed by only one aspect of a matter rather than by the overall picture, and instead of offering clients advice tailored to the situation, making use of a form or do-it-yourself kit. See id.

46. The goal of occupational licensure is to create and enforce standards for all who practice a particular trade or business.

47. There are two notable distinctions between the regulation of lawyers and the regulation of businesses in general. First, as professionals, lawyers depend upon self-regulation to a much greater extent than do other regulated businesses. Second, the
practice-of-law rules give lawyers a monopoly over the way in which the need for legal services is satisfied in this country.\textsuperscript{45} It is a profession's attempt to limit competition and preserve the power of lawyers over the delivery of legal services.\textsuperscript{49}

Unauthorized-practice-of-law prohibitions do have a significant anti-competitive effect on the manner in which the need for legal services is satisfied in the marketplace.\textsuperscript{50} To the extent that the legal profession prevents non-lawyers from offering a service provided by lawyers, lawyers are protected from competition with non-lawyers, which may result in higher fees to the ultimate client.\textsuperscript{51} Additionally,
given the state-by-state system of regulation of lawyers, unauthorized-practice-of-law statutes apply to lawyers who cross state boundaries to practice law in a jurisdiction in which they are not licensed. This application has the potential to increase legal fees for clients with activities in a state where their counsel is not licensed. The self-interest of lawyers as a collective group occupies a central role in explaining the early history of unauthorized-practice-of-law developments. The lack of empirical evidence of harm to the public in recent years reinforces the criticisms that many of the concerns about unauthorized practice of law are grounded in pure protectionism. The lack of involvement of the higher levels of the organized bar in enforcement schemes often leads to bar investigations that essentially amount to market protection for lawyers. In recent years, the state courts, legislatures, the Federal Trade Commission, and the Antitrust Division of the Department of Justice have begun to scrutinize carefully the organized bar’s claims of harm to the consumer.


52. See, e.g., Birbrower v. Superior Ct., 949 P.2d 1 (Cal. 1998) (holding that New York law firm violated unauthorized-practice-of-law statute by representing a California corporate client in a dispute with another California based corporation). The ethical rules prohibit a lawyer from practicing law in a jurisdiction in which the lawyer is not admitted to the bar. See Model Rules Rule 5.5; Model Code DR 3-101(B).

53. See Deborah L. Rhode, Professionalism in Perspective: Alternative Approaches to Non-Lawyer Practice, 1 J. Inst. Stud. Legal Ethics 97, 211-12 (1996) (noting that there is no evidence that the work of accountants, real estate brokers, and insurance agents has been inferior in quality to that of lawyers); Rhode, Legal Services by Non-Lawyers, supra note 38, at 230 (discussing survey showing that rates of client satisfaction with assistance from lay specialists are higher than rates of satisfaction with assistance from lawyers). It is difficult to imagine a legitimate public interest in prohibiting individuals licensed by the United States Patent Office from practicing patent law in the State of Florida. See generally Sperry v. Florida, 373 U.S. 379 (1963). As suggested by Professor Rhode, courts should demand empirical proof of harm to the public before adopting fact-findings of such harm in unauthorized-practice-of-law cases. See Rhode, Unauthorized Practice, supra note 5, at 85-86.

54. An interesting example of bar control over the delivery of legal services involved efforts by the organized bar to negotiate consent agreements with other professions on how to carve up the markets. See Wolfram, Legal Ethics, supra note 7, at 41. Such efforts, however, were short lived because they were viewed as violating the antitrust laws. See, e.g., United States v. New York County Lawyers’ Ass’n, No. 80 Civ. 6129(LBS), 1981 WL 2150 (S.D.N.Y. Oct. 14, 1981) (holding that the New York County Lawyers’ Association attempt to prevent corporate fiduciaries from giving advice on trust and estate matters was barred by a consent decree agreed to by the Association in an antitrust case).

Despite this background, there are many situations in which non-lawyers have been allowed to offer legal services that are closely affiliated with their non-law businesses. Some of these examples are explained by historic industry practices, and others are explained by the market power of the other professions involved in the service. For example, non-lawyers at banks are permitted to draft routine mortgages and non-lawyers are permitted to execute these legal documents with bank clients without running afoul of the unauthorized-practice-of-law prohibitions. Bank employees are also permitted to execute the joint tenancy with right of survivorship agreements on standard bank accounts. The theory underlying these practices is that the transactions are relatively common and straightforward for the client to understand, and society is unwilling to force consumers to incur legal fees for making these types of uncomplicated legal decisions. Many of these documents are also non-negotiable, form agreements and could not be modified by the client even if represented by an independent lawyer. The real estate industry in most states has been given the power to execute contracts on residential property in which the agent holds a commission. In some states, the non-lawyer employee must include an attorney review clause in the agreement, and explain to the client that the document will become binding in a certain number of days if it is not revoked and should be reviewed by an attorney during that time. Additionally, in a number of states, certified public accountants are permitted to perform state tax work. Thus, precedent does exist for allowing non-lawyers to offer certain legal services in the course of their routine businesses to clients.

The law of unauthorized practice is as much a product of history and politics between professionals as it is an attempt by the bar to

56. See, e.g., Miller v. Vance, 463 N.E.2d 250 (Ind. 1984) (providing an example of a consumer unsuccessfully trying to invalidate a mortgage drafted and executed by bank employee). Of course, under current law, a bank officer could not draft a will for a client without engaging in the unauthorized practice of law. The individualized drafting of a will is considered in most states to involve the practice of law because of the very technical nature of the law of wills and the fact that if errors are discovered after the client is dead, nothing can be done to correct them. See, e.g., id.


58. See id. The attorney review clause in that case stated:

THIS IS A LEGALLY BINDING CONTRACT THAT WILL BECOME FINAL WITHIN THREE BUSINESS DAYS. DURING THIS PERIOD YOU MAY CHOOSE TO CONSULT AN ATTORNEY WHO CAN REVIEW AND CANCEL THE CONTRACT. SEE SECTION ON ATTORNEY REVIEW FOR DETAILS.

Id.

implement the legal monopoly to protect the public.\textsuperscript{60} It is often difficult to define precisely what is "unauthorized practice of law."\textsuperscript{61} Thus, as non-law entities have begun to offer services that arguably constitute legal practice, the state bars generally have chosen not to enforce unauthorized-practice-of-law rules against these de facto MDPs.\textsuperscript{62} Currently, absent a showing of harm against the public interest, such enforcement actions stand little chance of success.\textsuperscript{63}

2. Non-Lawyer Involvement and Ownership in Law Firms

The American legal profession has also embraced the concept that non-lawyers should not become partners or owners in a law firm or other entity delivering legal services for a pecuniary gain.\textsuperscript{64} The 1908 Canons of Professional Ethics did not contain any restrictions on non-lawyer ownership of law firms. In 1928, however, the ABA amended the Canons of Professional Ethics to urge that lawyers not create partnerships with members of other professions if any part of the business is to consist of the practice of law.\textsuperscript{65} In 1969, the ABA

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\textsuperscript{60} See generally Mary C. Daly, Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership, 13 Geo. J. Legal Ethics 217, 248-52 (2000) [hereinafter Daly, Choosing Wisely] (examining the brief history of unauthorized practice of law and other professions who offer services bordering on the practice of law).

\textsuperscript{61} See, e.g., 2 Hazard & Hodes, supra note 2, § 5.4:103 (discussing the difficulty of defining the practice of law).

\textsuperscript{62} See Robert A. Stein, Multidisciplinary Practices: Prohibit or Regulate?, 84 Minn. L. Rev. 1529, 1535 (2000). Note, however, that opponents of MDPs believe that state bars should increase their enforcement of the unauthorized-practice-of-law rules. See generally infra Part III.C. The ABA adopted this position at its mid-year meeting in 1999. See infra text accompanying note 337.

\textsuperscript{63} Many of the organized bar's efforts in this area have been unsuccessful, and for good reason. See, e.g., Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *3, *11 (N.D. Tex. Jan. 22, 1999) (enjoining distribution of "Family Lawyer" software program in Texas as violation of unauthorized-practice-of-law statutes), vacated, 179 F.3d 956 (5th Cir. 1999) (per curiam) (vacating injunction because Texas Legislature passed a statute aimed at ending the lawsuit which excluded from unauthorized practice the marketing of legal software if it is clearly marked that such software is not a substitute for advice of an attorney).

\textsuperscript{64} The First Amendment rights of expression and association, as applied to the states through the Fourteenth Amendment, protect a public interest organization's rights to deliver legal services. See United Mine Workers, District 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 222-25 (1967) (holding that union's right to hire lawyer to provide legal services to its members is protected by First Amendment rights of expression, assembly, and association); NAACP v. Button, 371 U.S. 415, 444 (1963) (holding that NAACP's right to use the litigation system for political gains is protected by First Amendment rights of expression and association).

\textsuperscript{65} 53 A.B.A. Rep. 119-30 (1928). Canon 33 stated:

In the formation of partnerships for the practice of law, no person should be admitted or held out as a practitioner or member who is not a member of the 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
strengthened this ban, making it mandatory in the Model Code of Professional Responsibility. The ABA restated this position in 1983 by adopting Model Rule 5.4(a), which prohibits partnerships between lawyers and non-lawyers.

In 1928, the ABA completed the ban on non-lawyer involvement in the practice of law by adopting Canon 34 of the Canons of Professional Ethics that prohibited any sharing of legal fees with non-lawyers. Canon 35 also prohibited third party interference with the professional independence of the lawyer. The ABA later adopted similar prohibitions in the Model Code and the Model Rules. The adoption of these rules was the product of the collective effort of the bar, the state judiciary, and their ethics committees. Although there was some opposition to these rules, they were adopted largely on the grounds of “professional policy” of the legal profession.

As noted above, the ABA largely carried forward the rules contained in Canons 33, 34, and 35 in both the Model Code and the Model Rules. In 1982, however, during the drafting of the Model Rules, the Kutak Commission proposed a rule that would have significantly changed the ABA’s position on non-lawyer involvement in the practice of law. A proposed model rule on the “Professional

where part of the partnership business consists of the practice of law.

Canon 33.

66. See Model Code DR 3-102(A).

67. See Model Rules Rule 5.4(a).

68. See Canon 34. "No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility." Id.

69. "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer.... He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary." Canon 35.

70. See Model Code DR 3-102(A) (banning the sharing of legal fees with a non-lawyer), DR 3-103(A) (banning the forming of a partnership with a non-lawyer), DR 5-107(B) (maintaining professional independence of lawyers), DR 5-107(C) (banning the practice of law in a professional corporation if a non-lawyer owns any interest in, or is a corporate officer or director of, the corporation or if a non-lawyer has the right to direct the professional judgment of the lawyer); Model Rules Rule 5.4(a) (banning the sharing of legal fees with a non-lawyer), Rule 5.4(b) (banning the forming of a partnership with a non-lawyer), Rule 5.4(c) (maintaining professional independence of lawyers), Rule 5.4(d) (banning the practice of law in a professional corporation if a non-lawyer owns any interest in, or is a corporate officer or director of, the corporation or if a non-lawyer has the right to direct the professional judgment of the lawyer).


Independence of a Firm” provided that a lawyer could be employed by an organization in which non-lawyers held a financial or managerial interest as long as the professional independence of the lawyer was preserved. This rule, however, was completely rejected on the floor of the ABA House of Delegates meeting, and rewritten and replaced with the current version of Model Rule 5.4. Ironically, the 1999 proposals of the ABA Commission on Multidisciplinary Practice came almost “full circle” back to the Kutak position.

In 1988, both the District of Columbia bar and North Dakota bar proposed that their respective versions of Model Rule 5.4 be modified to allow lawyers and non-lawyers to hold ownership interests in a law firm. The District of Columbia bar sought to change the rule in order to allow non-lawyers to contribute to the legal services provided to clients. This proposal was in part a reaction to the non-law divisions of lobbying, real estate, and investment banking that some

73. See Stephen Gillers & Roy D. Simon, Regulation of Lawyers: Statutes and Standards 301 (2000 ed.).

74. Professor Andrews identified four reasons why the ABA House of Delegates rejected the Kutak Commission’s version of Model Rule 5.4:
(1) the Commission proposal would permit Sears, Montgomery Ward, H & R Block, or the Big Eight [now Big Five] accounting firms, to open law offices in competition with traditional law firms; (2) nonlawyer ownership of law firms would interfere with the lawyer’s professional independence; (3) nonlawyer ownership would destroy the lawyer’s ability to be a “professional” regardless of the economic cost; and (4) the proposed change would have a fundamental but unknown effect on the legal profession. Andrews, supra note 71, at 595-96 (footnotes omitted).

75. The narrative underlying the rejection of lay ownership or management of law firms involved a question posed to Professor Geoffrey Hazard, the Reporter to the Model Rules: “Does this rule mean that Sears, Roebuck will be able to open a law office?” See Gilbert & Lempert, supra note 23, at 392 (quoting interview with Professor Hazard); see also Andrews, supra note 71, at 595-96 (quoting extensively from an unofficial transcript that illustrates the fear by members of the House of Delegates of the competition from Sears and other non-law entities); see generally 2 Hazard & Hodes, supra note 2, § 5.4:102 (discussing the Sears hypothetical). Professor Hazard answered “yes” and that was the end of the Kutak Commission’s proposed model rule. See Gilbert & Lempert, supra note 23, at 392 (quoting interview with Professor Hazard); see also Andrews, supra note 71, at 596; Edward S. Adams & John H. Matheson, Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms, 86 Cal. L. Rev. 1, 9-11 (1998) [hereinafter Adams & Matheson, Law Firms on the Big Board?].


77. See Sutton & Dzienkowski, supra note 37, at 241-43 (examining the District of Columbia and North Dakota bars’ proposals).

78. A key facet of the District of Columbia rule is the requirement that lawyers and non-lawyers in the firm be engaged solely in the provision of professional legal services to clients. See D.C. Rules Rule 5.4(b)(1). By imposing this requirement on firms with non-lawyer partners and managers, the scope of services provided by the entity is severely restricted. For example, it is unlikely that D.C. Rule 5.4 would allow a lawyer to partner with a psychologist and a business planner in a family mediation clinic because the practice of law would not be the sole purpose of such a partnership.
District of Columbia law firms had begun to develop as subsidiaries.79 The North Dakota rule sought to allow lawyers and non-lawyers to offer combined services.80 Ultimately, after much debate and controversy, the District of Columbia rule passed,81 but the North Dakota rule was withdrawn by the state supreme court.82

In reaction to a perceived commercialization of the legal profession that allegedly threatened the ability of lawyers to render independent advice, the ABA began to consider an ethics rule on ancillary business services.83 Some in the ABA thought that the ABA needed to provide the states with an alternative rule to D.C. Rule 5.4 so that states would have an option when their lawyers pushed for modifying the codes of conduct to accommodate non-legal services.84 In 1991, the ABA House of Delegates adopted new Model Rule 5.7, "Responsibilities Regarding Law-Related Services."85 The 1991

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79. At the time, the large Washington, D.C., law firm of Arnold & Porter owned three non-law subsidiaries: an investment banking firm, a real estate brokerage house, and a lobbying firm. See James W. Jones, The Challenge of Change: The Practice of Law in the Year 2000, 41 Vand. L. Rev. 683, 689-92 (1988) (discussing the Arnold & Porter example). Mr. Jones, an Arnold & Porter partner and then chair of its management committee, made the following observations about the three subsidiaries:

Arnold & Porter's experience with these three affiliated firms and the nonlawyer professionals brought in-house has been an unqualified success. The affiliates and the nonlawyer professionals have added richness and diversity to Arnold & Porter's practice. They have enabled the firm to better serve the needs of its clients. They have expanded Arnold & Porter's horizons and forced the attorneys to think in much broader terms about the most effective and efficient ways to deal with client problems. Id. at 691-92. In the early 1990s, Arnold & Porter sold its interests in these three subsidiaries. See James W. Jones, Focusing the MDP Debate: Historical and Practical Perspectives, 72 Temp. L. Rev. 989, 990 n.3 (1999) [hereinafter Jones, Focusing the MDP Debate].

80. See Sutton & Dzienkowski, supra note 37, at 242 (reprinting proposed North Dakota rule). The North Dakota rule did not seem to limit the lawyer's association with non-lawyers to a law firm providing legal services only. The bar in North Dakota drafted this proposed rule to foster small firm affiliations with non-lawyers targeted at low- to middle-income clients.

81. See D.C. Rules Rule 5.4. For additional discussion of this approach to multidisciplinary practice, see infra Part IV.B.3.

82. The fear of Sears owning a law firm played a major role in the withdrawal of this rule. See Gilbert & Lempert, supra note 23, at 402 (noting that the North Dakota Supreme Court received letters predicting that, in the words of assistant state court administrator Larry Spears, "the world would come to an end if Sears came in").

83. See Block, Warren & Meierhofer, supra note 25, at 777-92 (examining the history of the promulgation of Model Rule 5.7); Schneyer, Perils of Professionalism, supra note 25, at 367-72 (discussing the history of the ancillary business debate). In 1986, the ABA appointed a Special Coordinating Committee on Professionalism, which ultimately asked the question: "Should practicing lawyers become active in the operation of any business which may be ancillary to the practice of law (e.g., real estate development or investment banking) or any business which may render other services to the lawyers' client?" Block, Warren & Meierhofer, supra note 25, at 779.

84. See Block, Warren & Meierhofer, supra note 25, at 798.

version of this rule was very strict as to lawyer involvement in law-related services provided to law firm clients. It required that such services ancillary to the practice of law be provided only to the clients of the law firm, and only by employees of the law firm, not of a subsidiary.\textsuperscript{86} Also, the rule required that the lawyer make appropriate disclosure to the client, and required that the law firm not hold itself out to the public as engaging in any non-legal activities.\textsuperscript{87} The comments to the rule make clear that the ABA sought to restrict “the ability of law firms to provide ancillary non-legal services through affiliates to non-client customers and clients alike, the rendition of which raises serious ethical and professionalism concerns.”\textsuperscript{88}

The severe restrictions of the 1991 Model Rule 5.7 were contrary to many practices within state bars regarding the provision of lawyer-owned non-legal services. In many states, lawyers owned title companies that were marketed to the general public as well as to firm clients.\textsuperscript{89} Thus, in 1992, the ABA House of Delegates deleted the 1991 version of Rule 5.7. In 1994, the ABA considered a different approach to lawyer provision of ancillary business services and adopted a revised version of Model Rule 5.7.\textsuperscript{90} The revised version of Model Rule 5.7 does not address the ethical or professional consequences of lawyers and law firms providing ancillary business services. Instead, it focuses on the client expectations that may arise when ancillary business services are provided by a law firm. Essentially, under revised Model Rule 5.7, a law firm’s ancillary business services may or may not be included under the protection of

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\textsuperscript{88} See id. Rule 5.7 cmt. 3 (1991 version), reprinted in Professional Responsibility: Standards, Rules, and Statutes 1999-2000 Edition 99 n.a (J. Dzienkowski ed., 1999). One leading article on Model Rule 5.7, Block, Warren & Meierhofer, supra note 25, is representative of the organized bar’s views toward the involvement of lawyers in ancillary business services. It views such services as extremely dangerous to the self-regulation of the profession and as likely to cause significant harm to clients. However, little or no empirical support is offered for these conclusions.

\textsuperscript{89} See, e.g., Patricia A. Wilson, A Guide to Ethics for the Real Estate Lawyer, 445 PLI/Real 305, 318 (Sept. 1999) (“Examples of ancillary businesses include court reporting firms, title insurance agencies and companies, financial planning firms, and real estate brokerage firms.”); Howard W. Brill, Advisory Ethics Opinion Issued on Ownership of Land Title Company, 33 Ark. Law. 40 (Summer 1998) (examining the Arkansas position on whether such ownership is acceptable under the ethics rules). For the ABA’s position on whether a lawyer representing a client may use a title company owned in part by the lawyer, see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 331 (1972) (analyzing whether the Model Code permits an ownership interest in a title company while performing real estate work for a client).

\textsuperscript{90} See Model Rules Rule 5.7(a).
the rules of ethics. To avoid application of the ethics rules, a law firm must provide the services in a manner distinct from the delivery of legal services. Additionally, the client must be informed that the services are not legal services and that the protections of the attorney-client relationship do not apply.

Although the ABA properly identified one key issue in the provision of ancillary business services—whether the attorney-client relationship attaches to those services—the new version of Model Rule 5.7 blatantly ignored all of the concerns that the ABA addressed in 1991. This exhibits the "politics of regulating the bar" within the ABA. Although nothing was done to alleviate the professional concerns in the provision of ancillary business services, the revised rule accommodated the practices throughout the country whereby lawyers provided non-legal services to clients and non-clients for significant profits, in some cases without disclosing the lawyers' ownership interests in the non-law business.

3. Lawyers in Non-Law Firm Settings

Any analysis of multidisciplinary practice must consider the current contexts in which lawyers perform their work outside of traditional law firms. This consideration is instructive for a number of reasons.

91. See id.
92. See id.
93. See id.
95. See, e.g., Schneyer, Perils of Professionalism, supra note 25. Professor Schneyer's account of the use of the rhetoric of "professionalism" to debate the ancillary-business rule offers an excellent portrayal of the politics at work in a debate over how lawyers can profit from law-related services.
96. Professor Geoffrey C. Hazard, Jr. discussed this phenomenon, as follows:

In contemplating the MDP issue, we naturally think first of the big accounting firms. However, there is a multitude of other entities that are responding to the same underlying market forces. We should include the management advisory firms that are now competing with the accounting firms. We should include the big banks that are managing huge amounts of money, in all different kinds of ways—money market accounts, securities trading, loans and other investments, and now insurance. We should include the insurance companies, which are themselves branching into other fields, for example, healthcare financing and management. We should include investment and securities companies, some of which have merged with or been merged into banks and insurance companies. None of these companies can operate without a large internal corps of lawyers. Of course, these lawyers are serving the entity by which they are employed and thus are not engaged in the unauthorized practice of law. But the work these lawyers do establishes the legal framework for the transactions with their employers' clientele. In that sense, the corporate legal staffs are providing legal services to the outside clientele.
First, examples of lawyers practicing law outside of the traditional law firm raise many of the same concerns that the organized bar and various commentators have raised with respect to MDPs—including unauthorized practice of law, professional independence, and sharing fees with non-lawyers. Second, to the extent that lawyers are hired by entities as employees to provide legal services for the entities, they are displacing services that would be provided by traditional law firms. Thus, lawyers in the non-law firm settings constitute yet another source of competition for law firms in the legal marketplace. Finally, the dramatic increase in lawyers practicing in non-law firm settings helps to prove the value and prevalence of multidisciplinary services in the modern global economy.

The early example of lawyers practicing in the non-law firm setting arose with corporations hiring in-house lawyers to represent the entity's interests. The early unauthorized-practice-of-law authorities explored this issue, and it was long ago established that corporations and other entities may hire and control lawyers as employees. In-house legal departments have grown dramatically during the past twenty-five years. This is the case even though concerns exist about the independence of in-house lawyers. The ABA uses the identical rule to govern the conduct of both in-house and outside counsel in representing the entity.

The use of in-house lawyers raised concerns when these lawyers began to represent third parties. When a corporation's employees represent an outside party, the corporation in effect becomes a provider of legal services akin to a law firm. As stated in the unauthorized-practice-of-law case law, non-law entities may deliver legal services that are routine and closely related to their business. They may not, however, deliver general legal services unrelated to their business, or deliver legal services that raise issues of conflicts of interest or competent representation, such as a bank drafting a will for a client. Many of these instances of non-law entities being allowed

Geoffrey C. Hazard, Jr., Foreword: The Future of the Profession, 84 Minn. L. Rev. 1083, 1084-85 (2000) [hereinafter Hazard, Foreword].
97. See Rhode, Unauthorized Practice, supra note 5, at 7 ("The New York County Lawyers Association appointed the first committee on unauthorized practice in 1914, and a series of cases against corporations, particularly title and trust companies, soon followed." (footnote omitted)).
98. See Wolfram, Legal Ethics, supra note 7, at 840-41.
100. See Model Rules Rule 1.13; see generally 1 Hazard & Hodes, supra note 2, § 1.13:200.
101. See supra text accompanying notes 56-57.
102. See Wolfram, Legal Ethics, supra note 7, at 836, 841-44. For a detailed discussion of this corporate-practice-of-law doctrine, see Grace M. Giesel,
to offer legal services arise because of accommodation and historic industry practices left unchallenged—they are often inconsistent with the current scheme for protecting the legal profession’s monopoly. There is anecdotal evidence that these historical exceptions are being stretched to accommodate new forms of legal services provided to customers of non-law entities. Moreover, evidence is developing that some corporations are seeking to market their legal department’s law and non-law expertise to other corporations.

The major example of in-house lawyers providing legal services to outside clients involves insurance companies who use in-house lawyers to execute their duty to defend what they owe the insured under insurance policies. In two states, the organized bar has prohibited representation of insureds by in-house counsel. In the other states, in-house lawyers are permitted to represent the insured in cases covered by the insurance policy unless a special conflict of


103. One of the authors received a non-confidential inquiry call from an attorney who asked the following question: Can a corporation, which is organized as a venture capital firm that acquires interests in intellectual property, provide legal services to the inventor of the intellectual property? The attorney pointed one of us to a web site where a British venture capital firm solicits opportunities for investment. Once the British venture capital firm acquires a small interest in the venture, it then offers legal services to the inventors in exchange for a larger percentage of the venture. This particular firm had an office in Pennsylvania and seemed to be offering legal services to the public. Of course, they were using their investment in the firm to claim that they were performing legal services for a company in which they had a financial interest. It is unclear whether this is improper. At a minimum, however, it pushes the current rules to the edge. See also Corporate Legal Times Roundtable on International Ventures, Counsel Steps to the Plate: Global Deals Let In-House Counsel Shine, Corp. Legal Times, Mar. 2000, at 75 (discussing that when companies form a joint venture, one company’s legal counsel usually performs legal services for both entities and the joint venture).

104. See Steven Andersen, The Law Department is Reborn as an Entrepreneur: Owens Corning Turns Mass Tort Experience into a Thriving Business, Corp. Legal Times, Mar. 2000, at 1. Owens Corning has taken part of its legal department and put it in a wholly owned subsidiary, Integrex, that services its parent company and third parties in the areas of corporate claims management. See id. Corporate claims management includes drafting of exculpatory clauses in manufacturing contracts, discovery services, records management, and other similar services. See id. Integrex has 550 employees with 60 attorneys. See id. Of course, in order to avoid problems of unauthorized practice, non-lawyer ownership, and lawyers sharing fees with non-lawyers, Integrex is probably organized as a management consulting company dealing with risk management and the attorneys it employs probably do not practice law, but rather offer business services.


interest arises between the insurance company and the insured. This practice belies all of the arguments that the profession has against non-law entities practicing law. In terms of independence, however, the practical difference between an in-house lawyer and an outside lawyer who represents only one or two insurance carriers in routine cases may be so insignificant that the organized bar is willing to tolerate the exception.

As discussed later in this Article, a second area in which non-law entities offer legal services is the various fields of law preempted by Congress. Accountants and enrolled agents have provided legal services in the tax field. Members of the United States Patent Office have provided legal advice in the patent registration area. Although these areas are relatively well-defined, lawyers in these non-law firms may not generally offer legal services outside of the preempted area to clients.

Recently, the Big Five accounting firms have expanded their consulting practices to include "estate planning; litigation support (including dispute resolution efforts and front-end services, such as investigation and discovery); valuation and business planning advice (including issues of environmental and labor law compliance and employee benefits issues); and financial planning." These services are classified as consulting work not involving the practice of law, and the firms claim that they do not hold themselves out as offering legal services to clients.

In the last ten years, many other non-law entities have begun to hire lawyers in large numbers. These entities often claim that they are not offering legal services to clients; it is difficult to distinguish, however,

107. See Wolfram, Legal Ethics, supra note 7, at 429-30.
108. This analysis assumes that insureds are the clients of the lawyer and insurance companies are third-party payors. Professor Charles Silver has argued that insurance companies should be viewed as co-clients of the lawyer. See Charles Silver, Does Insurance Defense Counsel Represent the Company or the Insured?, 72 Tex. L. Rev. 1583, 1591-92 (1994).
109. An outside lawyer or law firm with all of the business coming from one or two insurance company clients may be no more independent than the employees of that insurance company.
111. See infra text accompanying notes 119-27.
what they do from what law firms do for clients. A comprehensive list of such organizations is difficult to compile. Thus, this discussion will only focus on three types of non-law organizations that have begun to hire lawyers.

Lobbying firms have hired lawyers to represent clients in their lobbying efforts. These lawyers draft proposed legislation, write opinions and memoranda criticizing specific proposals, and interpret judicial opinions. In examining the effects of proposed legislation, it is inevitable that these lawyers give planning advice to clients.

Management consulting firms have begun to hire lawyers to provide clients with an analysis of a client’s legal affairs. These lawyers evaluate the work of current counsel, identify potential legal problems with a particular course of action, and give advice as to what a company should change in the future. For example, a management consulting firm may be hired to examine the best way to gain access to the European Union market. The management consulting firm’s in-house lawyers will opine to clients regarding the legal dimensions of this decision. These activities are clearly of the sort that would be provided by outside law firms for other clients.

Investment banking firms hire lawyers to provide services that clearly straddle the fields of investment banking and the practice of law. The lawyer employees of investment banking firms evaluate legal documents for clients, draft proposed language, and help offer planning advice on future transactions. In a recent move, Merrill Lynch hired one of the country’s top international tax lawyers to head a global tax unit and help develop effective tax strategies and corporate finance and acquisition strategies for Merrill Lynch’s clients. Of course, in the area of investment banking, many of the clients have in-house and outside counsel also advising them on the transaction. The point to be made here is that the investment banking firms seem to be hiring many lawyers who offer services to clients in the non-law firm setting.


116. McKinsey & Company interviews at leading law schools around the country and employs attorneys to provide clients with a legal perspective on management consulting advice.

117. A member of the ABA Commission on Multidisciplinary Practice, Robert Mundheim, former dean of the University of Pennsylvania School of Law, was a senior executive vice president and the general counsel of Solomon Smith Barney Holdings, Inc., an investment banking firm, at the time he joined the Commission. He is now a partner at the law firm of Shearman & Sterling in New York City.

The legal profession needs only to look to the placement offices of the top law schools in the major cities in this country to see how many non-law entities are interviewing the top students and what they promise the students in return for accepting employment with them. It is our position that legal services of the multidisciplinary variety are being provided throughout this country. Thus far, the state bars have chosen to do little to limit this development, or to threaten such entities with claims of unauthorized practice of law.


As mentioned above, one major area in which non-lawyers and lawyers in accounting firms have been involved in the delivery of legal services is in the practice of tax law. State unauthorized-practice-of-law statutes and case law must be read in conjunction with the federal system of authorizing lawyers and non-lawyers to practice in certain areas in the federal system. Under the Supremacy Clause, Congress and the Executive Branch can preempt state regulation of the unauthorized practice of law. Although the federal system has often deferred to the state bar system of lawyer regulation, one major area of federal preemption is federal tax practice. The federal scheme authorized by Congress allows lawyers and certain non-lawyers to practice in the area of federal tax.

In recent years, the Big Five accounting firms, as well as mid-sized accounting firms, have hired thousands of tax lawyers for their

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119. The debate over the proper role of accountants and lawyers in tax law has simmered for many years. See, e.g., Erwin M. Griswold, A Further Look: Lawyers and Accountants, 41 A.B.A. J. 1113 (1955) (examining the extent to which accountants can practice tax law). Dean Griswold's article discusses many of the same issues raised today by the practices of the Big Five accounting firms. See id. at 1179.


121. See U.S. Const. art. VI, cl. 2.

122. Part of the historical background here is that the bar may have been more relaxed in enforcing its professional monopoly in the tax law area vis-à-vis the accounting firms because of the low regard with which lawyers traditionally viewed accountants. Cf. Yves Dezalay, Territorial Battles and Tribal Disputes, 54 Mod. L. Rev. 792, 797-99 (1991). Another commentator explains the dominance of accountants in the tax field as having occurred "when law firms abdicated preparation of individual 1040 income tax returns to accountants when they no longer became profitable, after which the accountants automated the tax return process, gaining the associated tax-related legal advice and services to individuals of means, closely-held corporations and corporations for whose executives tax returns were prepared." Ward Bower, Multidisciplinary Practices—The Future, in Global Law in Practice 155, 167 n.2 (J. Ross Harper ed., 1997) [hereinafter Bower, Multidisciplinary Practices]. The same scenario could happen with legal services generally if law firms choose to ignore the competitive threat posed by MDPs. See id. For a discussion of the development of the accounting firms, see New York State Bar Association Special Committee, Report, supra note 22, at 140-51.
growing domestic and international tax planning practices\textsuperscript{123} (including well-known partners from major law firms in cities throughout the country).\textsuperscript{124} These efforts have been met with great concern and suspicion by state bar authorities and lawyers in general. In fact, several state bars have investigated the activities of the "Big Five" firms for violations of the unauthorized-practice-of-law statutes, but to date no unauthorized-practice-of-law complaints have been successfully maintained against such firms.\textsuperscript{125}

The Big Five accounting firms have argued that they are not engaged in the practice of law, but instead are engaged in tax consulting, something somehow different than tax law practice even though it involves interpretation and application of tax law. This argument appears to have no substance.\textsuperscript{126} A better argument by the Big Five accounting firms would be that to the extent they are engaged in the practice of tax law, at least at the federal level, the preemption doctrine prevents state bar authorities from successfully

\textsuperscript{123} See Campo-Flores, supra note 12 (describing Arthur Andersen report stating that it employs 2,734 lawyers in 35 countries); Farrell, supra note 114, at 604 (stating that "Ernst & Young employs approximately 3,300 tax attorneys worldwide and about 850 in the United States"); Elizabeth MacDonald, Accounting Firms Hire Lawyers and Other Attorneys Cry Foul, Wall St. J., Aug. 22, 1997, at B8 (noting that Arthur Andersen has 1,000 attorneys, Ernst & Young has 800 attorneys, and Price Waterhouse (now PricewaterhouseCoopers) has 500 lawyers); Molvig, supra note 11, at 44 ("The Big Five accounting firms have succeeded in attracting top attorneys. All combined, they employ more than 5,500 nontax attorneys worldwide (excluding lawyers practicing tax law exclusively within the firm’s accounting or tax divisions).")


\textsuperscript{125} See, e.g., Molvig, supra note 11, at 11 (noting that Texas filed a complaint against Arthur Andersen and Deloitte & Touche in 1997 which was dismissed 11 months later); see also Farrell, supra note 114, at 613-15; Elizabeth MacDonald, Texas Probes Andersen, Deloitte on Charges of Practicing Law, Wall St. J., May 28, 1998, at B15.

\textsuperscript{126} As stated by Lawrence Fox, a leading opponent of MDPs: "The argument that these lawyers are not engaged in the practice of law has as much merit as President Clinton's claim that he did not engage in sex." Lawrence J. Fox, Old Wine in Old Bottles: Preserving Professional Independence, 72 Temp. L. Rev. 971, 973 (1999) [hereinafter Fox, Preserving Professional Independence]; see also Remarks of Fox, supra note 28. For other, less colorful critiques of this claim by the accounting firms, see Fischel, MDPs, supra note 33, at 952-53; John H. Matheson & Edward S. Adams, Not "If" But "How": Reflecting on the ABA Commission's Recommendations on Multidisciplinary Practice, 84 Minn. L. Rev. 1269, 1272-73 (2000) [hereinafter Matheson & Adams, Reflecting on the ABA Commission's Recommendations]; and Carol A. Needham, Permitting Lawyers to Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as We Know It?, 84 Minn. L. Rev. 1315, 1325-27 (2000).
maintaining unauthorized-practice actions against them.\textsuperscript{127}

Federal law clearly preempts unauthorized-practice-of-law complaints by state bar authorities if and to the extent that the accounting firms' activities fall within the federal scheme of preemption. A federal statute,\textsuperscript{128} Treasury Circular 230,\textsuperscript{129} and the Tax Court Rules\textsuperscript{130} specifically authorize accountants and lawyers to practice in the area of federal taxation. Further, this federal authority does not limit partnerships or associations between lawyers and accountants working in this area.

The Supreme Court's decision in \textit{Sperry v. Florida}\textsuperscript{131} makes clear that when the federal government authorizes non-lawyers to practice before it, the Supremacy Clause precludes a state from prohibiting such practice as the unauthorized practice of law.\textsuperscript{132} \textit{Sperry} likewise precludes the bar authorities of a state from prohibiting a lawyer not admitted in the state from performing activities authorized by federal law, even if those activities would otherwise constitute the unauthorized practice of law under state law. Because various federal statutes and Treasury Department rules authorize accountants and attorneys to practice federal tax law, under \textit{Sperry}, states may not directly or indirectly interfere with the right of accountants or lawyers to practice in the federal tax area.\textsuperscript{133}

\begin{itemize}
\item[129.] See 31 C.F.R. § 10.3 (1999).
\item[130.] See Rules of Practice and Procedure of the United States Tax Court, Rule 200(a) (1998). If an applicant for admission to practice before the Tax Court is not an attorney, the applicant must pass a written examination in order to be admitted. See id. Rule 200(a)(3).
\item[131.] 373 U.S. 379 (1963).
\item[132.] \textit{Sperry} involved whether the State of Florida could prohibit a non-lawyer not admitted to the bar of any state from preparing and prosecuting patent applications for clients in Florida before the United States Patent Office. See id. at 381-83. The United States Supreme Court did not and could not question the state courts' determination that preparing and prosecuting patent applications for others constituted the practice of law under Florida law. See id. at 383. The Supreme Court held, however, that because a federal statute expressly permitted the Commissioner of Patents to authorize non-lawyers to practice before the Patent Office, the Supremacy Clause prohibited Florida from using its unauthorized-practice-of-law rules to deny non-lawyers the right to perform acts within the scope of the federal authority. See id. at 384-85.
\item[133.] But see Ranta v. McCarney, 391 N.W.2d 161 (N.D. 1986). In \textit{Ranta}, the North Dakota Supreme Court held that an attorney licensed in Minnesota, but not in North Dakota, engaged in the unauthorized practice of law in North Dakota when he traveled there to provide legal advice for a North Dakota client about certain federal tax issues. See id. at 164. The court held that the exception to the unauthorized-practice rules developed in many jurisdictions for federal court practice did not apply because the attorney did not appear before a federal court. See id. Thus, the court held that the attorney was not entitled to recover any fees for the unauthorized
Thus, to properly apply the preemption doctrine, the relevant inquiry is what activities within the area of federal tax practice are authorized by federal law.\textsuperscript{134} There are three broad categories of services that fall within this area: (1) tax return preparation, (2) tax advice and planning, and (3) tax controversy work including litigation. Numerous statutes and Treasury and court rules address these categories of services.

First, both accountants and lawyers are authorized to prepare federal tax returns.\textsuperscript{135} Indeed, anyone who meets certain record-keeping requirements and files the requisite information with the Internal Revenue Service ("IRS") may prepare federal tax returns for clients.\textsuperscript{136}

Second, a federal statute\textsuperscript{137} and Treasury Circular 230\textsuperscript{138} specifically authorize lawyers, accountants, and enrolled agents to provide clients with tax advice. Such advice may encompass current and future tax problems, including interpretation of statutes, regulations, and case law. It may include comparison for tax purposes of the different structures that a taxpayer could use to conduct a business or investment activity. It may also include the preparation of tax opinions for use by the client and third parties.

Third, Treasury Circular 230 allows accountants, enrolled agents, enrolled actuaries, and lawyers to represent clients in tax controversies before the IRS.\textsuperscript{139} If the controversy continues beyond administrative proceedings within the IRS, whether an accountant or accounting firm lawyer may continue to represent the client depends upon the client's choice of forum in which to litigate. If the client chooses to litigate in the Tax Court, a national court that hears cases in various locations throughout the country, the Tax Court rules permit an accountant as well as a lawyer who works at an accounting firm to represent the client.\textsuperscript{140} The client instead may choose to pay the disputed taxes but file suit for a refund in the local federal district court or in the United States Court of Federal Claims. In that case, only a lawyer admitted to practice before the federal court and practicing in a law firm, as a sole practitioner, or as in-house counsel, could represent the client.


\textsuperscript{135} See id. at 33 ("It is a proper function of a lawyer or a certified public accountant to prepare federal income tax returns.").


\textsuperscript{139} See id. § 10.3 (1999).

Fourth, in 1998, Congress created a new federal tax practitioner-client privilege in Section 7525 of the Internal Revenue Code. Under this provision, with respect to tax advice, the same common law protections of confidentiality that apply to communications between attorneys and their clients also apply to certain communications between a client and any federally authorized tax practitioner to the extent the communication would be a privileged communication between a taxpayer and an attorney. A federally authorized tax practitioner for this purpose is "any individual who is authorized under Federal law to practice before the Internal Revenue Service." There are, however, numerous limitations which make this new privilege much narrower in scope than the attorney-client privilege, and may lead to client confusion about whether communications with a particular tax professional are privileged. Nevertheless, the creation of this privilege represents congressional recognition of the key role that accountants and other non-lawyers who are admitted to practice before the IRS play in tax return preparation, tax planning, and tax controversy work.

There has been some suggestion that if a lawyer practices tax law in an accounting firm (that is, prepares tax returns, advises clients on tax matters, or appears before the IRS and represents clients before the Tax Court), that lawyer is in violation of Model Rule 5.4, because the lawyer is both sharing legal fees with a non-lawyer and practicing law with a non-lawyer in an entity owned by non-lawyers. Sperry and


143. Id. § 7525(a)(3)(A). "Tax advice" for this purpose is "advice given by an individual... which is within the scope of the individual's authority to practice" before the IRS. Id. § 7525(a)(3)(B).

144. First, the tax practitioner-client privilege does not apply in any criminal tax matters. See id. § 7525(a)(2)(A). Second, the tax practitioner-client privilege does not apply in state tax matters (although, in some states, a separate privilege created under state law may apply). See id. § 7525(a)(2)(B). Third, the tax practitioner-client privilege does not apply to written communications between a "tax practitioner and a director, shareholder, officer, or employee, agent, or representative of a corporation in connection with" certain matters relating to tax shelters. Id. § 7525(b). Moreover, the precise scope of the privilege remains to be determined through judicial interpretation.

145. This argument may emanate from ABA Committee on Ethics & Professional
the preemption doctrine, however, should preclude state bar authorities from attempting to prohibit such activities in the federal tax area. Neither Congress, nor the Treasury, nor the Tax Court has ever raised any concerns about cooperative practices between lawyers and non-lawyers in the tax area, even though such arrangements have been in existence for decades.

The Congress and the Treasury have made a policy decision that lawyers, accountants, and enrolled agents possess the necessary competence to offer tax services to the general public. This decision is based upon the training of these professionals and on the need for the general public to obtain affordable tax services in planning their affairs and complying with the law. Society is better off because competition exists in the tax practice area, and the public can access professional services from a variety of sources. The self-assessment nature of our federal tax system depends upon the availability of competent professionals to assist taxpayers in voluntary compliance with the tax rules. The efforts of state bars to limit non-lawyer involvement in tax practice or lawyer involvement in accounting firms’ provision of tax services is contrary to the public interest and violates the federal constitutional principle of the Supremacy Clause.

There is, however, one collateral aspect of tax practice that could involve the unauthorized practice of law. If a non-lawyer or a lawyer in an accounting firm provides tax services about a future transaction, and the client decides to adopt the advice, that client will often need non-tax services to implement the tax plan. Such services may include drafting of a will, transferring title to a property, or drafting the documents for a family limited partnership. Providing these services could arguably constitute the unauthorized practice of law.

There is no doubt that if a non-lawyer or a lawyer practicing in an accounting firm drafted an entire agreement and had the client execute the agreement in the accounting office, this activity would constitute the practice of law and could be enjoined by the state bar.

Responsibility, Informal Op. 1032 (1968), which held that an attorney may not represent clients before the IRS when the attorney is an employee of an accounting firm. See also ABA Comm. on Professional Ethics & Grievances, Formal Op. 269 (1943) (finding that an accounting firm can only employ a lawyer who ceases to hold self out as a lawyer and who ceases practicing law); ABA Comm. on Professional Ethics & Grievances, Formal Op. 272 (1946) (stating that an accounting firm may not employ a lawyer to offer legal services to clients).

146. "[I]t is well to remember that the overwhelming proportion of the government’s employees actually administering the tax law are not lawyers." Griswold, supra note 119, at 1114.

147. Professor Mary Daly describes in detail the arguments made by commentators claiming that accounting firms are engaged in the unauthorized practice of law when they offer tax-planning services. See Daly, Choosing Wisely, supra note 60, at 254-57. Such arguments are without merit and are against the public interest. They can only be explained as protectionist in nature, aimed at protecting the bar from competition in the tax law arena.
under the current ethical rules. A non-lawyer or a lawyer practicing in an accounting firm should, however, be able to propose language for inclusion in a legal document and draft such language without violating the unauthorized-practice-of-law rules. Such language could be provided to a client with the instruction that the client should take the language to an independent lawyer and have the lawyer include it in the legal documents only after review. Furthermore, an accounting firm could also draft an entire document for review by the client's lawyer. Although this comes closer to the practice of law, if the accounting firm sent this draft directly to the client's lawyer, that would arguably still be authorized by federal tax law. For the accounting firm to provide the draft directly to the client raises more serious liability concerns. On a case-by-case basis, it is unlikely that giving the draft to the client would trigger unauthorized-practice-of-law restrictions if the accounting firm makes it clear that the client needs to engage a separate lawyer to review the document before it is executed. There is always a risk, however, that a client could attempt to execute a complete document without review by a lawyer. Thus, an improperly executed will, for example, could be invalid and could subject the accounting firm to liability.

B. Developments in Other Countries

As noted by other commentators, it is very difficult to compare the development of the ethics rules relating to involvement of non-lawyers in the American legal profession with the development of such rules in other countries. First, many tasks typically performed

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148. See Wolfram, Legal Ethics, supra note 7, at 838-40.
149. If the client is a large corporation with in-house counsel, it is likely that concerns about liability and unauthorized practice are substantially reduced by simply handing the documents to an in-house lawyer.
152. See ABA Commission, Background Paper, supra note 14; see generally Daly, Choosing Wisely, supra note 60, at 227-40 (examining the provision of legal services by accounting firms outside of the United States); Terry, MDP Primer, supra note 113, at 883-90.
by lawyers in the United States are instead performed by non-lawyer professionals in other countries.\textsuperscript{153} Notaries, conveyancers, and tax advisers may provide legal services in many foreign countries.\textsuperscript{154} Thus, in many countries around the world, non-lawyers may give legal advice and notarize legal documents.\textsuperscript{155} Second, it is difficult to determine the extent to which unauthorized-practice-of-law rules are enforced in other countries. Finally, although many other countries have adopted restrictions against non-lawyer involvement that are similar to those in the United States, one can often plan around those rules with various contractual or entity arrangements.\textsuperscript{156}

The concept of professionals practicing together in an MDP originated in Germany, where lawyers and tax accountants have been able to practice together in a partnership since the end of World War II.\textsuperscript{157} Interestingly enough, under prior law, lawyers in Germany were permitted to partner with accountants only because the accounting profession was considered to maintain high professional standards. The German law relating to MDPs has undergone substantial recent change, however, and under the current rules, a lawyer may form an MDP with the following categories of professionals: patent lawyers, tax advisors, auditors, tax assistants, and sworn-in accountants.\textsuperscript{158}

Until recently, other European countries had traditional law firms in status-conscious legal professions.\textsuperscript{159} A major change in the legal


\textsuperscript{155} See, e.g., New York State Bar Association Special Committee, \textit{Report}, supra note 22, at 275. There is no evidence of significant problems involving incompetence or unethical conduct arising in foreign countries that permit non-lawyers to provide legal advice. See Rhode, \textit{Legal Services by Non-Lawyers}, supra note 38, at 230-31; Rhode, \textit{Unauthorized Practice}, supra note 5, at 89-90.

\textsuperscript{156} See, e.g., Charles W. Wolfram, \textit{Multidisciplinary Partnerships in the Law Practice of European and American Lawyers, in Lawyers' Practice and Ideals}, supra note 151, at 301, 309 [hereinafter Wolfram, \textit{Multidisciplinary Partnerships}] (noting that despite United Kingdom rules that prohibit solicitors from entering into unincorporated associations with non-solicitors, multidisciplinary practice arrangements exist, such as Arthur Andersen establishing Garret & Co., a law practice in England).


\textsuperscript{158} See Terry, \textit{German MDPs}, supra note 157, at 1561-62.


Lawyers operated as solo practitioners or in small firms that specialized in
profession in European countries coincided with the creation of the European Union:

As a result of the creation of the EC, the opening of European borders, the restructuring of European economies, and the growing number of business firms that operate simultaneously in several countries within Europe, a new market for legal services to business has emerged. . . . The old business law structures of the European legal fields have proved incapable of meeting the new demands generated by the Euro-law market.  

The demand was immediately met by three different sources of legal services: large American law firms, large accounting firms, and corporate in-house counsel.  

It is against this background that the Big Five accounting firms began to evolve as providers of legal services in European countries. In each country, the firms had to contend with old rules regulating the provision of legal services; thus, each country has a unique system for permitting forms of associations between lawyers and non-lawyers. Given, however, the relative inability of European law firms to meet the demand for business and tax services, and the special position that the accounting firms occupied because of their role as auditors, accounting firms quickly were viewed as a viable option to meet the demand. Additionally, the regulators of the legal professions in these countries generally have not been able to stop the development of multidisciplinary practice arrangements.  

In Europe, some jurisdictions explicitly allow lawyers to practice with non-lawyers in a single entity. Switzerland has permitted single entity MDPs for a number of years, and this is not viewed by the bar

specific areas of the law. Legal practice was oriented around litigation, and lawyers played relatively restricted roles in the general affairs of business firms. The idea of the lawyer as a general business advisor, or the law firm as a conglomerate of specialties, was slow to develop.

Id.  
160. Id. at 426.  
161. See id. at 427.  
162. The growth within the last ten years is dramatic. Compare Andrew Eburne, Accountants and Lawyers Heading for a Showdown, Int'l Fin. L. Rev., May 1991, at 15, 18 (listing the number of lawyers in accounting firms in the early 1990s), with ABA Commission, Background Paper, supra note 14, pt. I.  
163. See Richard L. Abel, Transnational Law Practice, 44 Case W. Res. L. Rev. 737, 747 (1994). The author states: [Accounting firms] gained a foothold in providing legal services in Europe because continental lawyers emphasized litigation. Even British solicitors were slow to develop a tax competence. Indeed, continental lawyers were so preoccupied with advocacy that the accounting firms developed litigation support services to complement lawyers' courtroom skills in the same way solicitors complement barristers.

Id.  
164. See Daly, Choosing Wisely, supra note 60, at 236-40 (examining the responses of foreign regulators to the formation of MDPs).
as being a controversial position.\textsuperscript{165} The Swiss economy, which is dominated by the banking industry, has long recognized the value of decisions informed by many different professionals.\textsuperscript{166} As noted above, Germany has permitted partnerships between accountants and lawyers for many years. Lawyers could not share fees with accountants, however, until a 1994 statute changed this result.\textsuperscript{167}

In France, accounting firms relied upon the French law that allowed drafters of legal documents called “conseil juridique” to offer drafting services to their clients. Accounting firms hired these drafters as employees.\textsuperscript{168} France also allowed accounting firms to affiliate with independent law firms or networks of firms.\textsuperscript{169} Recently, France merged the two legal professions—"avocats" and "conseil juridique"—to form one profession.\textsuperscript{170} Since that time, the accounting firms have been affiliating with or acquiring the combined law firms.\textsuperscript{171} The rules in France have led to the accounting firms using a “captive” law firm arrangement. A “captive” law firm remains separate in structure from the accounting firm, but the two share the same client base and often provide services in an indistinguishably unified manner.\textsuperscript{172} The accounting firm often provides the law firm with support, and the law firm provides the accounting firm with legal services.

In the United Kingdom, the current rules do not allow lawyers and non-lawyers to partner in the same entity or to share legal fees with

\textsuperscript{165} See New York State Bar Association Special Committee, Report, supra note 22, at 278-79 (stating that the ability to form MDPs depends on the canton).

\textsuperscript{166} See Interview with Carl Baudenbacher, Professor of Law, St. Gallen, Switzerland, Judge, EFTA Court of the European Union (July 1999). This reality is evidenced by the fact that the largest law firm in Switzerland is ATAG Ernst & Young. See Daly, Reporter’s Notes, supra note 11, at n.11.


\textsuperscript{168} See New York State Bar Association Special Committee, Report, supra note 22, at 195-96.

\textsuperscript{169} See id.

\textsuperscript{170} Id. at 197-200.

\textsuperscript{171} See Marc J. Bartel & Bradford W. Hildebrandt, Memo to Managing Partners: Start Worrying About Europe, 20 Am. Law. 69 (Nov. 1998) (examining the different affiliations and mergers between accounting firms and European law firms); John Leubsdorf, The Independence of the Bar in France: Learning From Comparative Legal Ethics, in Lawyers’ Practice and Ideals, supra note 151, at 275, 292.

\textsuperscript{172} See ABA Commission, Background Paper, supra note 14, at pt. I. That a law firm is “captive” does not mean that it works exclusively for clients of the accounting firm. The law firm may do much of its work for accounting firm clients, but may also have clients who are not clients of the accounting firm. See Neil Cochran, Statement Before the ABA Commission on Multidisciplinary Practice (Feb. 4, 1999) (available at <http://www.abanet.org/cpr/cochran1.html>) (discussing his law firm’s association with Arthur Andersen in Scotland and explaining that his firm has clients who are not Arthur Andersen clients).
non-lawyers. A deregulation of the English legal profession in the mid-1980s, however, was designed to allow close relationships between solicitors and non-lawyers. This change was designed in part to allow solicitors to broaden their scope of services offered to clients and to compete with the tax and real estate advice being provided by accounting professionals. The availability of a "package price" was designed to allow formation of alliances between lawyers and non-lawyers without explicitly permitting co-ownership or fee-sharing. Thus, accounting firms have initiated the creation of "captive" law firms that serve the clients of the accounting firms exclusively. Recently, however, there has been a movement to change the rules to allow the creation of "legal practice plus" and "linked partnerships." These new practice concepts will allow solicitors to join with non-lawyer partners and allow the formation of stronger alliances than are currently permitted.

There are many other interesting pro-multidisciplinary practice developments taking place around the world. An international practice committee of the Canadian Bar Association has embraced ownership and fee-sharing between lawyers and non-lawyers in MDPs, and recommends adoption of rules consistent with encouraging MDPs. New South Wales, Australia, is considering allowing law firms to incorporate, to share legal fees with non-lawyers, and to participate in passive investment on the Australian Stock Exchange.


174. See id. (describing recent deregulation of the legal profession).

175. See id. The barrister/solicitor distinction left solicitors at a competitive disadvantage with accountants and tax advisers. Thus, the changes were designed in part to let solicitors offer comprehensive services to clients.

176. Arthur Andersen affiliated with the "captive" firm Garrett & Co., and PricewaterhouseCoopers affiliated with the "captive" firm Arnheim, Tite, and Lewis.


178. Because of space constraints, this Article's coverage of international developments concerning MDPs is necessarily selective. Accordingly, an exhaustive examination of the legal professions around the world and their positions on MDPs is beyond the scope of this Article.


180. See Professional Regulation Task Force Report, Structure of Law Firms (May 1997) (available at
These developments should not be read to suggest that legal professions around the world are completely embracing MDPs. The reactions are varied and complex. In some countries, the rules already permit alliances between lawyers and non-lawyers and the status quo is not easy to change; thus, it would be difficult for lawyers in such countries to prevent the growth of MDPs. In other countries, the rules are being changed to allow lawyers to compete with the accounting firms. Yet, in still other countries, the legal professions seek to become a center of world legal commerce and believe that MDPs offer the best chance for accomplishing that goal. Although many foreign bars still oppose MDPs, it is likely that a majority of countries in the world will eventually accommodate some form of partnering between lawyers and non-lawyers to enable clients to receive integrated professional services.

II. THE BENEFITS OF AND DEMAND FOR MULTIDISCIPLINARY SERVICES

This part of the Article discusses the benefits of multidisciplinary services and why there is a growing demand for such services by the consumer. Ultimately, it is this consumer demand for multidisciplinary services that will determine the direction of the debate concerning multidisciplinary practice.

First, the major benefit of multidisciplinary services is the delivery of an integrated team approach to serving client interests—in other words, providing clients with a “one-stop shopping” approach for problems requiring services in different fields. When individuals...
work together on a regular basis, they provide a synergy that is simply not present when an individual works alone. The synergy is more likely to produce higher quality service for a client requiring both legal and non-legal representation. \(^\text{183}\) Without multidisciplinary services, some clients will choose not to involve other non-law professionals even though it would benefit them to do so. \(^\text{184}\) Even when they do choose a quasi-multidisciplinary approach, the difficulty in coordinating several sources of services has the potential to both reduce the quality and increase the cost of the representation clients receive. The liberalization of multidisciplinary services is necessary to give consumers full choice in accessing various professional services, including legal services. \(^\text{185}\)

A second major benefit of multidisciplinary services is the resultant efficiency that translates into savings of time or money, and ensures the delivery of a higher quality product to the client with lower transaction costs. \(^\text{186}\) Thus, a client with legal and non-legal problems

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\(^{183}\) A good analogy to describe the synergy is the difference between an all-star team in a sport versus a group of talented professionals on one team that works together. The constant interaction between the members of the same team produces a synergy that is not possible on the all-star team.

\(^{184}\) A general counsel of a Fortune 100 company recently discussed this issue with one of the authors of this article. He stated that his company had employed a team of in-house professionals from different disciplines who each occupy a different but coordinated role in examining corporate decision making that in the past was driven by lawyers. Economists, mathematicians, individuals with MBA degrees, and marketing experts team together to offer the corporation a complete and very sophisticated approach to decision making. He stated that he could not imagine doing business in today's world any other way and that he thought that companies without the benefit of this multifaceted approach were at a significant disadvantage.

\(^{185}\) See Jim Conran, President, Consumers First, Written Testimony to the ABA Commission on Multidisciplinary Practice (Feb. 1, 1999) (available at <http://www.abanet.org/cpr/conran.html>) (advocating consumer choice in legal service providers); David A. Swankin, President, Citizen Advocacy Center, Written Testimony to the ABA Commission on Multidisciplinary Practice (Mar. 24, 1999) (available at <http://www.abanet.org/cpr/swankin.html>) (examining right of consumer choice in context of potential harm to the public and concluding that issues of loss of attorney-client privilege, loss of independence, and possibility of conflicts of interest could be minimized through the arrangement); see also Evans & Wolfson, supra note 182, at 14.

\(^{186}\) See The Consumer Alliance, Written Remarks to the ABA Commission on Multidisciplinary Practice (Mar. 31, 1999) (available at
does not need to schedule appointments with several service providers who may or may not have worked together before. Eliminated transaction costs may include duplication of effort, the need for the professionals to consult each other in costly conferences or meetings, and the need for each provider to bill a sufficient dollar amount to ensure that the transaction is viable from a business and liability perspective. After all, few service providers will want to undertake joint liability when the financial reward of the representation is likely to be small. Other reduced costs include search costs, contracting costs, coordination costs, monitoring costs, and information costs.

MDPs are also likely to employ persons of varying skills and billing rates. This way, a person doing routine tasks, such as basic mathematical calculations, is billed at a lower rate than a more skilled professional who performs a mathematical calculation incident to the performance of his or her services. Specifically, a consumer of professional services may realize the benefit of reduced consumption-related costs when dealing with an integrated professional services firm that is in a position to offer a variety of services and specialists in one location.

See generally Michael Trebilcock & Lilla Csorgo, *Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective* (Aug. 4, 1999) (available at <http://www.abanet.org/cpr/canada.html>) (study commissioned by Big Five accounting firms in Canada); see also Andrews, *supra* note 71, at 623-24; John Quinn, *Multidisciplinary Legal Services and Preventive Regulation*, in *Lawyers and the Consumer Interest*, *supra* note 182, at 329, 334, 342 [hereinafter Quinn, *Preventive Regulation*]. "Search costs" are the costs of looking for professionals in each of the service areas and geographical locations in which professional services are needed to complete the consumer's project. Trebilcock & Csorgo, *supra*, at 3. "Contracting costs" are the costs of contracting with each professional performing services that are needed on the project. See id. "Coordination costs" are the costs of coordinating the tasks performed by each of the professionals and relaying information between the professionals. See id. "Monitoring costs" are the costs of verifying the quality of tasks performed by each of the professionals on the project. See id.

If one integrated MDP provides various professional services to the consumer, the consumer could either monitor the different services randomly and impute the verified quality to the MDP, or rely on the substantial reputational capital that the MDP would lose if it failed to deliver on its promised quality. See id.

Low- and middle-income individuals as well as small and medium sized business enterprises who rarely engage in activities requiring professional services are more likely to resort to an integrated provider of professional services. See generally Trebilcock & Csorgo, *supra* note 187. It is usually not worthwhile for such consumers
Third, producers of multidisciplinary services may realize the benefit of reduced production-related costs that result from delegating a function within the firm rather than purchasing it on the open market or leaving it to the client to purchase that function elsewhere. These reduced production-related costs comprise two types: economies of scope and economies of scale.

Economies of scope occur when the total cost of producing a group of products or services is less when those products or services are produced by a single integrated firm than when produced by a set of independent firms. In this context, MDPs "may facilitate the coordination and collaboration between a tax accountant... tax lawyer," and economist. This co-ordination and collaboration results in cost savings not only to the producers of the services, but also to the client.

Economies of scale occur when the average cost of producing a service decreases with increased production of the service. In the multidisciplinary practice context, economies of scale are relevant if one assumes that the introduction of an MDP will result in increased demand for the firm. With the increase in firm demand, an MDP may be able to justify the hiring of more specialized employees who are likely to be able to perform necessary tasks more efficiently and competently than someone who is not an expert in the area. This allows the MDP to reallocate tasks among various employees in such a way as to decrease the average cost of providing services and to increase the quality of the specialized services provided. Moreover, the increase in firm demand may also allow the MDP to invest in technologies that could not otherwise be justified under a cost/benefit analysis, or that, in the absence of the MDP, would have resulted in to pay to assemble a team of separate service providers and to incur the resulting higher search and monitoring costs. See id. at 3.

189. See id.
190. See id.
191. See id.; see also Quinn, Preventive Regulation, supra note 187, at 333-34.
192. Trebilcock & Csorgo, supra note 187 at 3; see also Quinn, Preventive Regulation, supra note 187, at 333-34.
194. See Trebilcock & Csorgo, supra note 187, at 3.
195. See id.; Wolfram, Multidisciplinary Partnerships, supra note 156, at 318 ("[T]he overriding economic factor in the growth of MDPs is that service is the fastest-growing sector in the global economy.").
two parties incurring duplicative costs in developing the same technologies. 198

The clients of MDPs would benefit directly from the reduced production-related costs in three ways. First, the consumer will benefit through the increase in quality of the services that MDPs can provide, i.e., the greater specialized skills of the professional personnel in the MDP and the improved technological capabilities. 199

Second, the consumer will benefit from being served in markets in which he or she had not previously been served. 200 Finally, in a competitive market for professional services, greater production efficiencies should translate into lower prices. 201 Because establishment of MDPs will not decrease the number of professional service firms competing for client business, but instead will expand product offerings, the introduction of multidisciplinary services is more likely to increase rather than decrease competition in the market for professional services. 202

Additionally, an MDP is more likely to identify both legal and non-legal issues than would an entity comprised of personnel with the same professional specialty (law or non-law). 203 Working together in a team approach, lawyers and non-lawyers will be more sensitive to their respective issues and are likely to formulate and promote a more comprehensive definition of client problems. 204 Clients will thereby be

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198. See Trebilcock & Csorgo, supra note 187, at 3-4; see also Bower, Multidisciplinary Practices, supra note 122, at 161; cf. Larry E. Ribstein, Ethical Rules, Agency Costs, and Law Firm Structure, 84 Va. L. Rev. 1707, 1716-17 (1998) (stating that large law firms are better able than small law firms to handle sophisticated work requiring non-legal services and technological investments).


200. See Evans & Wolfson, supra note 182, at 24; Trebilcock & Csorgo, supra note 187, at 4; see also Shigeru Kobori, Paris Forum on Transnational Practice for the Legal Profession: Discussion Paper Presented by the Japan Federation of Bar Associations, 18 Dick. J. Int'l L. 109, 111 (1999) ("An integrated firm with a worldwide network opens up the possibility of receiving specialized country to country service.").

201. See Evans & Wolfson, supra note 182, at 25; Trebilcock & Csorgo, supra note 187, at 4; Wolfram, Multidisciplinary Partnerships, supra note 156, at 309 (client will "often" receive a lower price "because of the greater efficiencies possible in providing seamless, coordinated services"), 344-45; see also Bower, Multidisciplinary Practices, supra note 122, at 167 (one response of law firms to competition from MDPs could be to streamline processes in order to directly compete with MDPs on price, efficiency, and responsiveness to client demands).

202. See Trebilcock & Csorgo, supra note 187, at 4; see also Evans & Wolfson, supra note 182, at 14; Gary A. Munneke, Lawyers, Accountants, and the Battle to Own Professional Services, 20 Pace L. Rev. 73 (1999) (examining the competition between the accounting and legal professions).


204. See Andrews, supra note 71, at 623; Quinn, Preventive Regulation, supra note
given a choice whether to engage the professional service provider to address other related issues during the representation. The result is a higher quality work product, which includes integrated and balanced solutions to all issues relevant to a matter.\(^{205}\) As stated by two commentators:

Lawyers and non-lawyers working together may also complement each other by bringing different problem-solving techniques to bear on an issue. As professionals become more specialized in order to satisfy complex client needs, a collaboration of professionals is more likely to result in optimal problem-solving approaches.\(^{206}\)

Moreover, the multidisciplinary firm can counteract the problem of lawyers doing the wrong type of specialized work for a client. This problem, if not corrected, results in clients consuming too much of the type of legal services performed by those lawyers and consuming too little of the types of services performed by lawyers with other specialities or by non-law professionals.\(^{207}\) Because the MDP offers more than one type of service, it is more likely to steer the client into using the optimal amount of each available service.\(^{208}\)

There are several other benefits of diversification that an MDP provides for both the producer of professional services and the consumers of those services. A diversified MDP can leverage its

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187, at 333-34.

205. See Quinn, Preventive Regulation, supra note 187, at 334 ("[M]ultidisciplinary organization of legal and related services should confer substantial benefits on those client groups whose complex and multi-faceted problems require the attention of interdisciplinary specialist teams.").


207. See Ribstein, supra note 198, at 1711; Schneyer, Economist as Storyteller, supra note 182, at 1792; Schneyer, Perils of Professionalism, supra note 25, at 375-77.

208. See Ribstein, supra note 198, at 1725; see also Robert G. Evans, Professionals and the Production Function: Can Competition Policy Improve Efficiency in the Licensed Professions?, in Occupational Licensure and Regulation 225, 247-59 (Simon Rottenberg ed., 1980); Fischel, MDPs, supra note 33, at 960-62. In addition, an MDP "may permit the realization of efficiencies through the allocation of task responsibilities on the basis of comparative advantages in aptitude or experience which may not be reflected in the existing statutory definitions of the professional groups' licensed functions." Quinn, Preventive Regulation, supra note 187, at 331. MDPs "can mitigate the rigidities of the licensure system because they facilitate an efficient allocation of functions and specific tasks within a framework of systematic collaboration between legal and non-legalspecialists." Id.
reputation across a number of professional specialties, thereby increasing the economic return derived from its investment in establishing that reputation. The clients of the MDP benefit from this diversification by receiving "the benefit of a single trusted intermediary with an established reputation to handle all of the client's needs." In addition, a diversified MDP is in a better position to survive economic downturns within a particular professional specialty or sub-specialty because it does not look to a single specialty as the sole source of its income. This, in turn, enhances the continuity and value of the firm's reputation.

The global economy and the Internet communication system place demands on professionals that can be met only in a teaming approach. A law firm, even one with offices in a dozen U.S. cities, has difficulty providing services to a company seeking to go abroad. Many international MDPs are likely to provide superior services to such a client on all of the facets of the decision to go abroad. A marketing study may be performed, different strategies may be employed in different regions of the world, and once a decision is made on the course of action, the MDP would be able to deliver the legal services. If the United States decides to isolate the practice of law from multidisciplinary services, the world's MDPs will surpass the quality of services delivered by professional service providers in the United States.

The demand for multidisciplinary services exists and many clients

209. See Ribstein, supra note 198, at 1717.
210. Id.
211. See id. at 1717-18.
212. See also William Hannay, Chair of ABA Section of International Law and Practice, Remarks Before the ABA Commission on Multidisciplinary Practice (Mar. 11, 1999) (available at <http://www.abanet.org/cpr/hannay1.html>) (asking the Commission to take into account international implications of the debate on MDPs).
213. Letters and testimony provided to the ABA Commission on Multidisciplinary Practice offered significant insight into such demand. There are many letters from consumer groups citing demand by their members for integrated services. Also, many small- and medium-sized business owners wrote to the ABA Commission about their needs for multidisciplinary services. In the words of the representative from the Los Angeles County Bar Association, "the question is not if there will be MDP's, but rather, when, what their structure will be and how they will be regulated." Letter from Samuel L. Bufford to Arthur Garwin, Staff Counsel to the ABA Commission on Multidisciplinary Practice (Apr. 1999) (available at <http://www.abanet.org/cpr/lacba.html>); see also Daly, Choosing Wisely, supra note 60, at 274-75 (discussing testimony before the ABA Commission by consumer groups, business clients, and ABA entities supporting amendments to the Model Rules to permit lawyers to share fees and partner with non-lawyers); Jones, Focusing the MDP Debate, supra note 79, at 993-95 (describing the wide-ranging client demand for integrated professional services provided by MDPs); Abraham C. Reich, Scott L. Vernick & Joshua Horn, Screening Mechanisms: A Broader Application? Balancing Economic Realities and Ethical Obligations, 72 Temp. L. Rev. 1023, 1029 (1999). Moreover, according to a survey conducted by random sample for the Financial Times, more than one-half of large corporate buyers of legal services in the United Kingdom and the United States (and 75 percent of U.S. financial organizations)
will continue to seek such services elsewhere abroad and domestically if the U.S. ethical rules do not allow lawyers to participate in delivering them. In a growing number of cases, multinational corporations are sending international legal business abroad because they find that the European MDP delivers higher quality services. That trend will continue. If the American legal profession refuses to accommodate this client demand, it is likely that one or more European cities will emerge as centers of international legal commerce for international transactions. Domestically, the situation may lead to more and more legal work being done by lawyers in non-law firms. Those entities would simply tell clients that the final stages of memorialization of legal documents require the use of an outside lawyer. Thus, technically, the non-law entity would not offer legal services and the outside lawyer would be a captive legal provider for that non-law professional. This form of civil disobedience of the unauthorized-practice rules would significantly undercut the U.S. regulatory system that has developed for protecting the public in the delivery of legal services.

Further, legal rules and constructs increasingly rely on non-law factors such as economics, quantitative analysis, and sociology. For would be willing to use a professional firm that combined lawyers and accountants. See Jean Eaglesham, Financial Groups Support Multi-Disciplinary Firms—Professional and Legal Services Most Corporate Buyers Would Use Organisation Combining Lawyers and Accountants, Financial Times (London), Sept. 6, 1999, at 8. Two-thirds of those questioned, however, preferred the traditional method of purchasing legal services. See id. In addition, according to a poll conducted by the Marist Institute on Public Opinion for the U.S. Chamber of Commerce and the American Corporate Counsel Association, 70% of Americans support changing the rules to allow MDPs. See 5 No. 12 Law Firm Partnership & Benefits Rep. 2 (Jan. 2000). For a discussion of these surveys and other matters relating to MDPs, see Stratton, Unauthorized Practice Saber, supra note 9.


Cf. Matheson & Adams, Reflecting on the ABA Commission’s Recommendations, supra note 126, at 1274, 1298-99 (“[W]ith the growth of nonlawyer firms, and the inability to control the unauthorized practice of law, the legal profession is facing severe competition in the relevant marketplace.”); Morello, supra note 151, at 252 (“[I]t 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.”); Wolfram, Multidisciplinary Partnerships, supra note 156, at 318 (“If MDPs make business sense, multinational companies can be expected to move legal business to those countries where MDPs flourish and make their services available.”).
example, the IRS employs economists to determine whether transactions have economic substance, and to develop safe harbor rules for taxpayers in areas such as intercompany pricing under Section 482.\textsuperscript{218} If the IRS employs economists to establish legal norms, taxpayers must similarly employ non-law professionals to inform their legal advice. Thus, a tax practice that properly informs its clients on intercompany transfer pricing issues must include the services of an economist to ensure that the client receives the highest quality representation. Those economists and other non-law professionals who participate in the delivery of professional services to the client understandably want to be able to obtain ownership interests in the firm that employs them, and that fact, in turn, leads to the formation of MDPs.

As an added benefit, non-lawyer partners of an MDP are likely to bring to the firm more efficient management techniques, which should result in lower operating costs and, hence, lower professional fees to clients.\textsuperscript{219} Stated differently, non-lawyer partners who bring professional management skills to the MDP will often be better than lawyer partners at determining how the firm may deliver quality legal and other professional services to the consumer in the most efficient fashion and at the lowest possible cost.\textsuperscript{220} In addition, "centralized managerial control over related service functions may also reduce the risks of error and improve overall service quality."\textsuperscript{221}

More importantly, if the organized bar accommodates multidisciplinary services, organizations that perform legal services, including law firms, are likely to have access to new sources of capital. Like other business and professional organizations, legal service organizations need new capital for expansion into new geographic and product (i.e., practice) areas, technological innovation, employee training, and various other business needs.\textsuperscript{222} The effects will be to better serve the needs of the clients of the legal service organization and enhance competition in the legal services market.\textsuperscript{223}

\textsuperscript{218} See Steven Alan Bennett, Former General Counsel of Banc One Corporation, Remarks Before the ABA Commission on Multidisciplinary Practice (Nov. 13, 1999) (available at <http://www.abanet.org/cpr/bennett.html>) (arguing that "pure[ly] legal problems no longer exist," that "lawyers are not the source of the necessary expertise," and that "the size or character of many problems facing American business demands a multidisciplinary approach"); Al Sterman, Written Comments to the ABA Commission on Multidisciplinary Practice (Mar. 26, 1999) (available at <http://www.abanet.org/cpr/sterman.html>) (arguing that "few . . . problems are solely legal in nature").

\textsuperscript{219} See Andrews, supra note 71, at 627-28; Carson, supra note 23, at 602-03; cf. Quinn, Preventive Regulation, supra note 187, at 331-32.

\textsuperscript{220} See Andrews, supra note 71, at 628.

\textsuperscript{221} Quinn, Preventive Regulation, supra note 187, at 333.

\textsuperscript{222} See Matheson & Adams, Reflecting on the ABA Commission's Recommendations, supra note 126, at 1301.

\textsuperscript{223} See id.
permits passive investment in law firms and MDPs, as this Article later proposes, lawyers will have access to the equity markets, a potentially major source of new capital. Even if passive investment in law firms and MDPs is not allowed, permitting lawyers to enter into partnerships with non-lawyers will permit those non-lawyers to contribute capital to the firm. Moreover, it may be easier for an MDP to borrow money in the debt markets and to borrow at a lower rate of interest than would be available to a professional firm operating separately in a small firm or solo practitioner structure.

Finally, there is one other significant cost to society if the organized bar does not accommodate multidisciplinary services. Low- and middle-income individuals and small businesses, who are excellent candidates for receiving multidisciplinary services, are likely not to obtain professional legal and non-legal services in the ordering of their personal and business matters. Family mediation clinics, small business consulting practices, environmental services firms, and gerontological services firms will all be casualties of a failure to move towards an acceptance of MDPs. The public deserves the opportunity to receive services from such providers, and society is likely to be worse off if these clients do not receive multidisciplinary services.

Moreover, in smaller towns, there may not be sufficient demand for legal services to keep lawyers engaged full-time in a legal practice. Accordingly, if lawyers are permitted to diversify and engage in other professional activities in addition to law practice and to enter into partnerships with other non-lawyer professionals, they can make

224. See infra Part IV.D.5.
225. See Matheson & Adams, Reflecting on the ABA Commission's Recommendations, supra note 126, at 1301.
226. See, e.g., Daly, Choosing Wisely, supra note 60, at 282.
227. See id.
228. For examples of small business owners who would be advantaged by MDPs, see Letter from Michael H. Horner to Arthur Garwin, Staff Counsel to the ABA Commission on Multidisciplinary Practice (Feb. 19, 1999) (available at horner.html) (discussing his need for multidisciplinary services in a small business context); Letter from Scott Hart to Arthur Garwin, Staff Counsel to the ABA Commission on Multidisciplinary Practice (Feb. 22, 1999) (available at hart.html) (discussing the benefits of obtaining legal services from his accounting firm in the business context); see also Daly, Choosing Wisely, supra note 60, at 274-75, 282.
229. See Letter from Marna S. Tucker to Sherwin Simmons, Chair of the ABA Commission on Multidisciplinary Practice (Apr. 7, 1999) (available at tucker3.html) (discussing in detail the potential consumer demand for multidisciplinary services in the family law context).
230. See Al Sterman, Written Comments to the ABA Commission on Multidisciplinary Practice (Mar. 26, 1999) (available at sterman.html) (noting that alternative ways of delivering legal services will make consumers more comfortable with lawyers and thus more likely to obtain legal services).
sufficient total profits to stay in business. This means that the clients in these smaller towns will have access to legal services that they might not have had otherwise.\footnote{231}

In addition, many low- and middle-income clients might be best served by allowing a major retailer such as Sears or H & R Block to hire lawyers and offer legal services at a reasonable cost.\footnote{232} This vehicle for delivery of legal services would probably work best for routine legal problems. Thus, the current ethical rules prohibiting lawyers from working in such organizations block a potentially important source of legal services for the portion of the population most under-served by lawyers.

III. THE ORGANIZED BAR'S RESPONSE TO THE MARKET DEMAND FOR MULTIDISCIPLINARY SERVICES

A. Formation of the ABA Commission on Multidisciplinary Practice

In August of 1998, then ABA President Phillip Anderson appointed a commission to study the concept of multidisciplinary services and what changes, if any, should be made to the ABA Model Rules of Professional Conduct. The official directive to the commission was to “study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public.”\footnote{233}

The Commission on Multidisciplinary Practice (the “Commission”) was chaired by Sherwin Simmons, a prominent senior tax lawyer and a former member of the ABA Board of Governors.\footnote{234} It was very fitting to have such an experienced tax lawyer lead the study of MDPs because he knew about the practice of accounting firms in the tax area and had ready access to many lawyers who had left law firms for Big Five accounting firms in recent years. The other members of the Commission included two judges,\footnote{235} two law professors,\footnote{236} one law


233. ABA News Release, supra note 13 (statement of then ABA President Philip S. Anderson appointing Commission on Multidisciplinary Practice).

234. Sherwin Simmons is the chair of the tax section of the Florida law firm of Steel, Hector & Davis, and a past chair of the ABA Section on Taxation. See Members of the Commission on Multidisciplinary Practice (visited July 22, 2000) <http://www.abanet.org/cpr/multicommembers.html>.

235. Judge Paul Friedman is a federal district judge for the District of Columbia and did play a role in the District of Columbia’s consideration of non-lawyer partners in D.C. Rules Rule 5.4. Judge Carl Bradford is a judge on the Maine Supreme Court. See id.

236. Professor Phoebe Haddon is a professor at Temple University School of Law.
school dean,237 one general counsel of a corporation,238 one general counsel of an investment banking firm,239 and four partners of law firms around the country.240 The Commission's members had experience in drafting ethics rules,241 international legal practice,242 corporate and business law,243 and legal services for the poor.244 The Reporter to the Commission was Mary Daly, a law professor at Fordham University who is an expert in legal ethics in the corporate and international areas.245 The Commission also had two liaisons to the ABA Board of Governors,246 and two members of the ABA Center for Professionalism who served as counsel to the Commission.247

In addition to studying the extent to which non-lawyers seek to deliver legal services to the public in the United States, the Commission had four broader tasks.248 First, the Commission was asked to study the experience that domestic and international clients have had with the delivery of legal services from multidisciplinary professional service firms.249 Second, it was asked to examine federal
and state laws that may permit multidisciplinary professional service firms to deliver legal services, and to consider whether changes should be made to these legal frameworks. Third, the Commission was asked to study the effect of the delivery of legal services by non-law professionals on the attorney-client privilege and on conflicts of interest. Finally, the Commission was asked to study the current ethics rules and determine whether they need to be modified to protect the public.

B. ABA Commission's Activities and Recommendations

The Commission used an extremely open and deliberative process for studying multidisciplinary services. The Commission established a web site and posted on that web site its own memoranda of opinions and questions for comment, all submissions from third parties, and the submissions and presentations in the various hearings held over a period of a year and a half. The web site made a wealth of information about the multidisciplinary services issue available to anyone with web access, and invited the public to submit comments to the Commission.

From its formation, the Commission had the almost impossible task of presenting a recommendation to the ABA House of Delegates within one calendar year. It held one set of hearings in November of 1998, and subsequently issued a report entitled, Background Paper on Multidisciplinary Practice: Issues and Developments (the "Background Paper"). The Background Paper provided detailed background information about multidisciplinary services outside of the United States, as well as information about the efforts of accounting firms and other service providers to form partnerships with

unauthorized-practice-of-law rules, a factual assumption that is probably correct.

250. See id. For example, federal and state tax regulatory regimes preempt certain state bar regulation concerning the delivery of legal services in the tax area. See supra Part I.A.4.

251. See Commission on Multidisciplinary Practice, supra note 248. During the Commission's study of multidisciplinary services, this inquiry was reformulated and broadened in an effort to protect the core values of the legal profession. For a discussion of the effect of multidisciplinary practice on the core values of the legal profession, see infra Part IV.D.

252. See Commission on Multidisciplinary Practice, supra note 248.

253. See id.

254. The ABA and the members of the Commission on Multidisciplinary Practice should be commended for using technology so effectively to keep everyone completely informed as to their deliberations. This experience should serve as a model for future ABA work and for deliberative processes generally.


256. See ABA Commission, Background Paper, supra note 14.
It also examined the current ethics rules and how they limited the development of multidisciplinary services.

In January of 1999, the Commission limited its inquiry to the following four questions: (1) the benefit and harm of allowing lawyers to partner and share fees with non-lawyers; (2) the effect of such partnering or fee-sharing on professional independence; (3) the difference between the professional rules governing lawyers and accountants; and (4) if lawyers were permitted to deliver legal services as employees or partners of non-law firms, what changes should be made to (i) the confidentiality rules, (ii) the conflicts-of-interest principle of imputed disqualification, (iii) the ethics rules imposing responsibility upon partners or supervisory lawyers, (iv) the ethics rules on unauthorized practice, (v) the ethics rules on advertising, (vi) the extent of disciplinary reach of the state bars upon such non-law firms, and (vii) any other areas.

From the list of questions asked, it was clear that the Commission was concerned with identifying all benefits and harms that would result from multidisciplinary practice, and that it focused on which rules of the profession would need to be amended to minimize or eliminate the potential harms to the public. This inquiry was to center on the extent to which professional regulation of accountants and lawyers differed, and possibly the extent to which such regulation should be harmonized. Overall, however, the Commission seemed very receptive to the concept that multidisciplinary practice should be accommodated in some fashion.

Subsequently, the ABA Commission held two hearings, one in Los Angeles in February of 1999, and the other in Washington, D.C., in March of 1999. The Commission also received significant commentary from the general public about multidisciplinary practice.

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257. See id.
258. See id.
259. See Model Rules Rule 5.4 (professional independence of the lawyer).
260. See id. Rules 1.6 (confidentiality of information), 3.3 (candor toward the tribunal).
261. See id. Rule 1.10 (imputed disqualification).
262. See id. Rules 5.1 (responsibilities of partner or supervisory lawyers), 5.2 (responsibilities of a subordinate lawyer), 5.3 (responsibilities regarding nonlawyer assistants).
263. See id. Rule 5.5 (unauthorized practice of law).
264. See id. Rule 7.1-.5 (advertising and solicitation rules).
265. See id. Rules 8.5(a) (disciplinary authority), 8.5(b) (choice of law for multi-jurisdictional practice of law).
266. The proceedings of both of these hearings were placed on the Commission's web site. One of the authors made a presentation at the Los Angeles meeting in February and submitted a written paper responding to the Commission's questions. See Professor John S. Dzienkowski, University of Texas School of Law, Statement Before the ABA Commission on Multidisciplinary Practice (Feb. 5, 1999) [hereinafter Statement of Dzienkowski] (available at <http://www.abanet.org/cpr/dzienkowskil.html>).
The hearings were balanced with speakers who were for and against multidisciplinary practices, as well as speakers who simply presented their observations. The results of this deliberative process produced a formal Commission document, *Hypotheticals and Models.*

The *Hypotheticals and Models* redirected the Commission's inquiry away from the general questions contained in the Background Paper to the more specific question of how the American legal profession should accommodate the need for multidisciplinary services. The Commission most likely had decided that some form of multidisciplinary services should be accommodated; now, it was turning to determining how to modify the current system for regulating lawyers.

The *Hypotheticals and Models* focused on how Model Rule 5.4 should be amended, and if amended, whether the imputation rules should apply to the entire professional services firm, or just the lawyers in a department. It proceeded to offer five alternative models. The first model—the "cooperation" model—retained the status quo and allowed cooperation between lawyers and non-lawyers in offering different professional services, but did not allow non-lawyer ownership in a law firm or the sharing of legal fees between lawyers and non-lawyers. The second model—the "command and control" model—adopted the District of Columbia's version of Model Rule 5.4. Lawyers could allow non-lawyers to become owners in a law firm—the sole purpose of which is to offer legal services to clients—but lawyers had to ensure that the non-lawyers followed the rules of ethics. The third model—the "ancillary business" model—relied upon Model Rule 5.7 to permit lawyers to offer clients ancillary business services. Under this model, both lawyers and non-lawyers could own the non-law ancillary business, but the lawyers could not share legal fees with the non-lawyers or allow the non-lawyers to be owners in the law firm. The fourth model—the "contract" model—would allow a contractual affiliation between a law firm and a non-law entity. The contours of such a relationship were left undefined by the ABA Commission. Perhaps they could advertise together, or perhaps they would be able to refer clients to each other or share certain overhead. The fifth and final model—the "fully integrated" model—would allow lawyers and non-lawyers to practice in a single professional services entity. Lawyers would provide legal services to...
some, but not all, clients of the entity, and non-legal services might or might not be part of the legal services engagement.

The Commission's issuance of the *Hypotheticals and Models* signaled that the Commission was seriously considering adopting some framework for allowing lawyers and non-lawyers to practice together. In addition to the five models described above, the document also presented a number of hypotheticals—involving conflicts and confidentiality—and asked for public comment on how they should be resolved by the Commission. The Commission received comments from a variety of sources and posted them on its web site as a form of public distribution.

The ABA Commission issued its Final Report on June 8, 1999, as part of a submission to the ABA House of Delegates for the August 1999 meeting. The Commission recommended that the ABA House of Delegates amend the Model Rules to permit lawyers to offer legal services through an MDP. The Report ultimately suggested that the ABA not constrain the type of entity that lawyers could use in offering multidisciplinary services. In other words, lawyers could offer legal services through any of the five models, even in the form of a fully integrated MDP. The Commission acknowledged, however, that the delivery of legal services through an MDP could threaten the core values of the legal profession. Thus, if the Commission's recommendations were adopted, MDPs would be required to follow the same rules that law firms followed and would have to certify their compliance with that requirement to the state bar. MDPs controlled by non-lawyers would be subject to an annual state bar audit to determine whether the certification was in fact true. Failure to comply with the certification could result in the firm's disbarment from MDP status. Moreover, non-lawyer controlled MDPs would have to pay the cost of the annual state bar audit. In addition, the Report recommended that the definition of an MDP be expanded to include any entity that employs lawyers for providing legal services. Thus, under the Commission's recommendations, in


273. See id.

274. See id.

275. See id.

276. See id.

277. See id.

278. See id.

279. See id.

280. See id.
exchange for permission to deliver legal services through an MDP, all entities hiring lawyers for the performance of quasi-legal services would have to agree to be bound by the lawyer's rules of conduct and to be subject to a state bar audit.\textsuperscript{281}

In many ways, the ABA Commission's Report was very progressive in its approach to multidisciplinary services. It recognized the public demand for such services and the desire within various professions to offer such integrated services. It embraced the need for change in order to meet these market forces by allowing lawyers to practice in various types of multidisciplinary firms. As a political compromise with those opposing MDPs, however, the Commission proposed the creation of a special regulatory scheme that would apply only to MDPs controlled by non-lawyers (i.e., the annual certification and state bar audit requirements for which the non-lawyer controlled MDPs would have to bear the cost). Thus, under this proposal, lawyer controlled MDPs would have had both a less regulated atmosphere in which to operate and a less costly form of doing business than would non-lawyer controlled MDPs. In other words, the Commission's proposal would have provided lawyer controlled MDPs with an unwarranted competitive advantage, thus undermining consumer welfare by interfering with the market for professional services.\textsuperscript{282}

The Commission should be commended for recognizing the widespread client demand for integrated professional services and the potential efficiencies that it may produce. The Commission's Report meticulously documented the international development of MDPs and the reasons why the U.S. legal system should implement rules that foster a market-based system of regulating MDPs. Although that is the reasoning behind the Commission's proposals, the Commission's recommendations unfortunately lapsed back into a regulatory structure that discriminated between lawyer controlled MDPs and non-lawyer controlled MDPs.\textsuperscript{283} Moreover, the Report attempted to

\footnotesize{\textsuperscript{281} See Burnele V. Powell, \textit{Flight from the Center: Is It Just or Just About Money?}, 84 Minn. L. Rev. 1439, 1439-49 (2000) (examining whether the Commission's positions have achieved the proper balance between accommodating multidisciplinary practice and regulating the delivery of professional services so as to protect client and judicial processes).

\textsuperscript{282} See John S. Dzienkowski & Robert J. Peroni, \textit{ABA's Definition of Practice Flawed}, Nat'l L.J., July 26, 1999, at A27 (arguing that selective application of the audit requirement would discourage formation of non-lawyer controlled MDPs).

\textsuperscript{283} The Commission recommended that if non-lawyers control an MDP, it must subject itself to a state bar audit. See ABA Commission, \textit{1999 Final Report}, supra note 8. Imposing an audit requirement on non-lawyer controlled MDPs and not on lawyer controlled MDPs or law firms in general obviously discourages the formation of non-lawyer controlled MDPs. The Commission cited no evidence that non-lawyer controlled MDPs are more likely to violate the ethical rules or to harm the public. There is little justification for imposing an audit requirement solely on non-lawyer controlled MDPs. See infra Part IV.E.
bring into the system of bar regulation an entire group of professional services that previously have not been treated as the practice of law.\textsuperscript{284}

Proponents of MDPs applauded the Report for its progressive attitude towards integrating legal and non-legal services.\textsuperscript{285} They correctly criticized, however, the Commission's attempt to expand the definition of the practice of law—thus, giving lawyers and the state bars a greater monopoly power over non-law entities currently employing lawyers for management consulting, lobbying efforts, and perhaps even tax services. Opponents of MDPs viewed the Report as a major step towards losing control over the delivery of legal services to the Big Five accounting firms.\textsuperscript{286} The issuance of the Report brought the

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\textsuperscript{284} In a little-noticed but controversial move, the Commission redefined the practice of law for MDPs. An MDP, for purposes of its regulation, constituted any entity "that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services." ABA Commission, 1999 Final Report, supra note 8. The Commission then redefined the practice of law to include "[p]reparing or expressing legal opinions [and] [a]ppearing or acting as [a lawyer] in any tribunal," and preparing documents of any kind "containing legal argument or interpretation of [the] law, for filing in any... administrative agency or other tribunal." Id. Under this definition, every lobbying firm with licensed lawyers would be an MDP, and every Big Five accounting firm with licensed lawyers that does tax, ERISA, lobbying, and management consulting would be an MDP even though those entities today arguably are not engaged in the unauthorized practice of law under the traditional definition of that term. Lobbying traditionally has been excluded from the practice of law. Tax and ERISA practice is authorized under federal and state statutes and regulatory schemes and thus accounting firms can provide such services (including arguing cases before the Tax Court) without subjecting the entire firm to state bar regulation. Thus, any attempt to expand bar regulation over these areas may, in many instances, be preempted by other federal or state law.

Furthermore, this proposal could be viewed as a guild-motivated attempt to dramatically expand the regulatory reach of the ABA and state bars. The effect of this proposal could force accounting firms with licensed lawyers to subject themselves to regulation as MDPs, or give up their tax opinion, consulting, and IRS representation practices. This result would have a very significant anti-competitive effect and would be injurious to the public who has relied on non-lawyer entities for these services. The increased regulation proposed by the Commission was being done without empirical proof that these lobbying and accounting firms impose harms on the public not found in law firms. If this proposal were adopted by the ABA and state bars, many, if not all, lawyers in such entities could (and many probably would) give up their licenses and thus forgo state regulation, but that should not be necessary. The Commission's redefinition of the practice of law to include such services was conceptually troubling and not in the public interest.


\textsuperscript{286} The legal profession's fear of competition from the accounting firms is not hard to understand: "At a minimum, they can boast of twelve competitive advantages over even the largest of law firms: an institutional client base, cross-marketing opportunities, size, leverage, availability of capital, brand name recognition, institutional advertising, sophisticated marketing, cutting edge technology, substantial research and development, and international capabilities." Daly, Choosing Wisely,
issue of MDPs to the forefront of debates over the future of the legal profession.

C. The Opponents’ Case Against MDPs and the Commission’s Report

The Commission’s 1999 Report to the ABA House of Delegates caught the state bar constituencies by surprise. They had not expected so much change in so little time from a small commission comprised of many traditional ABA-type lawyers. The argument for change had come from within and it prompted many lawyers to mobilize an attack on the ABA Commission’s Report.

A principal spokesperson for the opposition to MDPs was Lawrence Fox, a former chair of the ABA Section of Litigation. Mr. Fox had been criticizing MDPs from the inception of the Commission’s mandate, but no one seemed to be listening. He delivered impassioned speeches to the Commission and to various bar groups around the country in an effort to fight what he viewed as the further commercialization of the practice of law. He delivered the “I had a Nightmare” speech to the ABA House of Delegates in which he envisioned a world where lawyers answered to non-lawyers, where professionalism had given way to the bottom line, where pro bono services and client loyalty were disbanded, and where law had become a product sold by multinational accounting firms and corporations.287

Opponents of MDPs present several arguments why the organized bar should reject any efforts to accommodate partnering and fee-sharing between lawyers and non-lawyers. These arguments can be summarized into three broad categories. First, there is no demand for multidisciplinary services; the perceived demand is completely manufactured by the Big Five accounting firms. Second, if lawyers are allowed to practice with non-lawyers, the core values of the legal profession will be destroyed. Finally, law is a profession and not a business and it must remain within the sole control of lawyers so as to guarantee the profession’s commitment to pro bono work, to improvement of the legal system, and to the public in general.

The opponents are convinced that the demand for integrated professional services is largely manufactured by the excellent marketing efforts of the Big Five accounting firms.288 Their view is

supra note 60, at 233. Professor Daly outlines the Big Five accounting firm’s strategies for expanding their presence in the legal marketplace. See id. at 234-36.


288. See Lawrence J. Fox, Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs, 84
that the general public is largely satisfied with the current modes of delivery of legal services, and cherishes the fact that lawyers remain in control of the practice of law.\textsuperscript{9} Opponents of MDPs claim that, to the extent that some clients need integrated services, the cooperative

\begin{quote}
Why are we looking at this issue at all? Why has MDP suddenly been thrust upon the legal profession as an issue with which it must grapple? Is there any validity to the mantra of providing clients with the opportunity for “one-stop shopping,” to which we repeatedly hear MDP proponents refer as the principal justification for permitting lawyers to form professional partnerships with nonlawyers. The mantra, which assumes certain efficiencies arising out of integration of efforts on behalf of clients, is incanted chiefly by accounting firms and traditionally anti-lawyer organizations. It is incanted by a self-selected sampling of organizations which purport to represent the interests of consumers of legal services and insist that there is client demand for MDPs. At bottom, the reason the legal profession feels itself pressed to deal with the MDP issue at all is because the issue is being forced upon the profession mainly by nonlawyers who would like to add legal services as an additional profit center for their organizations, and by lawyers who see MDP as a means of enhancing their bottom line.
\end{quote}


\textsuperscript{289} See Carl Bevernage, Paris Forum on Transnational Practice for the Legal Profession: Discussion Paper Presented by the Council of the Bars and Law Societies of the European Community, 18 Dick. J. Int’l L. 89, 96-97 (1999). The ABA Commission on Multidisciplinary Practice did, however, note the difficulty in determining, through empirical research, the level of client demand for multidisciplinary services:

In response to the House of Delegate’s [sic] August 1999 Resolution, the Commission also sought the assistance of the American Bar Foundation (ABF). The ABF asked two top economists about the “utility of conducting market research about the demand” and was advised that “questions about services in the abstract would not be effective in telling what people might actually do,” and “that there is only one way to find out if there is a demand, and that is to see if there turns out to be a market.” Thus, making the services available would not only determine demand, but also, the public’s perception, as evidenced by that demand, of the maintenance of independence and loyalty. The Commission believes that the testimony it heard and the written comments it received demonstrate some public support for allowing MDPs, which would translate into demand if the services were available.

ABA Commission, 2000 Final Report, supra note 19 (footnote omitted). In a footnote to this excerpt, the ABA Commission further noted: “The ABF’s response also made the telling historical observation that there was a lack of demand for business litigation (except defense work and the collection of debts) and business consulting until these services became available, at which time a dramatic increase in demand occurred.” Id. at n.18 (citing Letter from Bryant G. Garth, Director, American Bar Foundation, to Arthur Garwin, Staff Counsel to the ABA Commission (Mar. 28, 2000)).
model fulfills this need. Moreover, the opponents of MDPs point out that many clients develop the non-law expertise in-house with non-law professionals.

As discussed above, however, there is ample evidence that the demand for multidisciplinary services is coming from clients of all types, including low- and middle-income clients.\textsuperscript{290} It seems clear that a change in the bar's ethical rules to facilitate lawyer participation in MDPs will benefit clients at all income levels by providing them with the advantages of MDPs discussed above.\textsuperscript{291}

Further, opponents of MDPs often focus on the allegedly detrimental effect that multidisciplinary practice will have on the core values of the profession. The ABA Commission initially identified the three core values as (1) independence of judgment, (2) confidentiality, and (3) loyalty.\textsuperscript{292} It subsequently identified another core value, (4) competence, when opponents began to question the effect of MDPs on competence in legal services.\textsuperscript{293}

The opponents of MDPs argue that lawyers' participation in multidisciplinary practice raises serious concerns about each of the core ethical values of the legal profession.\textsuperscript{294} They argue that non-

\textsuperscript{290} See supra text accompanying notes 228-32. 
\textsuperscript{291} See supra Part II. 
\textsuperscript{292} See ABA Commission, Background Paper, supra note 14. 
\textsuperscript{294} See Block, Warren & Meierhofer, supra note 25, at 757-64; see also Andrews, supra note 71, at 605-16; Beverage, supra note 289, at 96-98. As discussed later in this Article, see infra text accompanying note 335, in August of 1999, the ABA House of Delegates directed the ABA Commission on Multidisciplinary Practice to conduct further study to determine whether allowing MDPs would compromise lawyer independence and the legal profession's tradition of client loyalty. In response, the ABA Commission stated the following in its report issued in 2000:

In response to the Resolution [the ABA House of Delegates' August 1999 Resolution], the Commission endeavored to obtain expert assistance regarding the nature, organization, and implementation of such a study. The responses it received expressed significant reservations about the study's feasibility. The Commission consulted with The Institute for Social Research (ISR) at the University of Michigan, the nation's longest-standing laboratory for interdisciplinary research in the social sciences. The ISR advised the Commission that "public interest", "independence", "loyalty", or "conflict of interest" were, as a practical matter, incapable of definition in a manner that was independent of perception. It suggested, but was not certain, that it might be possible to frame an inquiry to determine client perceptions about how business and ethical considerations currently affect the resolution of conflicts of interest in law firms and how those considerations would likely affect the conflicts' resolution if lawyers were permitted to deliver legal services in a multidisciplinary practice setting. The value of such an inquiry into "client perceptions" is not at all clear. Furthermore, the Commission's current Recommendation requires that the lawyers in an MDP must have the control and authority necessary to assure lawyer independence in the rendering of legal services. Accordingly, the
lawyer involvement in law practice will jeopardize lawyers' independent professional judgment. Lawyers affiliated with non-law businesses who provide legal services to a client will not be able to exercise independent judgment. For example, if an MDP is providing legal and real estate services to the same client, the profit that its real estate division makes from a transaction may affect the legal advice given to the client on whether to enter into the transaction. The problem may be further accentuated if the professional services firm is owned solely or primarily by the non-lawyers and the lawyer is only an employee. Moreover, the opponents of MDPs point to the failure of the accounting profession to observe their already existing independence obligations under SEC rules as a prediction of the future in a professional world dominated by accountant-controlled MDPs.

Weighing of such considerations in an MDP, would, by definition, be the same as in a law firm.


295. See, e.g., Block, Warren & Meierhofer, supra note 25, at 765-67; Carson, supra note 23, at 611-12; Levinson, Independent Law Firms, supra note 24, at 242-43; Matheson & Adams, Reflecting on the ABA Commission's Recommendations, supra note 126, at 1302-04; Morello, supra note 151, at 245; New York State Bar Association Special Committee, Report, supra note 22, at 322-24; Quinn, Preventive Regulation, supra note 187, at 339-40; Terry, MDP Primer, supra note 113, at 891-92; see also David Luban, Asking the Right Questions, 72 Temp. L. Rev. 839, 855 (1999) (noting that incentives in MDP and in-house lawyering will make it more difficult to maintain lawyer independence).


297. As noted by one leading commentator, Daniel Fischel, this independence argument is often made without opponents of MDPs providing any definition of what "independence" means in this context or why it should matter. See Fischel, MDPs, supra note 33, at 954-56.

298. See Fox, Ruminations on MDPs, supra note 288, at 1100-01. The SEC alleged that PricewaterhouseCoopers' partners and staffers had engaged in widespread violations of the SEC independence rules that prohibit investment in audit clients. There were over 8,000 violations, 45% of which were committed by auditing partners. See Elizabeth MacDonald & Michael Schroeder, Report by SEC Says Pricewaterhouse Violated Rules on Conflicts of Interest, Wall St. J., Jan 7, 2000, at A3. PricewaterhouseCoopers responded to these allegations in a somewhat defensive manner, although a firm representative did say that the firm was making "sweeping changes to our processes." See id. (quoting firm representatives). The SEC recommended that 52 corporations replace PricewaterhouseCoopers with another auditing firm. See Elizabeth MacDonald, Accountant Faces Salvo from SEC, Wall St. J., Feb. 28, 2000, at A3. Various commentators predicted that this incident was likely to lead to further developments by the SEC and accounting industry groups in this area. See, e.g., Elizabeth MacDonald, Top Accounting Industry Group Sets Conflict-of-Interest Compliance Rules, Wall St. J., Feb. 2, 2000, at B2. In June of 2000, the SEC proposed new rules regarding when an auditor is regarded as independent for purposes of the SEC rules requiring that public companies' financial statements be audited by an independent auditor. With regard to financial relationships, this proposal would narrow the categories of people within an auditing firm whose investments in or employment relationships with the audited company trigger independence concerns. The proposed rule would focus on investments by those
This argument is without any significant evidentiary basis. As recommended later in this Article, lawyers working in MDPs should be bound by the same ethical rules that apply to other lawyers, including the duty to exercise independent judgment on behalf of clients.299 There is no evidence that lawyers working in MDPs will be any less likely to fulfill their ethical duties than lawyers working in traditional law firms.300 Even under the current ethical rules, many lawyers work in organizations under the command and control of non-lawyers, such as corporations, government entities, trade associations and other not-for-profit organizations. There is no evidence that these lawyers fail to exercise independent judgment to any greater extent than lawyers working in law firms.301 The substantial financial pressures placed on lawyer independence are a serious concern in traditional law firms as well as organizations controlled by non-lawyers. Lawyers in law firms are under strong pressure to obtain and retain clients and to bill hours, and the exercise of independent judgment may sometimes anger the client and jeopardize the law firm lawyer's source of income. Thus, the concern about lawyer independence, although a justifiable concern, is not a concern that should be directed solely at lawyers practicing law in MDPs, and is not a valid basis for prohibiting lawyers from partnering with non-lawyers.302

299. See infra Part IV.D.
300. Organizations made up entirely of lawyer-owners may be more likely to provide an institutional support system and environment to encourage its lawyer-employees to follow the ethical rules of the legal profession than would organizations in which both lawyers and non-lawyers are owners. See Jones & Manning, supra note 214, at 1203-04. Nevertheless, this issue can be addressed without prohibiting lawyers from practicing law in MDPs. See id.
301. See Jones, Focusing the MDP Debate, supra note 79, at 997; Schneyer, Economist as Storyteller, supra note 182, at 1791 ("[T]he legal profession has learned to live with many outside influences that could affect a lawyer's judgment, and it is hard to see why the influence of non-lawyer owners would be different in kind.").
302. As stated by one commentator:

There is no evidence that an ownership interest by nonlawyers in a law firm will lead to unethical practices. Attorneys are required to exercise independent judgment on behalf of clients, and complete fidelity is owed to the client irrespective of how or by whom the attorney is compensated. There is no necessary relationship between attorney independence in serving clients and financial arrangements for the payment of services or the manner in which payments are subsequently divided. . . . The duty of fidelity to individual clients is a valid and important principle, but it can be retained without regard to who shares the profits generated by a law practice.

Huber, supra note 232, at 580 (footnotes omitted). But see Quinn, Preventive Regulation, supra note 187, at 340 ("It is at least plausible that non-lawyer entrepreneurs will be more likely than their lawyer counterparts to exploit consumer
Opponents of multidisciplinary services also argue that non-lawyers, such as accountants, have a different concept of loyalty to clients than lawyers do. These non-legal professions view loyalty as an individual matter and as entirely subjective, whereas the legal profession views loyalty as a firm-wide matter and one to be judged objectively. Thus, these opponents argue that allowing non-lawyer professionals to own interests in an entity that practices law will compromise the legal profession's notions of loyalty.

Similarly, opponents of multidisciplinary services argue that non-lawyers do not have the same incentive to protect confidential information of a client, particularly if that information can be used for many other clients. They argue that if non-lawyers enter the legal services market, they will lobby to change the confidentiality and conflicts-of-interest rules so that they can represent more clients. In the alternative, they will accept clients only if the clients contractually waive their rights to demand confidentiality or loyalty. Thus, the infusion of non-lawyer owned entities who deliver legal services will degrade the high standards of confidentiality and loyalty that are now maintained in the legal profession but are not currently maintained by accounting professionals. Moreover, opponents of MDPs argue that allowing lawyers, (whose communications with clients are covered by the attorney-client evidentiary privilege) to partner with other professionals (whose communications are either not covered by any privilege or covered by a narrower privilege) will confuse clients' understanding of whether their communications with personnel of the MDP are privileged. This effect might lead to disadvantageous waivers of the attorney-client privilege.

303. See, e.g., Fox, Ruminations on MDPs, supra note 288, at 1102-03; see also Bower, Multidisciplinary Practices, supra note 122, at 164; Eleanor W. Myers, Examining Independence and Loyalty, 72 Temp. L. Rev. 857, 859-61 (1999).

304. See, e.g., Fox, Ruminations on MDPs, supra note 288, at 1102-03.


306. See, e.g., Matheson & Adams, Reflecting on the ABA Commission's Recommendations, supra note 126, at 1307-08; see also Bower, Multidisciplinary Practices, supra note 122, at 163-64. This problem is exacerbated by the relatively new tax practitioner-client privilege in 26 U.S.C. § 7525, enacted as part of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3411, 112 Stat. 685. The tax practitioner-client privilege is considerably narrower than the attorney-client privilege and its contours will not be fully defined until courts have had the opportunity to interpret and apply the new privilege. See supra note 144.
As discussed later in this Article, however, the concerns about attorney loyalty and confidentiality can be dealt with through careful regulation of MDPs, including enforcement of existing ethical rules concerning attorney supervisory responsibility for the conduct of non-lawyer employees.\textsuperscript{307} It is therefore not a valid justification for prohibiting lawyers from practicing law in MDPs.

Further, opponents of MDPs argue that as attorneys become actively involved in other business activities, the quality of their legal work declines.\textsuperscript{308} Thus, they argue that the movement toward lawyer participation in MDPs will undermine the core value of competence.\textsuperscript{309}

To the extent that this is a problem, however, it is a problem with existing law firms as well. Lawyers are under pressure to bring in clients, bill hours, and take care of the administrative matters of the practice. There are not enough hours in the day to do all of these things; thus, without additional staffing, work will suffer.

Opponents of MDPs express concern that MDPs will steer law clients to non-lawyer professionals within the MDP for non-legal problems, even if a more qualified non-lawyer professional could be found outside the MDP.\textsuperscript{310} The implication is that the MDP will assign unqualified professionals to do the job in order to keep all of the work (including the legal work) within the MDP. A related concern is that the MDP will attempt to persuade the client to purchase non-legal professional services that are unnecessary.\textsuperscript{311}

MDPs likely would not, however, pursue such a client-losing strategy. If the MDP assigns unqualified professionals to do the work or encourages the client to purchase unnecessary non-legal professional services, the result will be a lower quality, higher cost product for the client.\textsuperscript{312} In the long run, such conduct by the MDP would result in a major loss of client business. In fact, the MDP, like other business firms, has a strong economic interest in carefully monitoring the work of its employees in order to build and preserve its reputation in the marketplace, an important intangible business asset.\textsuperscript{313} Thus, the discipline of the marketplace would be a significant restraining force on such behavior.\textsuperscript{314}

\textsuperscript{307} See infra Part IV.D.1.

\textsuperscript{308} See Block, Warren & Meierhofer, supra note 25, at 767-68; Levinson, Independent Law Firms, supra note 24, at 242; Morello, supra note 151, at 246.

\textsuperscript{309} See Written Remarks of Wolfman, supra note 28.

\textsuperscript{310} See, e.g., Quinn, Preventive Regulation, supra note 187, at 342-44; Morello, supra note 151, at 242; Schneyer, Economist as Storyteller, supra note 182, at 1792 n.78; Schneyer, Perils of Professionalism, supra note 25, at 375-77; Wolfram, Multidisciplinary Partnerships, supra note 156, at 347-48; cf. Fox, Preserving Professional Independence, supra note 126, at 977.

\textsuperscript{311} See, e.g., Quinn, Preventive Regulation, supra note 187, 342-44.

\textsuperscript{312} See Fischel, MDPs, supra note 33, at 960-62, 973.

\textsuperscript{313} See id. Dean Fischel also argues that MDPs, which often are large in size,
Opponents of MDPs further argue that the practice of law is a unique profession and the organized bar should resist efforts to commercialize it. This argument maintains that non-lawyers, unlike lawyers, are driven solely by a profit-maximization objective and therefore will further push the legal profession in the direction of merely being another business activity (instead of a profession).\footnote{See Fischel, \textit{MDPs}, supra note 33, at 957.} A slight variation transforms this "lawyers are a profession" argument into an argument that "lawyers are special." During the ABA House of Delegates debate in August of 1999, Jack Dunbar, a delegate from Mississippi, gave a speech based on the notion that lawyers are special in some way.\footnote{See Unedited Transcript of ABA House of Delegate Proceedings, supra note 287.} The argument reflects the observation that lawyers are not like accountants, MBAs, or investment bankers. Attorneys are officers of the court; they hold in trust the fabric of society. Therefore, this unique role of lawyers in our society is inconsistent with deal-making, because a non-lawyer controlled entity that must respond to the demands of clients is less likely to care about the needs of society.

This argument suffers from several flaws. Most law firms, whether large or small, are run like a business—there is nothing unique about MDPs in this regard.\footnote{See Fischel, \textit{MDPs}, supra note 33, at 957.} There is simply no reason to assume that lawyers in law firms are any less inclined to seek profit-maximization for their legal services than are non-lawyers for their non-law businesses;\footnote{See Andrews, \textit{ supra} note 71, at 601-03; Matheson \& Adams, \textit{ Reflecting on the ABA Commission's Recommendations}, supra note 126, at 1303-04, 1308-11; see also Block, Warren \& Meierhofer, \textit{ supra} note 25, at 754-57; Norman Bowie, \textit{The Law: From a Profession to a Business}, 41 Vand. L. Rev. 741, 745-46 (1988); Levinson, \textit{Independent Law Firms}, supra note 24, at 231-39; L. Harold Levinson, \textit{Making Society's Legal System Accessible to Society: The Lawyer's Role and Its Implications}, 41 Vand. L. Rev. 789, 803-05 (1988).} the fact that law is a profession does not mean that law is

\begin{quote}
"will be more vigilant in monitoring acts that damage [their] reputation" (such as unqualified personnel working on a client matter) than will smaller firms. \textit{Id.} at 973. He further argues that MDPs, because they offer integrated services, "have greater incentive to provide clients with unbiased advice regarding what services they need." \textit{Id.} By contrast, a professional service firm that performs only one type of service has an incentive to promote that service to the client and downplay other types of services, although concerns about the firm's reputation in the marketplace will serve as a counterweight to this incentive. See \textit{id.; see also supra text accompanying notes 207-10.}
\end{quote}
not also a profit-oriented business activity. 319 Furthermore, this argument is based on an arrogant assumption by lawyers that non-lawyers are motivated only by profit maximization and do not care about other values, an assumption that is not correct. 320

Also, it is not clear why lawyers desiring to maximize their profits (whether they work in MDPs or some other type of organization) is a bad thing for their clients or for society in general. 321 Lawyers who are motivated by economic gain are likely to work the hardest and perform the most ably for their clients. 322 The profit motive is also likely to lead firms to innovate with organizational structures so as to serve their clients more effectively. 323 Moreover, this argument by opponents of MDPs presumes that a profit motive inevitably leads to a failure to observe ethical standards, a presumption for which there is scant empirical support. 324

Some of the arguments against MDPs are based on the view that lawyers' increasing involvement in non-law business activities has resulted in financial scandals and related criminal, civil, and disciplinary proceedings, which, in turn, have undercut the reputation of the legal profession. 325 Opponents of MDPs argue that this negative trend in the profession will be accentuated if lawyers can practice with non-lawyers in the same firm. These arguments are strained at best. Most lawyers are law-abiding and ethical, whether they work in law firms or non-law organizations. Some lawyers do fail in their ethical duties, but many of these scandals occur in the context of lawyers practicing in law firms, e.g., defrauding clients through false expense statements or padded legal bills, assisting clients in a fraud or

319. See generally Hany S. Brollesy, Current Developments: The Tension Between Law as a Business and as a Profession, 6 Geo. J. Legal Ethics 1111 (1993); Jones, Focusing the MDP Debate, supra note 79; Russell G. Pearce, The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar, 70 N.Y.U. L. Rev. 1229 (1995); Ellen S. Podgor, Form 8300: The Demise of Law as a Profession, 5 Geo. J. Legal Ethics 485 (1992); Milton C. Regan, Jr., Law Firms, Competition Penalties, and the Values of Professionalism, 13 Geo. J. Legal Ethics 1 (1999). On a number of occasions, the Supreme Court has rejected the notion that the occupation of a practicing lawyer is somehow above the law and different from other occupations. See, e.g., Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (striking down the state bar's restrictions on attorney advertising as a violation of attorneys' First Amendment rights, and rejecting the state bar's argument that the practice of law's status as a profession requires that the Court uphold the constitutionality of the advertising restrictions); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (holding that state bar's minimum-fee schedule constituted price fixing in violation of the antitrust laws and rejecting the state bar's argument that the practice of law's status as a profession exempted it from antitrust scrutiny).

320. See, e.g., Andrews, supra note 71, at 601-03.

321. See id. at 602; Fischel, MDPs, supra note 33, at 957; Matheson & Adams, Reflecting on the ABA Commission's Recommendations, supra note 126, at 1303-04.

322. See Fischel, MDPs, supra note 33, at 957.

323. See id.

324. See Andrews, supra note 71, at 601-03.

325. See Block, Warren & Meierhofer, supra note 25, at 768-69.
crime, or incompetent or neglectful representation. There is simply no causal connection between a lawyer's ethical behavior, or lack thereof, and the type of organization in which the lawyer performs her services.

Opponents of MDPs additionally argue that lawyers' involvement in non-law activities will lead to the profession's loss of self-regulation.\textsuperscript{326} It would be difficult for a state bar to regulate a Big Five accounting firm with 20,000 employees worldwide. The loss of self-regulation might consequently lead to detrimental changes in the bar's efforts to provide pro bono services to persons of limited means, to improve the legal system, and to protect the public interest.

These pressures on the state-by-state system for regulating lawyers existed before the multidisciplinary practice movement arose. The increased globalization of law and business and the change in the structure of many law firms into large, multi-jurisdictional organizations have already placed great stress on the state-by-state system for regulating lawyers. Given the increasingly international focus of the business world, the current state-by-state system for regulating lawyers is in need of a major overhaul.\textsuperscript{327} Thus, this argument about the stresses placed on the current self-regulation system for lawyers is not so much an argument against MDPs as it is an argument that the time for re-evaluating and restructuring the system for regulating lawyers in the United States is long overdue.\textsuperscript{328}

Opponents of MDPs also contend that relaxing current restrictions will lead to a proliferation in the unauthorized practice of law, and will place lawyers who work in MDPs at risk of violating ethical rules by assisting non-lawyers engaged in such conduct.\textsuperscript{329} As one example of this, the opponents point to the fact that clients of MDPs may ask non-lawyer partners of the MDP for advice that constitutes legal advice, perhaps without either party realizing that legal advice was

\textsuperscript{326} See id. at 773-77. This argument assumes, of course, that because the practice of law is a profession, it is entitled to special treatment in our society, including self-regulation.

\textsuperscript{327} See Daly, Choosing Wisely, supra note 60, at 286-87.

\textsuperscript{328} An interesting problem arises when a foreign law firm with multidisciplinary ties abroad acquires a U.S. law firm, such as the entry of Clifford Chance into the United States by acquiring the New York law firm of Rogers & Wells. First, some of the profits of the firm end up back in the foreign office of the law firm and may end up shared in some way with non-lawyers. Second, regulation of such a relationship is problematic. It will be difficult for a state bar to gain access to the factual information concerning how the firm's professionals, both in the United States and outside the United States, offer legal and non-legal services, particularly to clients outside the United States. Finally, can the current state bar system of regulation effectively prohibit this firm from offering integrated services by using foreign professionals abroad?

\textsuperscript{329} See, e.g., Carson, supra note 23, at 615-17; Matheson & Adams, Reflecting on the ABA Commission's Recommendations, supra note 126, at 1311-12; Morello, supra note 151, at 230.
involved. This concern, however, can be remedied without prohibiting lawyers from practicing in MDPs. Lawyers in MDPs will be subject to all of the ethical rules, including the duty to supervise non-lawyer assistants and the duty not to assist non-lawyers in the practice of law, and can be disciplined for violating those rules. Moreover, under the proposal presented in this Article, only lawyers in an MDP would be permitted to practice law; non-lawyers who do so would be subject to the normal unauthorized-practice-of-law proscriptions and penalties. Thus, allowing lawyers to practice law in MDPs should not result in any change in the enforcement of the unauthorized-practice restrictions against non-lawyers.

Finally, opponents of MDPs express concern that lawyers working in MDPs will be less willing to provide pro bono services and engage in law reform activities than are lawyers working in traditional law firms. Thus, they argue that allowing lawyers to practice law in an MDP will lead to a decline in support for the pro bono ideal. There is, however, no sound basis for this argument. First, if the organized bar should decide to impose pro bono obligations on attorneys in the future, those obligations could and should be imposed on all members of the bar, regardless of the type of organization in which they work. Second, because pro bono activities can actually be lucrative for firms, profit-maximizing MDPs are likely to continue to support pro bono activities, if for no other reason than that support is in their economic interest. Third, there is no reason to think that lawyers who work in MDPs will be any less likely than lawyers who work in law firms to do pro bono work. The desire to give something back to society and to help someone less fortunate should be no less prevalent in a lawyer who works for an MDP than one who works for a law firm. Moreover, much as a lawyer who works for a law firm, the lawyer who works for an MDP will also want to obtain the benefits of an interesting work experience derived from a pro bono project.

330. See Morello, supra note 151, at 230.
331. Cf. Quinn, Preventive Regulation, supra note 187, at 337 (noting that costs imposed by existing rules exceed the consumer protection benefits they provide).
332. See infra Conclusion.
333. See Fox, Ruminations on MDPs, supra note 288, at 1112-13; see also Daly, Choosing Wisely, supra note 60, at 279. Because under current ethical rules there is no requirement of mandatory pro bono service by members of the bar, this ideal is not a core value of the legal profession of the same magnitude as the core values of independence, confidentiality, and loyalty. See Daly, Choosing Wisely, supra note 60, at 279.
D. The ABA House of Delegates

The vigorous debate at the August 1999 ABA meeting led the Commission on Multidisciplinary Practice to withdraw its proposal and to support further study. The ABA House of Delegates adopted a resolution proposed initially by the Florida delegates. Although the Florida Bar's resolution was read by some as a deferral of the issue for more study, it seemed to be a strong rejection of the concept of MDPs:

Resolved, that the American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients.\textsuperscript{335}

The ABA President gave the Commission on Multidisciplinary Practice one additional year to study the issue and to report back to the House of Delegates.

The Commission on Multidisciplinary Practice was very busy after the August 1999 meeting of the ABA House of Delegates. Its members traveled around the country explaining its positions and receiving additional public comment. In December of 1999, the Commission issued a report entitled \textit{Updated Background and Informational Report and Request for Comments}.\textsuperscript{336} This report updated developments concerning MDPs in the United States and around the world. It then responded to some of the criticisms that had been leveled against its proposal and requested additional commentary. It also examined the arguments for and against the various models that the Commission had presented in its earlier report.

At the ABA Meeting in February of 2000, the House of Delegates adopted a resolution of the Ohio State Bar encouraging state and local bars to investigate and prosecute unauthorized-practice-of-law claims.\textsuperscript{337} In March of 2000, the Commission issued recommendations

\textsuperscript{335} See ABA Commission, \textit{Updated Background Paper, supra} note 293.

\textsuperscript{336} See id.

\textsuperscript{337} Stratton, \textit{Unauthorized Practice Saber, supra} note 9, at 1057 ("Nonetheless, the perception of most state and local bars looking at the MDP issue is that current professional rules need to be enforced rather than relaxed, Cheryl Niro [president of the Illinois State Bar Association] said at the MDP Commission meeting."). The resolution also required the ABA to set up a national reporting mechanism for MDPs for the state bars to access. For commentary arguing that the ABA Commission on Multidisciplinary Practice should develop two definitions of the "practice of law," one for lawyers and one for non-lawyers, and that the bar should concentrate its initial efforts in this area on regulating lawyers who practice in non-law firm organizations, see Linda Galler, "Practice of Law" in the New Millennium: New Roles, New Rules, But No Definitions, 72 Temp. L. Rev. 1001 (1999).
to the House of Delegates,\textsuperscript{338} scaling back its 1999 recommendations to the following:

1. Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services. "Nonlawyer professionals" means members of recognized professions or other disciplines that are governed by ethical standards.

2. This Recommendation must be implemented in a manner that protects the public and preserves the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and \textit{pro bono publico} obligations.

3. To protect the public interest, regulatory authorities should enforce existing rules and adopt such additional enforcement procedures as are needed to implement the principles identified in this Recommendation.

4. This Recommendation does not alter the prohibition on nonlawyers delivering legal services and the obligations of all lawyers to observe the rules of professional conduct. Nor does it authorize passive investment in a Multidisciplinary Practice.\textsuperscript{339}

The ABA Commission presented this recommendation to the House of Delegates in July of 2000, and the House of Delegates rejected it. However, several state and local bars offered a counter-proposal that was based in significant part on the report issued by the New York State Bar Association.\textsuperscript{340} The proposal boldly stated that sharing legal fees with non-lawyers and allowing non-lawyers to become partners in law firms was incompatible with the professional obligations of the legal profession.\textsuperscript{341} Thus, the proposal called for a

\textsuperscript{339} Id.
\textsuperscript{340} See New York State Bar Association Special Committee, \textit{Report}, \textit{supra} note 22. This proposal was sponsored by the Florida Bar, the state bar associations of Illinois, Ohio, New Jersey, and New York, and the bar associations of Cuyahoga County, Ohio, and Erie County, Pennsylvania. \textit{See Recommendation 10F, Presented to the ABA House of Delegates} (July 2000) [hereinafter \textit{Recommendation 10F}] (available at \textlangle}http://www.abanet.org/cpr/mdprecom10F.html\textrangle). Some delegates attributed the momentum in favor of this proposal to the persuasive nature of the New York State Bar Association's report and the strong reputation of the chair of the Committee that authored the report, Robert MacCrate, the influential New York City attorney. \textit{See Wendy Davis, ABA Emphatically Rejects MDPs}, Nat'l L.J., July 24, 2000, at A5.
\textsuperscript{341} \textit{See Recommendation 10F, supra} note 340.
complete rejection of MDPs in the American legal profession and a disbanding of the ABA Commission on Multidisciplinary Practice.\footnote{342}{See id. Recommendation 10F reads in part: FURTHER RESOLVED that the American Bar Association recommends that in jurisdictions that permit lawyers and law firms to own and operate nonlegal businesses, no nonlawyer or nonlegal entity involved in the provision of such services should own or control the practice of law by a lawyer or law firm or otherwise be permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person. Id. The Recommendation further resolves that “the Commission on Multidisciplinary Practice be discharged with the Association's gratitude for the Commission's hard work and with commendation for its substantial contributions to the profession.” Id. 343. The Colorado Bar's proposal reads: RESOLVED, that the American Bar Association take no actions that in any way discourage further discussion of Multi-Disciplinary Practice (“MDP”) until a more substantial number of state and local bar associations and ABA entities currently studying MDP have had an opportunity to consider those reports. FURTHER RESOLVED, that the subject of MDP be included within the jurisdiction of the ABA Committee on Research into the Future of the Legal Profession. Recommendation 10J, Presented to the ABA House of Delegates (July 2000) (available at <http://www.abanet.org/cpr/mdprecommendation7-00.html>).} The Colorado bar offered a compromise proposal to refer the matter for further study.\footnote{343}{344. See Davis, supra note 340; James P. Schaller, Opting Out of the Debate on MDPs, Legal Times, Aug. 7, 2000, at 23; Stratton & Sheppard, supra note 21; see also Geanne Rosenberg, Accounting Legal Affiliates Criticize ABA's Proposal to Restrict MDPs, Nat'l L.J., July 31, 2000, at B6.} Despite the pleas by the incoming President of the ABA for adoption of the Colorado compromise proposal, the ABA House of Delegates, with barely one hour of debate, adopted the proposal to completely reject accommodation of MDPs by the ABA and disband the ABA Commission on Multidisciplinary Practice.\footnote{344} These actions illustrate politics as usual in the ABA House of Delegates. How could otherwise intelligent lawyers in the ABA believe that they could make this problem go away by simply voting the matter out of its realm of study? Will the entities that are currently offering multidisciplinary services in this country somehow disappear from the scene? Will accounting firms discharge the attorneys that they have hired over the years, which include some of the best tax attorneys in the country? Will the accounting firms refuse to refer their American clients to their lawyers abroad when those American clients seek to do business abroad? Will foreign law firms stop acquiring U.S. law firms? Will the lobbying, investment banking, and international consulting firms stop performing integrated services that include a component bordering on the practice of law in disregard of the unauthorized-practice-of-law proscriptions? The answer to all of these questions is, of course not. Moreover, it is highly unlikely
that the state bars will begin unauthorized-practice-of-law actions against the Big Five accounting firms, investment banking houses, lobbying firms, or international consulting firms. If they did so, the likely result would be the evisceration of the unauthorized-practice-of-law rules by court decision or legislative enactment.

Thus, the ABA has implicitly sanctioned civil disobedience by these professional service providers and others who seek to provide multidisciplinary services to clients who want such services. This action by the ABA will benefit large multinational corporations who will continue to receive multidisciplinary services, and disadvantage low- and middle-income clients who will be unable to readily gain access to such services. Such a two-track system, which perpetuates the status quo, is the clear result of the action of the House of Delegates. It is difficult to see how the intelligent lawyers who advanced this result could think that they had won a great victory for the legal profession. By this vote, the ABA has abdicated its role of leadership on the ethical issues relating to MDPs and effectively "voted itself into irrelevance." 345

Given the actions of the ABA House of Delegates, the ABA is not likely to modify the Model Rules to accommodate MDPs or to recommend state accommodation of such practices in the immediate future. Thus, the question becomes how change can be implemented in the American legal profession with respect to this issue. There are many potential avenues for change.

It is important to realize that the ABA is a voluntary group of lawyers, and that the ABA has designated itself as the official body that promulgates rules of ethics for the legal profession. 346 Those rules do not carry with them the force of law. The ABA depends upon state bars to adopt the ABA Models as their local codes of ethics. Many years ago, the ABA had great influence with the states. For example, the ABA Canons and the ABA Model Code were replicated by many states without significant changes. 347 Since 1983, however, the ABA's Model Rules have not been treated so deferentially. Most states have modified the Model Rules to reflect state practices and prior law. 348 California and New York continue to promulgate their own unique sets of ethics codes. 349 Thus, the ABA is not as influential as it once was and is unlikely to regain that influence in the future. In

345. Stratton & Sheppard, supra note 21.
346. See Wolfram, Legal Ethics, supra note 7, at 34-35.
347. See id. at 55-58.
fact, the Commission of Chief Justices of the State Courts has appointed a committee to formulate recommendations concerning MDPs. The forum is likely to have more significant influence on the way in which state bars approach the multidisciplinary practice issue.

Many state and local bar associations have begun their own studies of the issues concerning multidisciplinary practice. The multidisciplinary practice concept is likely to be embraced by a few progressive states that wish to experiment with integrated services. Public sentiment is in favor of MDPs, and the demand for such services seems to be growing. Once one or two states adopt rules favorable to formation of or experimentation with MDPs, it is likely that others will soon follow suit. Although it is too early to tell which states will become the first to actually promulgate bar rules favorable to MDPs, at the present time, a number of state bars have issued promising recommendations. Two city bar associations have also published reports in favor of adopting rules accommodating MDPs.

Some proponents of MDPs have suggested that Congress pass a national system for implementing and regulating MDPs. Although

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351. In many states, the highest court in the state directly controls the state bar and the adoption of ethics rules. In other states, the highest court has significant influence on the regulation of lawyers within the state. See generally Wolfram, supra note 7, at § 2.2 (discussing the role of the highest court in a state in regulating lawyers admitted in the state).

352. See Links to Bar Association MDP Committees and Reports (visited July 22, 2000) <http://www.abanet.org/cpr/mdplinks.html> (links to the various state and foreign web sites devoted to multidisciplinary practice).

353. Individual states may embrace MDPs for many different reasons. For example, a state with significant foreign trade may wish to foster greater trade with the world and thus encourage integrated services for their business base. Alternatively, a state may wish to foster the development of multidisciplinary services for low- and middle-income individuals. The family mediation clinic or the gerontological counseling center may solve needs of the general public. Alternatively, a state might simply prefer to regulate the development of MDPs rather than see them proliferate without any regulatory input from the state. States that decide instead to continue using the present set of rules may attempt to undertake more stringent enforcement of the unauthorized-practice-of-law rules. The Federal Trade Commission or Department of Justice Antitrust Division, however, could view such enforcement as anti-competitive behavior by the bar that violates the antitrust laws.

354. For a comprehensive summary of developments at the state level, see Mona L. Hymel, Multidisciplinary Practice: The States Weigh In, 88 Tax Notes 261 (2000).


356. Such a proposal was presented to the ABA Commission on Multidisciplinary Practice by Jim Holden, a partner at the Washington, D.C., law firm of Steptoe and
such a plan poses many challenges for implementation, it is not out of the realm of possibility that Congress may become involved in the legal profession's turf war with non-lawyers.\textsuperscript{357} Ultimately, any attempts by state bars to prevent lawyers from working in MDPs may provoke a serious movement for a national bar in this country.\textsuperscript{358} Thus, the consideration of MDPs assumes significance in the broader debate over federalizing the licensure of lawyers. Moreover, international developments under world trade agreements, such as the General Agreement on Trade in Services, and regional trade agreements such as the European Union, may play a significant role in shaping the legal landscape applicable to MDPs.\textsuperscript{359}

Johnson, and advocated by several other commentators. See James P. Holden, Written Remarks to the ABA Commission on Multidisciplinary Practice (Nov. 12, 1999) (available at <http://abanet.org/cpr/holden.html>). A federal solution to the regulation of MDPs is probably not feasible at the present time. The process for enacting federal legislation and creating new regulatory structures is fraught with political difficulty and any federal solution to the issue of MDPs would probably take years, if not decades, to devise. One can imagine the intense lobbying that would accompany such a congressional legislative effort. Nevertheless, a strong argument can be made that a federal system for regulating MDPs is the more efficient approach given that many of such entities will operate across state and possibly international borders. Of course, the major concern about a federal approach is whether it would be effective in enforcing rules that overlay a state-by-state system of regulating lawyers. At a minimum, some form of decentralized enforcement would probably be necessary to implement any federal structure for regulating MDPs. See also Daly, \textit{Choosing Wisely}, supra note 60, at 286-87 (suggesting that a new system of regulation of lawyers needs to be designed in light of the increasingly national nature of law practice).

\textsuperscript{357} One does not need to look beyond the federal systems in taxation, employee benefits, patent protection, and securities practice to see that Congress views certain areas of practice to be important enough for federal control and regulation. If one were to view MDPs as integral to the national and international economies, one could see congressional interest in preventing undue state burdens on such interstate and international commerce. Even if Congress did not show an interest in federalizing this area of law, the current administration of the Justice Department's Antitrust Division and the Federal Trade Commission has shown an interest in encouraging competition in the legal services market. Moreover, the American Antitrust Institute has opined that if the ABA and the states constrain competition in the professional services markets through their multidisciplinary practice rules, such action may be a violation of the antitrust laws. See American Antitrust Institute, \textit{Comments Regarding Recommendations of the ABA Commission on Multidisciplinary Practice} (July 23, 1999) (available at <http://www.abanet.org/cpr/aai2.html>); see generally American Antitrust Institute, \textit{Converging Professional Services: Lawyers Against the Multidisciplinary Tide} (Feb. 9, 2000) (available at <http://www.antitrustinstitute.org/books/multidisc.cfm>).

\textsuperscript{358} \textit{See generally} Wolfram, Legal Ethics, supra note 7, at ch. 2 (discussing the regulation of the legal profession); Chesterfield Smith, \textit{Time for a National Practice of Law Act}, 64 A.B.A. J. 557 (1978) (arguing for adoption of a national practice of law act by states under which all states would give full reciprocal recognition to lawyers admitted in other states).

\textsuperscript{359} In the European Union ("EU"), the trade agreement expressly covers trade in professional services. Thus, the EU is developing rules for how each member state can control the practice of law within its borders. Although the accommodation of free trade in services is more complicated than free trade in goods, it is likely that
IV. INTEGRATING MDPs INTO THE MODERN LEGAL PROFESSION

A. Overview

As discussed in Part III of this Article, the ABA Commission on Multidisciplinary Practice devoted significant effort to studying the delivery of legal services by non-law entities in the United States and throughout the world. The Commission gathered significant evidence about the consequences of allowing lawyers to partner with non-lawyers, and it proposed a system for allowing MDPs to develop in the United States. Unfortunately, the debate in the ABA House of Delegates devolved into a general attack on the concept of MDPs. What was lacking in the ABA House of Delegates' consideration of the multidisciplinary practice issue was a thoughtful analysis of how the legal profession could accommodate the integration of legal and non-legal services but still preserve its core values. Professor Robert Gordon aptly characterizes the bar's position:

Historically, the sad if hardly surprising fact has been that the organized bar's resistance to new modes of practice, though often clothed in the high-minded rhetoric of protecting the ethical standards and independent judgment of the legal profession, has been to a considerable extent motivated by far less elevated desires to protect the incomes of lawyers from economic competition or their status from erosion by groups perceived as interlopers. Given this history of protectionist and factional motives, it is reasonable—without for a moment questioning the sincerity and good faith of the critics of multi-disciplinary practice—to treat resistance to organizational innovation with some skepticism and to ask whether support for such resistance is more likely to stem from concern for the incomes rather than the independence of lawyers.

Despite the enlightened views of many members of the ABA, the House of Delegates chose a path of self-protection and disregard of client demand and the public interest.

360. See Rocco Cammarere, ABA Panel's MDP Plan Hit as Sellout, N.J. Law., June 14, 1999, at 1 (“The issue of MDPs focuses as much on a turf war—lawyers protecting their profession and income—as it does on the disputed cost-saving benefits to clients and the conflicting ethical guidelines between lawyers and other professionals.”).

361. It is clear that the ABA Commission on Multidisciplinary Practice had to tailor its various recommendations and findings to the political climate in the ABA House of Delegates. Ultimately, its recommendations were significantly watered down versions of the findings and thoughts in the substantive documents.

For the reasons discussed in Part II of this Article, a multidisciplinary approach to problem solving is desirable and necessary for many client problems. A significant and growing demand for multidisciplinary services exists in a diverse spectrum of clients, from multinational corporations to small businesses and individuals. Given that the ABA has chosen to remove itself from the development of reasonable ethical rules concerning MDPs, the issue then is how the state bars can accommodate multidisciplinary practice while protecting clients and the core values of the legal profession. Stated differently, the important questions are what forms of practice structure involving multidisciplinary services should be permitted, and what rules should govern the practice of law in these organizations. This part provides a methodical examination of the different ways in which the organized bar could accommodate joint work between lawyers and non-lawyers in delivering multidisciplinary services to clients.

B. Examination of the Different Models for Delivering Integrated Services

The debate concerning MDPs has produced six distinct models for delivering integrated services: (1) the "cooperation" or "status quo" model, (2) the "ancillary business services" model, (3) the "command and control" model, (4) the "contract" model, (5) the "joint venture" model, and (6) the "fully integrated MDP" model. This part describes these models in detail and examines their benefits and detriments.

1. The "Cooperation" or "Status Quo" Model

The "cooperation" or "status quo" model allows law firms to offer multidisciplinary services by cooperating with non-lawyer professionals and entities through an independent contractor or an employee arrangement. Thus, under this model, a law firm has two basic choices: non-lawyers as employees or non-lawyers as independent contractors.

To illustrate the current system, assume that a client in the United States sought advice concerning which method of distributing products is most desirable for entering the European Union marketplace. A full evaluation of this problem would require knowledge of international transactional law, the law of cross-border trading, the domestic and European Union rules regarding protection of intellectual property rights, the business climate in the European Union, and so forth. The "cooperation" or "status quo" model allows the law firm to engage independent contractors who possess the necessary expertise without violating the current ethical rules.

363. See supra Part II.

364. This model is Model 1 in the ABA Commission's Hypotheticals and Models. See ABA Commission, Hypotheticals and Models, supra note 267. This model assumes that the current rules against fee-sharing and joint ownership remain in place.
Union, and the estimated expenses and revenue of the venture. The client could approach a U.S. law firm and ask it to consider only the legal implications of an international business venture, and then could enlist a professional consulting firm to perform the business and financial modeling aspects. As an alternative, the corporation could satisfy the need for one or both of these services with in-house professionals.  

If, however, the client wanted a full-service team approach from one or more outside professional service providers, current law would permit the following arrangements.

The law firm could hire, as employees, a management consultant and an accountant who specialized in the European Union business climate. The non-legal services would be bundled with the legal services, and the non-lawyers could participate in the firm’s profits. The non-lawyers could not, however, be owners of the law firm or share directly in the legal fees. If the law firm chooses to hire the non-lawyers as employees, it could advertise the full-service nature of its international consulting practice. Thus, if a law firm had or anticipated having a sufficient client base to offer integrated services, it could do so through non-lawyer employees.

In theory, the ban on ownership by non-lawyer employees in law firms should not completely deter law firms from offering integrated services. Therefore, it is counterintuitive that law firms do not hire non-lawyers in order to meet the client need for integrated services. The explanation is based partly on economics, partly on the scope of lawyers’ knowledge, and partly on the current rules of professional conduct. If a lawyer hires a non-lawyer to perform a non-legal service, under the current rules the lawyer is required to supervise the work of the non-lawyer even though it does not involve legal services. That supervision extends to the lawyer-supervisor requiring that the non-lawyer follow the rules of the legal profession in performing this non-legal work. The lawyer-supervisor must also ensure that the non-lawyer’s work is conducted with a minimum level of competence even though the lawyer-supervisor has no expertise in the non-legal area of work. The requirement that the non-lawyer follow the legal profession’s rules in performing non-legal services might degrade

365. Of course, corporations can develop integrated services in-house and allow lawyers and non-lawyers to cooperate and join together in servicing the corporation’s needs. Cf. Charles W. Wolfram, In-House MDPs?, Nat’l L.J., Mar. 6, 2000, at B6. Many corporations have been using non-lawyers, such as MBAs, economists and computer modeling experts to inform their legal and business decision making.

366. See Model Rules Rule 5.4(a).

367. See id. Rule 5.4(a)(3). In theory, law firms may not directly share legal fees with non-lawyer employees; in practice, however, “profit sharing” means gross profits minus expenses equals net profits, which may be shared with the non-lawyer employees. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1440 (1979) (interpreting profits to mean sharing in net profits rather than in particular legal fees received by a law firm).
work-quality or needlessly increase the cost of providing services. Lawyers usually are not trained in other, non-law disciplines, and thus would need to hire managers who could monitor the non-lawyer's performance.

In the illustration, it would be difficult for the law firm to hire just one expert on the European Union in order to claim an expertise in that area of the world. The law firm would need to hire several professionals before being able to legitimately claim expertise. This would require the law firm to incur a significant expenditure to offer a full complement of multidisciplinary services to clients. A law firm would need to attract sufficient demand to justify the expenditure. Also, it is unclear whether the non-lawyer could offer non-legal services apart from the law firm and advertise those services to obtain those clients.\footnote{368} Thus, under the current ethical rules, most or all of the non-lawyer employee's work would have to be performed for clients of the law firm.

There is one other aspect of the current rules that may influence the desire of non-lawyer professionals to become employees of a law firm. Although these employees can share in the profits of the firm, they cannot be partners of the lawyers in the firm. Many non-lawyers may find such an arrangement demeaning or "without merit."\footnote{369} This opinion may be a significant reason why some non-lawyers will not wish to cooperate in offering integrated services to clients in a law firm setting.

Alternatively, a law firm could instead hire non-lawyers as independent contractors to serve the law firm's client base. The non-lawyer independent contractors could not share legal fees with the law firm, and they would need to charge clients under the normal rate structure permitted in their professions.\footnote{370} Under the current system, a lawyer cannot ask an independent contractor to defer all payment unless and until the transaction is completed. This would be tantamount to sharing legal fees with a non-lawyer. Thus, the lawyer could enter into a contingent fee arrangement with the client and pay the independent contractor regardless of the outcome, or the client itself could agree to do so.

The independent contractor relationship suffers from the weakness that it somewhat impedes the ability of lawyers and non-lawyers to develop synergies that result from years of cooperation. In order to

\footnote{368. It is also unclear whether the non-lawyer employees of a law firm may offer non-legal services to the general public. One could view the non-lawyer employee's work for the general public as inconsistent with the general purpose of the law firm to practice law. Also, even if the non-lawyer employees could offer services to the general public, the lawyers would need to supervise the work and most likely the rules of the legal profession would apply to all aspects of the non-law matters.}
\footnote{369. \textit{Cf.} Hazard, \textit{Foreword, supra} note 96, at 1088 (referring to the difficulty of attracting top talent when they must be "second class citizens").}
\footnote{370. \textit{See} Model Rules Rule 5.4(a); Model Code DR 3-102(A).}
create such synergies, the lawyers and non-lawyers would need a client base that justified constant cooperation. This would require advertising the arrangement, which would be somewhat questionable under current advertising rules. The law firm could list the possible availability of non-legal services through independent contractors, but the advertisements would need to disclose properly the extent and nature of such relationships. Before a lawyer could involve a non-lawyer, client consent would be necessary because the non-lawyer independent contractor is an outside entity for the purposes of confidentiality and conflict-of-interest principles. The advertisements for the law firm and independent contractor services may also raise questions about whether the arrangement involves the sharing of legal fees or an impermissible referral arrangement between a law firm and a non-lawyer. Although the threat of disciplinary action may be slight, the arrangement may pose too much risk for a lawyer or non-law professional to undertake.  

To the extent that law firms have offered integrated services under the current ethical rules, they have done so primarily with large clients in the business consulting area. Such integrated services have not proliferated in professional practices concentrated on the delivery of services to low- and middle-income clients. Under the status quo, it is difficult for a law firm to offer integrated services to middle- and low-income persons. The detrimental effect of the status quo on low- and middle-income clients is significant. Many categories of clients, including the elderly, would benefit from MDPs. Family mediation clinics cannot have lawyer and non-lawyer partners, thus a lawyer typically must provide legal services to clients on an independent contractor, case-by-case basis. The employee and independent contractor models have produced few elder law clinics or family mediation centers, entities which provide legal services to low- and

371. The threat of sanction against a lawyer for sharing a legal fee with a non-lawyer is greater than the threat of sanction against a non-lawyer entity, such as an investment banking firm, that offers services bordering on the practice of law.

372. The ABA Commission on Multidisciplinary Practice held hearings on October 9, 1999, during a meeting of the ABA Section on General, Solo and Small Firm Practice. During that meeting, the debate centered on how MDPs could help the practices of small law firms. See Sheryl Stratton, Lawyers Debate Divisive MDP Issue, Tax Notes Today, Doc. 1999-33135 (Oct. 13, 1999). The participants examined the following types of arrangements: (1) a lawyer, an accountant, and an insurance agent offering financial planning, including retirement and estate practice work; and (2) a lawyer, a clinical psychologist, and a child development specialist focusing on serving the needs of disabled children and their parents or guardians. See id.

373. See Letter from Wayne Moore, Director, Legal Advocacy Group, to the Center for Professional Responsibility, American Bar Association (July 27, 1999) (available at <http://www.abanet.org/cpr/aarp.html>) (arguing that the formation of MDPs would be more convenient and cost effective for the elderly); Theodore Debro, Statement Before the ABA Commission on Multidisciplinary Practice (Feb. 12, 2000) (available at <http://www.abanet.org/cpr/debro2html>) (arguing that low- and middle-income clients are the income groups that need the services of MDPs the most).
middle-income clients. Legal services are only a small part of the array of professional services that low- and middle-income clients may typically need. Thus, under the status quo, it is not in the economic interest of lawyers to offer integrated services of which the largest component is non-legal services. This would potentially expose the lawyer to significant liability, and would not be in the interest of non-lawyer employee professionals. Accordingly, under current law, the most likely structure for cooperation would be the "independent contractor" model. Lawyers, however, are hesitant to cooperate with other professionals in providing services to low- and middle-income clients. These clients are more likely to complain to authorities than are large corporate clients, and state regulatory structures are more likely to provide them protection. These realities render the "independent contractor" model an unlikely solution to the multidisciplinary practice dilemma.

An analysis of the status quo must consider not just the ethical rules of the legal profession, but what is actually taking place in practice. As discussed in Part II, many non-law professional service entities have begun to offer legal services as part of their non-legal services. The state bars have largely chosen not to enforce the unauthorized-practice-of-law rules in this context, and, thus, corporate clients have at least some avenue for obtaining integrated professional services. Investment banking, management consulting, public relations, and lobbying firms are increasingly meeting client demands for multidisciplinary services in the corporate business area. This reality threatens the integrity of the entire system of unauthorized-practice-of-law rules and regulation of lawyers. It also places law firms at a significant competitive disadvantage in the market for integrated professional services because these non-law entities are not bound by the restrictions imposed upon attorneys.

2. The "Ancillary Business Services" Model

The "ancillary business services" model is based on Model Rule 5.7 of current law. It involves lawyers and non-lawyers owning ancillary

374. Cf. Roger C. Cramton, Delivery of Legal Services to Ordinary Americans, 44 Case W. Res. L. Rev. 531, 564-78 (1994) (Model Rule 5.4 contributes to the lack of competition in the delivery of legal services).
375. See supra Part I.A.3.
376. See id.
377. This concern has led leaders in some state bar associations to demand greater enforcement of the unauthorized-practice-of-law rules. See supra text accompanying note 337.
378. This model is Model 3 in the ABA Commission's Hypotheticals and Models. See ABA Commission, Hypotheticals and Models, supra note 267.
379. The ABA Commission on Multidisciplinary Practice presented two hypotheticals involving the ancillary business model: Hypothetical 3.1 and Hypothetical 3.2. See id.
businesses together and the law firm sending clients to these businesses for non-legal services. As discussed above, Model Rule 5.7 has a troubled past largely due to various customary practices that currently exist in the states with respect to title companies and other businesses owned by lawyers. Although this model for multidisciplinary practice has some initial appeal, it also has many problems that make it ineffective as a means for fostering the development of MDPs.

Model Rule 5.7 is not designed to regulate the delivery of multidisciplinary services; instead, it is a rule addressing lawyer investment in a law-related ancillary business such as a title company, document production service, or real estate brokerage company. If the client receives services that are not distinguishable from legal services, the lawyers must ensure that both the law firm and the non-law ancillary business firm comply with the Model Rules. By contrast, if the lawyers make it clear that the law-related services are not legal in nature, but are separate and distinct from traditional legal services, then the ancillary business need not comply with the Model Rules.

Under Model Rule 5.7, lawyers must be in total control of the delivery of legal services; a lawyer and a non-lawyer can, however, co-own an ancillary business (that is not engaged in delivering legal services) available to clients. For example, a lawyer and a non-lawyer could co-own a copying service. Clients of the law firm could be encouraged to use the copy service business, but legal fees could not be shared with the non-lawyer and the copy service business could not deliver legal services to the client. These prohibitions most likely mean that integrated professional services could not be characterized as an ancillary business unless controlled by the lawyers, with non-lawyers working as employees. The practical outcome is thus similar to that of the "status quo" model under Model Rule 5.4.

380. See supra text accompanying notes 83-95.
381. See generally Munneke, Dances With Nonlawyers, supra note 231; Schneyer, Perils of Professionalism, supra note 25.
382. See ABA Commission, Hypotheticals and Models, supra note 267. Questions of imputation between the law firm and the ancillary business arise under the "ancillary business" model. If the law firm and the ancillary business provide integrated services, which by definition carry the protection of the ethics rules, all joint work for clients should be imputed back to the firm and would require compliance with the conflict-of-interest rules. Even if the law firm invokes the aspect of Model Rule 5.7 that removes the protection of the rules from the non-legal service, to the extent that there is overlap with the legal work, the client would receive protection from the ethics rules. Also, because the law firm is providing both legal and non-legal services to the same client in the same matter, a conflict of interest exists under Model Rule 1.7(b). The law firm must examine this conflict and its effect and resolve it. If the non-law entity performed solely non-legal work for a client, however, then the non-law representation should not be imputed to the law firm and its clients.
In other words, under Model Rule 5.7, a law firm could form a European Union business-consulting subsidiary. If that subsidiary were to provide fully integrated services to law clients, however, it is difficult to see how that entity could have non-lawyer owners without violating Model Rule 5.4. Otherwise, lawyers today could form ancillary businesses in most non-law specialties and then compensate the non-lawyers by making them partners, thus avoiding the ownership and fee-sharing rules of the profession. Given that Model Rule 5.7 requires that lawyers must own and control entities delivering integrated services, it offers little advantage over the "status quo" model. Therefore, Model Rule 5.7, in its present form, is not the appropriate framework for regulating the delivery of multidisciplinary services by the American legal profession.

3. The "Command and Control" Model

The "command and control" model is based on the District of Columbia's Rules of Professional Conduct Rule 5.4 (D.C. Rule 5.4), which allows law firms to make non-lawyers partners and managers in law firms. The District of Columbia is the only jurisdiction in the United States that permits fee-sharing and partnerships between lawyers and non-lawyers. Under D.C. Rule 5.4, the sole purpose of any partnership between a lawyer and a non-lawyer must be to provide legal services to clients. All non-lawyers in the partnership must abide by the D.C. Rules of Professional Conduct, and the lawyers in the partnership are responsible for ensuring that the non-lawyers do so. Fee-sharing between lawyers and non-lawyers is allowed only through such partnerships and not with non-lawyers outside the law firm. Only a few firms have taken advantage of this rule, in part because the ABA has opined that no firm with offices outside the District of Columbia may use the non-lawyer partner option.

D.C. Rule 5.4 is not designed to foster integrated services and thus it is not an appropriate model for regulating the development of MDPs. The rule limits the services that a law firm may provide: a firm must solely offer legal services, and all non-lawyers must follow

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383. This model is Model 2 in the ABA Commission's Hypotheticals and Models. See ABA Commission, Hypotheticals and Models, supra note 267.
384. See D.C. Rules Rule 5.4.
386. See D.C. Rules Rule 5.4(b).
387. See id. Rule 5.4(b)(2).
388. See id. Rule 5.4(a)(4).
the rules of professional conduct. 390 These requirements essentially preclude the use of the D.C. Rule as a rule to foster multidisciplinary practice for consumers.

The requirement that law firms alone can bring in non-lawyer partners means that only law firms can provide multidisciplinary services in which one service is the practice of law. Under this model, mediation centers, estate planning and family wealth firms, and management consulting firms could not add practicing lawyers to their partnerships and integrated teams of professionals. Under the "command and control" model, all of these non-legal services would have to be offered to consumers under the umbrella of a law firm.

It is difficult to justify a rule that permits lawyers in law firms to practice with non-lawyers, but does not permit lawyers to practice with non-lawyers in other types of business structures. Such a rule could only be justified by showing either that harm would result to the public if non-law firms offered such services, or that law firms would provide such superior multidisciplinary services that society should preclude non-law firms from doing the same. The proponents of such a rule would need to demonstrate probable harm to the client if multidisciplinary services were offered by non-law firms, and impairment to the core values of the legal profession if lawyers did not control the delivery of such services. 391 Lawyers have practiced in many non-law entities such as government agencies, corporations, and insurance companies, without a demonstration of client harm. In the light of this reality, and considering the anti-competitive effect of such a rule, our society should reject the notion that law firms should be the sole providers of multidisciplinary services. 392

The second requirement that non-lawyers can join lawyers as partners in a law firm solely for the purpose of offering legal services by its terms restricts the delivery of multidisciplinary services. Consumers today increasingly face multi-faceted problems with interrelated legal, financial, and business components. 393 These

390. For a contrary view concerning D.C. Rule 5.4, which supports the rule as a reasonable, middle-ground approach on partnerships consisting of lawyers and non-lawyers, see Gilbert & Lempert, supra note 23.

391. The questions that must be asked are whether non-law entities are likely to pose unacceptable risks for the delivery of legal services, and what effects those risks might have on the core values of the legal profession.


393. See Stefan Tucker, Written Remarks to the ABA Commission on Multidisciplinary Practice (Feb. 4, 1999) [hereinafter Written Remarks of Tucker] (available at <http://www.abanet.org/cpr/tucker1.html>) ("Multidisciplinary practice has not developed in a vacuum. It is the product of a rapidly growing, consumer-driven, global economy. We see ever more sophisticated clients seeking advice on increasingly complex matters, often involving an inextricable mix of finance,
consumers want to retain professionals with the necessary skills to solve these problems, and do not care about what the professionals call themselves or where they practice. There are many examples of client problems that would benefit greatly from a multidisciplinary problem-solving approach. Most of these examples fail the “solely the practice of law” requirement. A strict interpretation of this requirement would therefore severely inhibit the formation of MDPs.

The final requirement in D.C. Rule 5.4 is that law partners in a law firm must ensure that non-lawyer partners and managers follow the rules of ethics. The rules of ethics would apply to non-lawyers in every aspect of their activities. It is not controversial to assume that when a client is just receiving legal services from lawyers and non-lawyers working together in the same firm, the non-lawyers would need to comply with the legal ethics rules. When the client is just receiving non-legal services from the firm, however, it is not clear why the ethics rules of the legal profession should apply to a non-lawyer's activities. In the context of a limited “command and control” model adopted by the District of Columbia Bar, which contains a “solely the practice of law” requirement, the application of legal ethics rules to non-lawyers makes sense. This requirement would need to be reexamined, however, if one were to attempt to broaden D.C. Rule 5.4 to foster the development of multidisciplinary services.

It is clear that the the approach illustrated by D.C. Rule 5.4 is designed to allow law firms to provide ancillary business services closely related to the firm’s legal services and to let non-lawyers who

accounting, law and other disciplines.

394. There is one modification that could be made to D.C. Rule 5.4 that would improve its use as an approach for fostering the delivery of multidisciplinary services. If the rule did not limit the function of a law firm offering non-legal services solely to the practice of law, that would open the possibility of true multidisciplinary practice services coming from a law firm. The non-lawyer partner could be hired to provide non-legal services to clients of the law firm and thus integrated services could result. D.C. Rule 5.4, however, would still prohibit a non-lawyer controlled firm from providing legal services to clients.

395. Of course, if one were to interpret loosely the “solely the practice of law” requirement of D.C. Rule 5.4, then perhaps it would not be an obstacle to a more broad-based development of integrated services. No authorities, however, have interpreted D.C. Rule 5.4 to mean anything other than the law firm must be engaged only in law practice. Indeed, the use of the term “solely” does not seem to leave much room for argument.

396. This is why this model is referred to as the “command and control” model—it retains the distribution of legal services in traditional law firms and allows a law firm to admit non-lawyer partners.

397. See D.C. Rules Rule 5.4(b)(3). Should a client of an MDP who seeks only web design services receive the protection of the attorney-client rules? Stated differently, the question is whether a non-lawyer who provides only non-legal advice concerning web design should be subject to all of the legal ethics rules merely because the non-lawyer is a partner or manager in an entity that also practices law as one of its major activities.
work in the firm become partners. D.C. Rule 5.4 is not designed to foster the development of MDPs. By reason of its requirements and limitations, the "command and control" model would inhibit the development of multidisciplinary service providers. 398

If the organized bar were to adopt D.C. Rule 5.4 as its model for integrating multidisciplinary services into the legal profession, it is likely that its consequences in the District of Columbia would be replicated throughout the country. Some law firms would consider adding non-lawyer partners. For the most part, however, the rule would not change current practice and would not adequately encourage the development of firms providing multidisciplinary services. 399 If one removed the requirement that a firm with non-lawyer partners must be engaged solely in the practice of law, it would expand the types of functions that a law firm with non-lawyers could perform. Although such modification of D.C. Rule 5.4 would be better than the status quo in facilitating the delivery of multidisciplinary services in the United States, it would unnecessarily restrict non-law entities' participation in offering such services, and would also restrict the types of services that these entities could provide. 400

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398. See Trebilcock & Csorgo, supra note 187, at 18:

[R]estricting multi-disciplinary partnerships to the provision of legal services is, in a fundamental sense, something of an oxymoron. The defining characteristic of MDPs is that the services provided do not fall within the exclusive competence of members of one profession. The essence of the advantages from a client perspective of integrated professional service provision . . . is largely negated by attempting to confine MDPs to single-disciplinary practices—an obvious contradiction in terms.

399. One major reason why Washington, D.C., firms have not rushed out to add non-lawyer partners is that these partners often perform non-legal services and do not want to be bound by the D.C. legal ethics rules with respect to these non-legal services. For example, a non-lawyer who performs lobbying services does not understand why she should be bound by the legal ethics rules when she is already regulated by congressional lobbying rules.

400. The criticisms of D.C. Rule 5.4 here relate only to the manner in which this rule would affect multidisciplinary services in the United States; they have no bearing on the rule as a provision affecting lawyer and non-lawyer partners providing legal services. Although it is unlikely that this rule will work as the model for a more broad-based approach for facilitating multidisciplinary practice, D.C. Rule 5.4 is considerably better than the status quo because it encourages lawyers to bring in non-lawyers as partners in an effort to deliver quality legal services to clients.
4. The "Contract" Model

Under the "contract" model of multidisciplinary services, a law firm may agree to an advertising affiliation with a professional services firm, agree to refer clients to that entity on a nonexclusive basis, or agree to purchase or exchange services from that firm. This affiliation or arrangement is initiated with a contract identifying what each separate firm will contribute to the contractual arrangement. When most authorities describe a contractual arrangement, they presume that no direct sharing of legal fees is implicated in the affiliation. Many contractual arrangements, however, do provide for some form of exchange of information, services, or support. Thus, indirectly, services and/or funds may change hands between the law firm and the non-legal service provider.

The reason why two entities would enter into such a contractual affiliation relates to the services that each contributes to the client and the image that such an arrangement projects to the public. Frequently, the most important aspect of the contractual MDP involves advertising. Two separate service providers often undertake a publicity campaign to attract clients who seek integrated services. Often, one provider is seeking to bolster a weak aspect of their practice, perhaps by adding a new area of service or a new geographic region.

A second dimension of the contractual MDP relates to the sharing of information and support on a particular matter. At one level, a contractual MDP could be a "highly touted" formalized referral arrangement. For example, a law firm that does tax litigation but no transactional work could refer cases to another entity for the transactional work in exchange for referrals of litigation cases. At another level, the two professional service firms could serve as second chair on each other's cases or local counsel in out-of-state cases. Such sharing of services works only if both sides benefit roughly equally and the firms' clients are satisfied with the arrangement.

A final purpose for a contractual affiliation relates to services that each party needs from the other party. The relationship is premised upon an exchange-of-services rationale. A law firm that needed, for example, a restructuring of its telecommunications system or computer support system could exchange services with an accounting

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401. This model is Model 4 in the ABA Commission's Hypotheticals and Models. See ABA Commission, Hypotheticals and Models, supra note 267. This Article's description of the "contract" model is based on the ABA Commission's description of the model, in which no mention is made of the sharing of fees or costs between the law and non-law entities. Thus, it is assumed that the "contract" model, as described by the ABA Commission, differs substantially from the model described in the next subpart of the Article, called the "joint venture" model.

402. This is similar to the benefit derived from the advertising of a specialty. See Model Rules Rule 7.4.
firm needing legal assistance in, for example, drafting agreements for its clients. Such an exchange of legal services for "back office" support occurs in many European countries. In the French legal profession, many of these arrangements lead to a "captive" law firm, which is a firm available primarily to the clients of the affiliated entity, in most instances, a Big Five accounting firm. 403

A limited version of the contractual MDP is permissible under the current rules of professional responsibility, and some law firms have created such contractual affiliations. 404 The major restrictions on such an affiliation involve an inability to share fees and a need to keep formal lines of authority within each profession. For example, the association of the Miller & Chevalier law firm with PricewaterhouseCoopers several years ago seems to fit this model. 405

Law firms have established affiliations with other professional service providers in many countries outside of the United States. 406 These affiliations take many forms, depending on the regulatory structure of the country. For example, a Scottish law firm, Dundas & Wilson, formed a relationship with Arthur Andersen whereby Arthur Andersen provides office support services to the law firm, including telephone and computer system maintenance, and the law firm and Arthur Andersen team together to offer services to clients. 407 As another example, KPMG formed an alliance with Morrison & Foerster and certain other law firms that are members of SALTNET, a network of lawyers engaged in the practice of state and local tax law. 408

403. For an example of a "captive" law firm arrangement involving Ernst & Young and a Washington, D.C., law firm, see infra text accompanying notes 409-12.
404. See National Conference of Lawyers and CPAs, Analysis of ABA Models, supra note 392 (noting that the contract model is possible under the current rules).
406. This phenomenon was explored in the Commission's Background Paper. See ABA Commission, Background Paper, supra note 14.
408. See, e.g., Brenda Sandburg, MoFo Allies With Accounting Giant, N.Y. L.J., Aug. 9, 1999, at 2. Yet another example of a contractual alliance between a law firm and a non-law professional firm is the recent alliance between the law firm of Bingham Dana LLP and the investment firm of Legg Mason Inc. to offer
A more aggressive form of this "contract" model approach was recently undertaken by Ernst & Young. In the District of Columbia, Ernst & Young has opened the "captive" law firm of McKee Nelson Ernst & Young with four major tax partners formerly with the D.C. branch of the law firm of King & Spalding. By choosing this jurisdiction, Ernst & Young took advantage of the more liberal rules of the District of Columbia Bar regarding trade names. In one respect, one could view much of the work performed by this law firm as within the purview of federal tax law. It is important to note, however, that these lawyers are holding themselves out as legal counsel able to draft agreements and represent clients in all courts (not just the Tax Court). Ernst & Young claims not to be sharing in the legal fees of the law firm; instead, it has provided a non-recourse loan to the firm and offers "back office" support. The partners of the law firm have agreed to be bound by the independence rules that apply to partners of Ernst & Young; under those rules, which are applied on a firm-wide basis, neither a partner nor a partner's spouse may own stock of an Ernst & Young auditing client. Presumably, the law firm will use Ernst & Young on all controversy work and sophisticated investment advice. See, e.g., Ritchenya A. Shepherd, Law and Finance Under One Roof, Nat'l L.J., Nov. 15, 1999, at A21.

409. See generally Jonathan Groner & Siobhan Roth, Envisoning a Big 5 Law Firm: Ernst & Young Positioning to Offer Full Legal Services, Legal Times, Oct. 25, 1999, at 1. This firm is the first U.S. law firm with the name of a Big Five accounting firm in its law firm name. Professor Geoffrey Hazard describes this arrangement as follows:

The names of people who were not lawyers have been tacked on pursuant to a rule in the District of Columbia that permits a law firm to use a trade name. Thus, lawyers have the trade name as a subscript to their identification, and Ernst & Young has held out their affiliation with the law firm. I have it from a reliable source that Ernst & Young chose to include their name in the firm's name in defiance of the organized bar, challenging the bar to try to suppress the arrangement. There was an additional reason they wanted to include Ernst & Young in the firm name—that designation permitted the accountants to advertise the relationship particularly to their European clients, in effect saying that they had special access to super American tax lawyers who will be able to help out. Under the current rules, at least in the District of Columbia, there is nothing wrong with including Ernst & Young in the firm's name.

Hazard, Foreword, supra note 96, at 1086.

410. See, e.g., Tom Herman, Ernst & Young Will Finance Launch of Law Firm in Special Arrangement, Wall St. J., Nov. 3, 1999, at B10. Some leading commentators, including Professor Bernard Wolfman of the Harvard Law School, have questioned whether this purported debt arrangement is in substance an equity interest by Ernst & Young in the law firm. See Sheryl Stratton, Ernst & Young Law Firm Financing Questioned at ABA Meetings, 86 Tax Notes 1060 (2000).

411. See Sheryl Stratton, Ethics Lawyers, E&Y Partner Debate Multidisciplinary Practice, 87 Tax Notes 1451 (2000). It is unclear, however, whether the Ernst & Young law firm has adopted a similar approach for testing conflicts of interest. Id. at 1451-52. As discussed earlier in this Article, see supra note 298, in June of 2000, the SEC proposed revisions to its auditor independence rules regarding stock ownership interests of auditing firm personnel in audit clients.
other matters that accountants may legally perform. The precise details of this arrangement are not fully known except to the parties involved.\(^\text{412}\)

It may not be immediately apparent why this "contract" approach would not be sufficient to meet client needs for multidisciplinary services. Although law firms could enter into such an arrangement in virtually all states under current law, very few have done so with other professional services firms or with other law firms in so-called "law firm networks."\(^\text{413}\) In fact, many law firms prefer the option of merging with another law firm in lieu of forming a contractual network. It would be possible to obtain most of these advantages by closely integrating the separate firms.\(^\text{414}\)

Various reasons may explain why many American law firms are seeking to merge with London firms to create a single firm with a global presence, or are enlarging the size and number of their branch offices.\(^\text{415}\) First, U.S. law firms recognize that a common partnership fosters a shared culture and produces consistently high-quality work product with uniform attention to professional standards. A unified firm creates a fabric of mutual dependence, teamwork, and collaborative effort, rather than an ad hoc approach to client problems. The motivation driving law firms to merge is the desire to create one firm culture with numerous lawyers trained in multiple specialties that can provide both a wide range of legal services and clear accountability to clients.\(^\text{416}\) Two firms with separate methodologies and technologies, including different policies and procedures, may produce an uneven work product.\(^\text{417}\) The "contract" model fails to address this problem adequately.

\(^{412}\) For a critique of this arrangement, see Lawrence J. Fox, \textit{New Firm: Wolf in Sheep's Clothing?}, Nat'l L.J., Jan. 24, 2000, at A23.

\(^{413}\) A few law firm networks have been formed. \textit{See e.g., Legal Netlink} (visited July 22, 2000) <http://www.legalnetlink.com> (loosely affiliated network of lawyers in small and medium size law firms in the United States and throughout the world); \textit{Lex Mundi} (visited July 22, 2000) <http://www.lexmundi.org/AboutLM/statement.html> ("Lex Mundi is an organization of independent law firms providing for the exchange of professional information about the local and global practice and development of law" and comprising "158 members, with 375 offices and 12,500 attorneys in over 90 countries.").

\(^{414}\) For example, the District of Columbia office of Ernst & Young could be affiliated closely with the law firm of McKee Nelson Ernst & Young. \textit{See supra} text accompanying notes 409-12.


\(^{416}\) Another reason for law firm merger may be that, ultimately, law firms fear that the current prohibition against partnerships with multidisciplinary firms may place them at a competitive disadvantage with their European counterparts, who are able to provide clients with integrated, comprehensive services. \textit{See} Kathryn A. Oberly, \textit{Statement Before the ABA Commission on Multidisciplinary Practice} (Feb. 4, 1999) [hereinafter \textit{Statement of Oberly}] (available at <http://www.abanet.org/cpr/oberly1.html>).

\(^{417}\) \textit{See} Trebilcock & Csorgo, \textit{supra} note 187, at 5:
Further, the contractual arrangement often fails to result in added revenue or business for a service provider. In fact, many contractual affiliations have the potential to foster competition instead of collaboration between firms. When a service provider sends a client and matter to another service provider, there is a risk that the client may prefer the second service provider’s work and that the referral may lead to the eventual loss of a client. Although fostering competition and client choice are worthy values, the accompanying risks deter many firms from referring clients to other professional service entities.

In addition, use of the “contract” model in the United States would not avoid the regulatory battle with the organized bar. As long as the legal profession embraces the prohibition against fee-sharing with non-lawyers, these contractual arrangements will lead to numerous complaints that the cost-sharing contracts amount to fee-sharing with a non-lawyer. Further, to the extent that the non-lawyers provide “back office support” to the law firm, this could be viewed as either a subsidization of the law firm or a sharing of profits between the law firm and the non-lawyers. Thus, these arrangements would provide the participants with little comfort that they are adhering to the rules prohibiting fee-sharing and the payment of referral fees to non-lawyers.

Moreover, the “contract” model may, as a practical matter, preclude the joint offering of services to those clients whose demand is most acute—the individual or small firm client. The solo and small firm practitioners who service such clients may find it too complicated or cumbersome to contract with other professionals, or may be fearful that doing so will increase their exposure to liability without a concomitant sharing of benefits. For the small firm or solo practitioner considering a possible multidisciplinary arrangement, a fully integrated structure simply makes more economic sense because the risks and costs of such a venture are more easily spread among the various participants.

When a client is unable to distinguish the quality of the legal advice from the quality of the accounting advice contained in a product jointly produced by both entities, the incentives to provide a quality product are distorted. Each firm bears only part of the cost in reputation of any reduction in quality. Should a client complain with respect to the joint product, each firm’s position may be to blame the other for the product’s shortcomings.

418. On one hand, “back office support” and exchange of services can replicate any profits-sharing system and thus avoid the rules against sharing legal fees with non-lawyers. On the other hand, the non-law firm does not have a direct interest in a client fee.

5. "Joint Venture" Model\textsuperscript{420}

The "contract" model described above does not permit the sharing of fees between the law firm and the non-law entity. An extension of that model is the "joint venture" model,\textsuperscript{421} which would allow two separate firms to affiliate through a contractual relationship. Such a relationship has the following characteristics: (1) the creation of a joint venture entity which performs multidisciplinary services separate and apart from both the law firm and the non-law entity; (2) the sharing of legal and non-legal fees for work done in the joint venture that can be distributed to the law firm and the non-law firm entities; and (3) the advertising of a joint entity that offers legal and non-legal services.

The first feature of the joint venture MDP is that the law firm and the non-law firm entity remain separate and distinct. Each entity continues to perform the traditional work done for its own clients. The rules of each entity's respective professions continue to govern the conduct of each entity's professionals. For the purposes of providing integrated services, however, the law firm and the non-law firm form a joint venture to provide integrated services. The joint venture could be formed informally through a contract describing the manner in which the venture operates—called a "contractual joint venture."\textsuperscript{422} Alternatively, it could be formed in a more formal manner through the creation of a jointly owned entity—called an "entity joint venture."\textsuperscript{423} In either form, the joint venture would have a management structure and have operational guidelines for accepting clients and for performing integrated services. In some instances, clients would be served by the joint venture through the delivery of legal and non-legal services. In other instances, clients could be referred to one of the separate companies; there, the services would not be integrated. A potential client could also be referred out to an unrelated firm. The purpose of the joint venture is to create a synergy among the legal and non-legal disciplines to provide clients with the highest quality professional services.

To facilitate the use of the joint venture MDP, the legal profession

\textsuperscript{420}This model is an extension and variation of Model 4 in the ABA Commission's \textit{Hypotheticals and Models}. See ABA Commission, \textit{Hypotheticals and Models}, supra note 267.

\textsuperscript{421}In business transactions, joint ventures can be structured as a contractual relationship or an entity relationship.

\textsuperscript{422}In a contractual joint venture, the relationship between the parties is defined by the terms of the contract. The parties must work out more of the details before entering into one of these engagements because, unlike the "entity joint venture," see infra note 423, they cannot rely on default rules provided by entity law to fill in the details.

\textsuperscript{423}In an entity joint venture, the articles of incorporation in the case of a corporation, or the agreement in the case of a partnership, govern control and the sharing of profits.
needs to relax the prohibition against the sharing of legal fees. Each separate firm will contribute assets and labor to the joint venture. The participants should be given the freedom to allocate profit and loss in any way they see fit as long as the fees are earned by the joint venture. This is the major difference between the “contract” model and the “joint venture” model. The “contract” model, as interpreted by most authorities, does not provide for the direct sharing of fees. The “joint venture” model presumes that each participant will share fees. The sharing of fees is very important for the viability of the MDP as a concept. If professionals cannot share fees with each other, they will be less likely to enter into any cooperative venture to provide integrated services to clients. Economic ties are the best way to foster cooperation and teamwork, rather than competition. Moreover, the prohibition against sharing of fees leads to a potential risk of sanctions from regulators, and encourages efforts to mask the transfer of funds through indirect arrangements.

Additionally, the creation of a contractual or entity joint venture allows the MDP to hold itself out as an MDP and to advertise to potential clients. The ability to advertise integrated services delivered through the jointly owned entity gives this form of MDP a significant advantage over the “ancillary business” or pure “contract” model. Advertising combined with a trade name enables the entity to attract clients and establish brand loyalty.

Lastly, for purposes of state bar regulation, the “joint venture” model is easier to regulate than is the “contract” model. The “joint venture” model separates the joint activities of legal practice and non-legal practice into one source. With the “contract” model, state bars will often have difficulty determining how business is referred between lawyers and non-lawyers.

424. Of course, a general ban on sharing legal fees with non-lawyers outside of the joint venture could continue and lawyers could be prohibited from paying referral or forwarding fees to non-lawyers. See Model Rules Rule 7.2(c); Ohio S. Ct. Bd. Of Comm. on Grievances and Discipline, Op. 2000-1 (Feb. 11, 2000); Attorneys—Conflicts of Interest: Ohio Attorneys May Not Receive Fee for Referring Clients to Financial Group, 68 U.S.L.W. 2549 (Mar. 21, 2000) (discussing a decision of the Ohio Supreme Court Board of Commissioner of Grievances and Discipline in which it stated that a lawyer could not take a referral fee for directing a client to a financial services firm because this would impair the lawyer’s professional independence). This Article does not take a position on how the ethical rules should treat pure referral fees between lawyers and non-lawyers.

425. As noted in the discussion of the “contract” model, there may be a greater tendency in such a model for the professionals to compete with each other and blame each other for failures. When you share fees, as in the “joint venture” model, the failures of one partner in the venture will have an economic effect on all the participants in the venture, and the successes will benefit everyone.

426. PricewaterhouseCoopers seems to have unified all of its lawyers into a legal network called “Landwell” for the purposes of creating brand recognition and to attempt to become one of the top five law firms in the world. See Terry, MDP Primer, supra note 113, at 879 (discussing the formation of the Landwell international legal network).
between the entities and what financial arrangement has been made. The "joint venture" model narrows the scope of the inquiry and will make it easier for a state bar to determine whether the non-legal services in some way have compromised the core values of the legal profession.

The joint venture MDP does have some disadvantages. First, the requirement that both entities remain separate imposes a fictional structure on the MDP that may inhibit true teamwork and synergy with little added protection for the public. Ultimately, a spirit of competition may pervade the culture of the arrangement. To the extent work is profitable, one entity may seek to keep it out of the joint entity and retain all the profit for itself. Thus, the benefits of MDPs may not be fully realized.

Second, although the joint venture MDP may work well for multidisciplinary arrangements between a large accounting firm and a law firm, it will inhibit creation of small MDPs that focus on low- and middle-income clients. It is difficult to imagine that a family law mediation clinic or a gerontology law clinic would work as well as a joint venture MDP because these types of clinics often require the partnering and close working relationship that a single entity, fully integrated MDP could provide.

Finally, unless the joint venture relationship results in significant increases in profit to both the non-law and law entities, it is likely that the potential joint liability would discourage the formation of such entities. A professional services firm would not expose itself to liability if the current and future rewards from the venture did not justify the risk. Despite these disadvantages, the joint venture MDP would be a significant improvement over current law, particularly if the ABA and state bars are not yet ready fully to embrace multidisciplinary services in the form of the fully integrated MDP.

6. The "Fully Integrated MDP" Model

The final model, the fully integrated MDP, involves a fully integrated partnership or professional corporation with lawyer and non-lawyer owners offering client services. In this model, lawyers can practice in law firms and non-law firms and non-lawyers can be co-owners of non-law entities or law firms delivering legal services. The fully integrated MDP is an entity where the individual lawyers
and non-lawyers can determine the extent to which they own the firm, share in profits, manage the decisions of the firm, and provide legal and non-legal services. Thus, this model provides the greatest flexibility to the lawyer and non-lawyer participants in structuring their arrangement.

The benefits of allowing fully integrated MDPs are significant. First, it is this model which permits the most efficient and coordinated delivery of services from professionals in multiple disciplines. The premise in allowing a single entity MDP is that professionals should be free to structure the entity in whatever way best serves client interests. This freedom allows innovation. Innovation in the delivery of legal and non-legal professional services is necessary because the needs of clients change as the ways of conducting business change. The single entity MDP offers the best opportunity for professional service firms to experiment with new ways of delivering professional services to clients.

Second, the "fully integrated" model is most likely to foster teamwork and cooperation in delivering integrated services. Multidisciplinary firms can fully share knowledge and intellectual capital to provide integrated solutions to client problems. These firms can support the communication networks and common strategies that are vital to delivering client services. A fully integrated MDP allows the market to provide the most efficient delivery of legal and non-legal services to clients.

Third, fee-sharing and allocation of income and expenses are integral to a fully integrated MDP. Thus, although a joint venture allows some economic ties that are likely to produce cooperation among professionals, a fully integrated MDP is the best model for achieving that cooperation. The participants in a fully integrated MDP will act to maximize profits and minimize the risk of mistake because it is in their joint economic self-interests to do so.

Finally, the single entity MDP is most likely to be the model used to deliver integrated services to low- and middle-income clients. As discussed earlier in this Article, large corporations will have access to integrated professional services under the status quo. These large entities can obtain integrated services in-house, from de facto MDPs, or from foreign MDPs. Low- and middle-income clients do not have the same opportunities for obtaining integrated services under current law. It is the formation of single entity, fully integrated MDPs that offers the best chance of making integrated professional services available to this category of clients.

429. See supra Part I.A.3.
C. Which Model Should the ABA and State Bars Adopt?

The "cooperation" model ("status quo" model) has not in the past and will not in the future foster the development of integrated services. The incentives for cooperation do not exist once there are no opportunities for ownership in the venture or for sharing of fees with non-law professionals. Law firms are not able to hire all non-law professionals as independent contractors or as employees. The conclusion is similar for the "ancillary business" model. Model Rule 5.7 was not designed to facilitate the delivery of integrated services. Thus, what is left for consideration are the "command and control" model, the "contract" model, the "joint venture" model, and the "fully integrated services" model.

The "command and control" model as discussed by the ABA Commission clearly embraces the D.C. version of Rule 5.4. In this form, the requirements that services fall within the practice of law, that all non-lawyers follow the rules of professional conduct, and that activities take place only in a law firm make the rule very unattractive for fostering multidisciplinary services. The fact that, under this model, multidisciplinary services must take place only in a law firm seems to be unjustified given that lawyers frequently practice with non-lawyers in non-law entities such as government agencies and corporations.

Under any version of the "command and control" model, law firms must control multidisciplinary services if any part of the service involves the practice of law. Lawyers naturally would find comfort in such an approach because it places them at the controls of most business venture MDPs. One should question, however, whether such a requirement is necessary to preserve the core values of the profession.

It is clear that there are less restrictive means to protect the core values of the legal profession. There are cooperative legal and non-legal professional service arrangements in which legal services would be a small or minor part of the services delivered to the client. Family mediation centers, disabled children clinics, and gerontological services centers are all examples in which the legal service component is likely to be a small part of the services delivered to the client. Thus, in a bar jurisdiction that decides to adopt the "command and control" model, these types of MDPs would be unlikely to develop. Also, many non-lawyers will be hesitant to join an MDP controlled and majority owned by lawyers. Therefore, the "command and control" model would hinder the formation of MDPs that are directed toward middle- and low-income clients.

430. Lawyers may decline to participate in such arrangements because of lack of substantive knowledge of the other field, because of the potential liability, or because the non-lawyer professionals may demand too large a share of the compensation.
The purpose underlying the requirements of the "command and control" model is that lawyers are more likely to follow the rules of the legal profession and more likely to protect the client's interests especially in matters of attorney-client privilege and conflicts of interest. Of course, the bar would always prefer to impose rules and an enforcement scheme upon its own members over which it has considerable power. That does not mean, however, that a similar system of regulation and enforcement cannot be designed for legal services in a non-law firm. There are no serious arguments under the current ethical rules that corporations should not be able to hire in-house lawyers or that lawyers who work in non-law firm settings are violating the rules of ethics and injuring client interests.

The "contract" model and the "joint venture" model both allow the MDPs to be formed separately from the participating entities. The major difference between the two models involves whether legal fees can be shared with non-lawyers. As stated before, each professional entity must keep its fees and cost structure separate. Thus, the pure "contract" model does not provide the direct incentives for cooperation and synergy that result from the delivery of integrated services. The exchange of services or back office support does, however, provide the entities with the opportunity to mirror the economic effect created by sharing legal fees. Therefore, as between the two models, there are very few reasons to prefer the "contract" model to the joint venture MDP. The "joint venture" model has the benefit of keeping the professional entities separate while allowing the joint venture to act more as a separate entity which has the capability of offering true multidisciplinary services.

Thus, what remains for consideration are the joint venture MDP and the fully integrated MDP. Close scrutiny reveals that the fully integrated multidisciplinary firm is optimal because it would best satisfy the strong demand for integrated services. This model could be regulated so that the core values of the legal profession would not be endangered. It would best satisfy the needs of individual and small business clients and the small firms and solo practitioners that service them. The "fully integrated MDP" model, together with appropriate bar regulation to protect clients and the core values of the legal profession, allows the market in legal services to function without unnecessary restrictions. As long as client interests and the core

431. A more acceptable approach from a political perspective could be to adopt a rule permitting fully integrated MDPs only if they are lawyer controlled, but permitting joint venture MDPs without the command-and-control requirement. This intermediate approach could be more acceptable from a political perspective because firms that deliver legal services with lawyer and non-lawyer partners would remain under the control of lawyers. If a non-law firm wanted to deliver legal services, however, it could do so through a joint venture with a group of lawyers, and each party (the law firm and the non-law firm) could share legal fees. The authors do not endorse this approach other than to point out its political appeal.
values of the profession are properly protected, it is unreasonable to prohibit this form of multidisciplinary practice.

As a compromise alternative to the fully integrated MDP, the "joint venture" model accommodates many, but not all, forms of multidisciplinary practice. A system that would allow lawyers and non-lawyers to form a joint venture, either contractual or entity, would foster the development of integrated services. Law firms and non-law firms would have an incentive to cooperate in a venture because of the opportunity for enhanced marketing efforts. Moreover, for most clients, the joint venture would produce integrated solutions to their problems. The potential downsides of the joint venture MDP are that it may unnecessarily limit innovation in the delivery of integrated services, and that it may have a negative impact on MDPs aimed at middle- and low-income clients. Doctors, lawyers, and medicare-claims specialists would be less likely to operate through jointly owned entities than through entities in which they could be partners. Thus, at a minimum, the ABA and state bars should amend their rules to permit liberal contractual affiliations between law firms and non-law firms aiming to provide multidisciplinary services to the public.

D. Regulating Multidisciplinary Practice to Protect the Core Values of the Legal Profession

Opponents of MDPs raise serious concerns that integrated firms offering legal services could threaten certain core values of the legal profession. In particular, they argue that MDPs will undermine four specific core values of the profession: (1) independence of judgment, (2) confidentiality, (3) loyalty, and (4) competence. These concerns are legitimate but should not lead the bar to categorically prohibit MDPs. Instead, the bar should deal forthrightly with these difficult and important issues, and fashion specific, narrow rules to preserve the core values of the legal profession.

A primary issue that arises with respect to the regulation of MDPs involves what set of rules the individual professionals should follow in their practice. Most authorities reach the same conclusion. Lawyers holding themselves out as lawyers engaged in the practice of law must follow the rules of the legal profession. This conclusion is grounded in theoretical and practical reasoning. Theoretically, when a client hires a lawyer to perform legal services, the client has expectations.


433. A discussion of the core values of the legal profession is complicated because many of the problems are interrelated. In other words, often a criticism of an aspect of an MDP will require analysis of several interrelated core values.

434. See Daly, Reporter's Notes, supra note 11.
about the relationship that is formed. Practically, the law of attorney-client privilege dictates that to preserve confidentiality a lawyer must act in furtherance of the client's desire to obtain legal services.\textsuperscript{435} Because many clients seek the protection of the privilege, lawyers delivering legal advice must structure the services in such a way as to protect the privilege.

A question arises whether all individuals within an MDP would be required to follow the rules of the legal profession. In the D.C. Rule 5.4 "command and control" model, the answer is easy. Because the only services that a District of Columbia entity operating under the rule may provide are legal in nature, non-lawyers working in the entity would be required to follow the lawyer's professional responsibility rules. One could argue that all individuals working in any entity formed under the "command and control" model should be required to follow legal ethics rules because the lawyers are in charge of the entity. Just because the lawyers are in charge, however, does not mean that the bar should impose the lawyer's rules on all non-lawyers in the firm. The imposition of rules should depend on the work performed by non-lawyers and on whether the client and the MDP choose to treat the work as primarily legal in nature.

Whether an MDP arises under the "command and control" model or the "fully integrated MDP" model, the application of ethics rules and the extent to which lawyers control a transaction depend on the desires and reasonable expectations of the client and the nature of the services delivered.\textsuperscript{436} When a client approaches an MDP, the interview process must necessarily include an inquiry about the services sought by the potential client. In some instances, the services may be clearly non-legal, such as computer programming or product testing. In other circumstances, however, the prospective services may be clearly legal and such that the prospective client seeks the protections afforded to an attorney-client relationship. In some situations, the services may include both a non-legal and legal component, such as taking a product abroad and establishing a web presence in a foreign country. In that case, it would be up to the prospective client whether the services were classified primarily as legal services or primarily as non-legal services.\textsuperscript{437} An integral part of

\textsuperscript{435} See Wolfram, Legal Ethics, \textit{supra} note 7, at 251-53.

\textsuperscript{436} Note that the situation could arise where a lawyer decides that he or she does not want to continue to practice law in an MDP. In such a case, if a licensed lawyer works on non-legal matters and does not hold himself or herself out as a lawyer, the rules of the legal profession should not attach to such non-legal work.

\textsuperscript{437} One might wonder why a potential client may choose the non-legal approach to problems that may have both legal and non-legal components. If the attorney-client privilege is not important to the client, and if most of the work is non-legal, then choosing the legal approach would end up costing the client more money than choosing the non-legal approach. The legal approach would be more expensive because lawyers would need to control the representation in order to protect the
this discussion with the client would be a disclosure of the benefits and
detriments of characterizing the relationship as legal or non-legal.\textsuperscript{438} If
the potential client seeks the protection of attorney-client rules, then
lawyers and non-lawyers (directly and through lawyer supervision) must follow the rules of the legal profession. If the potential client
seeks primarily a non-legal engagement, then the non-lawyers could
provide the services without following the rules of the legal profession
or without the supervision of the lawyers.\textsuperscript{439} This result protects client
expectations and the legal profession's desire to regulate lawyers, yet
allows MDPs the flexibility to offer purely non-legal services.

The problem of applying the legal profession's rules may be
accentuated slightly in a fully integrated MDP because it may be
difficult to know when lawyers are delivering legal services and when
they are delivering non-legal services, such as business consulting.
Clients may have difficulty knowing the difference between legal
services and non-legal services and lines may become blurred within a
fully integrated entity. This confusion may lead to loss of attorney-
client confidentiality or imposition of unanticipated tort liability if a
disappointed client decides to pursue legal action against the MDP.
For these reasons, in a fully integrated MDP, lawyers holding
themselves out to clients as engaged in the practice of law should be
organized in a separate legal department within the MDP.

Grouping all practicing lawyers in a legal department would also
avoid client confusion about the nature of the services being provided
by the particular professional in the MDP. A client would know that
she is receiving legal services if a lawyer from the legal department
works on her engagement.\textsuperscript{440} Lawyers in that department would
report to, and be supervised by, lawyers. Delivery of services by any
lawyer in the legal department, even services that involve a
combination of legal and business advice, would be governed by the
rules of professional responsibility.\textsuperscript{441} Lawyers in the legal department
would be required to comply with the bar rules in the jurisdictions in

\textsuperscript{438} This is similar to the informed consent and disclosure provided to a potential
client concerning the decision to accept one lawyer to represent multiple clients, or
when a conflict of interest arises under the Model Rules. \textit{See} Model Rules Rule
1.7(b).

\textsuperscript{439} Note, however, that only lawyers could perform activities that involve the
practice of law and those lawyers would be subject to the legal ethics rules.

\textsuperscript{440} \textit{See} Oral Testimony of DiPiazza, \textit{supra} note 428 (suggesting that where there
are two types of lawyers in an MDP, grouping lawyers who hold themselves out as
practicing law into a separate legal department helps ensure that clients understand
the role of each type of lawyer).

\textsuperscript{441} \textit{See id.} In his testimony, Mr. DiPiazza stated that a lawyer who is in a non-
legal service division within an integrated MDP would not be subject to the rules of
professional responsibility and that "care needs to be taken that no impression is
created, outside the legal services division, that the person at the table is there as a
lawyer." \textit{Id.}
which they are licensed, and would need to satisfy any continuing legal education and pro bono requirements imposed in those jurisdictions. As is the case today, lawyers in a legal department would bear responsibility for the individuals that they supervise. A single legal department would also make it easier for a local disciplinary authority to regulate the practice of law in an MDP. 442

Of course, not all individuals trained and licensed as lawyers will elect to practice in a legal department. Today, accounting firms hire individuals trained as lawyers to provide tax advice to clients, and these individuals claim that they do not hold themselves out as lawyers and do not create client expectations that they are practicing as lawyers. 443 These individuals should be able to continue to provide tax advice to clients without joining a legal department if and only if they do not hold themselves out as lawyers, and do not create any client expectations that the legal profession's rules apply. To ensure that clients fully understand that lawyers practicing in a non-legal department are not acting as lawyers, the rules governing MDPs would need to require that the client be informed that the lawyer is not practicing law and that none of the protections of the attorney-client relationship applies. A client who seeks the protections of the attorney-client relationship (including the attorney-client privilege) would be well advised not to bring their tax law problems to an MDP that does not have a separate legal department, such as a Big Five accounting firm.

Even if the above suggestions are incorporated into a framework of rules designed to foster MDPs, it is still necessary to address the effect of MDPs on efforts to protect the core values of the legal profession.

1. Maintaining Confidences

Some commentators have expressed concern that client information from a joint engagement would be shared between lawyers and non-lawyers in the firm, thus compromising the ethical duty of confidentiality and destroying the protection of the attorney-client privilege. 444 This concern rests, however, on the erroneous

442. The compliance issue led to the ABA Commission's recommendation that non-lawyer controlled MDPs submit themselves to annual audits of their practices. See Daly, Reporter's Notes, supra note 11. As discussed elsewhere, the authors do not believe that an audit requirement directed only at non-lawyer controlled MDPs sufficiently protects the public interest. See infra text accompanying notes 516-20. It is difficult to justify the disparate treatment between lawyer controlled MDPs and those controlled by non-lawyers.

443. See Statement of Oberly, supra note 416 (describing the role of lawyers in accounting firms); Written Remarks of Treiger & Lipton, supra note 385 (describing the organization of accounting firms). But see supra note 126 (criticizing the claim by the accounting firms that they are not practicing law).

assumption that a lawyer can never share confidential client information with a non-lawyer. Lawyers share such information all the time—with secretaries, paralegals, experts, and others who assist them in rendering legal advice to a client. Confidentiality and the privilege are preserved because, under Model Rule 5.3, the lawyer must instruct the non-lawyers with whom he or she works of the duty not to disclose information relating to the representation of clients on legal matters. This requirement has force because a lawyer can be disciplined if his or her non-lawyer associates reveal confidential client information.

The situation would be precisely the same for a lawyer working on an engagement with non-lawyers in an integrated services firm. Concerns about confidentiality are addressed at the outset of the engagement. Thus, the question is whether a client's communication with the lawyer is made to obtain legal advice, or whether the communication was made to obtain non-legal services, such as strategic financial advice. The key here is transparency: the client must be informed from the start that the privilege may not attach to communications with non-lawyers for the purpose of obtaining non-legal advice. It is imperative that MDPs clearly explain whether or not the client is obtaining legal services and whether or not the privilege will apply to the services.

A recent decision highlights the confusion that can result when an MDP performs both legal and non-legal services for the same client. In United States v. Frederick, a professional who was both a lawyer and an accountant provided services to a client. The professional drafted a client's tax return and then participated in the defense of an audit. The IRS issued a summons for hundreds of documents to which the professional responded by asserting the attorney-client privilege. The Seventh Circuit affirmed a district court decision that the professional had served in a dual role for the client. He prepared tax returns for the client, which is not the practice of law, and represented the client in a controversy before the IRS, which may constitute the practice of law. In fact, the professional knew when preparing the returns that the IRS was conducting an audit of the client. Judge Posner found that, in a dual-purpose representation, the documents prepared by the lawyer-accountant both for use in preparing tax returns and for use in litigation were not privileged.


445. 182 F.3d 496 (7th Cir. 1999), cert. denied, 120 S. Ct. 1157 (2000).

446. See id. at 501-03. Judge Posner stated:

[A] dual-purpose document—a document prepared for use in preparing tax returns and for use in litigation—is not privileged; otherwise, people in or
Frederick stands for the proposition that if taxpayers employ two separate professionals in different firms, then the documents prepared by the lawyer solely for use in litigation would be privileged and would not be discoverable. The documents prepared by any professional (whether an accountant or lawyer) for use in preparing tax returns, however, would not be privileged and would be discoverable through the summons. This case illustrates a potential ambiguity in the law when both representations arise in the MDP, and a need to fully inform the client of the scope of the privilege. This case is very troublesome for MDPs seeking to do dual-purpose representations in the tax area.

With the appropriate information, clients with confidentiality concerns can decide whether to use lawyers in the MDP, or instead retain a separate law firm and thereby protect the attorney-client privilege. It is important that the client be fully informed both about the nature of the professional relationship being performed by the MDP (i.e., whether or not an attorney-client relationship is formed), and about which communications between the client and professionals in the MDP will be covered by the attorney-client privilege. In the light of the severe damage that loss of confidentiality and privilege could inflict on clients of an MDP, MDPs must put in place structures that preserve client confidentiality in the delivery of legal services.

2. Independent Professional Judgment

A number of commentators have maintained that participation of non-lawyers in organizations offering legal services would diminish the independence of lawyers. None of these commentators,

contemplating litigation would be able to invoke, in effect, an accountant's privilege, provided that they used their lawyer to fill out their tax returns. And likewise if a taxpayer involved in or contemplating litigation sat down with his lawyer (who was also his tax preparer) to discuss both legal strategy and the preparation of his tax returns, and in the course of the discussion bandied about numbers related to both consultations: the taxpayer could not shield these numbers from the Internal Revenue Service. This would be not because they were numbers, but because, being intended (though that was not the only intention) for use in connection with the preparation of tax returns, they were an unprivileged category of numbers.

Id. at 501-02 (emphasis in original). The documents in this case also would likely not be privileged under the federally authorized tax adviser privilege in 26 U.S.C. § 7525, because that privilege applies only to communications that would be privileged had they taken place between a client and an attorney. See id. at 502. For commentary on the implications of the Frederick decision, see Christopher S. Rizek, *Question at Heart of New Tax Adviser Privilege—When is Tax Practice 'Legal'* , Legal Times, July 5, 1999, at S24.

447. *See, e.g.*, Gary T. Johnson, Written Testimony to the ABA Commission on Multidisciplinary Practice (Oct. 8, 1999) (available at <http://www.abanet.org/cpr/johnson.html>) (arguing that professional independence will be jeopardized if "individual professionals [within an MDP] march to the beat of their own ethical drummers"); Unpublished Johnson Paper, *supra* note 444; Written Testimony of
however, has offered any substantial evidence to support their concern. Professional independence is undoubtedly an important value for clients. When a client seeks the professional advice of a lawyer, the client justifiably expects to receive advice that is not tainted by influence from a non-lawyer trying to increase firm profits, seeking to sell a product, or seeking to peddle a non-legal service. It is important to note, however, that although the pressures on professional independence already exist in today's legal profession as law has become increasingly more competitive and attuned to the bottom line, most lawyers are nonetheless able to deliver independent professional advice. Thus, it remains to be seen whether the presence of non-lawyers as partners/owners of the firm will in fact jeopardize the independence of the lawyers providing legal services. Although this Article favors no specific limit on the structure of the MDP, this professional independence issue is of great concern, and thus the regulation of MDPs should include rules that minimize the potential for such interference with the lawyer’s independent professional judgment.

The requirement that, in fully integrated MDPs, lawyers who practice law and hold themselves out to clients and the public as offering legal services be placed together in a separate legal department offers significant protection against such influence. It mirrors the same protection that exists in corporate legal departments when lawyers are grouped under a general counsel in a legal department structure. Such a department should significantly

Krane, supra note 288; NJSBA Preliminary Report, supra note 444.

448. The authors acknowledge that if it were in fact the case that professional independence is impaired because of co-ownership of professional service organization by lawyers and non-lawyers, it would be difficult to find evidence of that impairment.

449. See Jones & Manning, supra note 214, at 1206-10 (proposing a new Model Rule 1.18 on independence of professional judgement and a modified Model Rule 5.4 on lawyer participation in an MDP).

450. See generally Ted Schneyer, Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics, 84 Minn. L. Rev. 1469 (2000) (examining in detail the profession’s desire to implement “anti-interference” rules to protect loyalty to a client).

451. Indeed, there exists significant experience to the contrary. The legal profession today regularly permits lawyers to be supervised by or subject to the control of a non-lawyer. For example, in-house counsel, government lawyers, union lawyers, and lawyers working for pre-paid legal service plans are often under the supervision of non-lawyers. See id. at 1491-1525. There is no evidence that such non-lawyer supervision has resulted in lower-quality legal services being delivered to lawyers’ clients or that the professional independence of lawyers working in such situations has been seriously undermined in the majority of representations.

452. Although the ethics rules do not require that a corporation place all lawyers in a corporate legal department headed by a lawyer with reporting obligations to the board of directors, many Fortune 500 corporations have imposed such a structure to protect the independence of the lawyer and the advice. Such a structure by analogy would benefit the independence of lawyers in an MDP and help protect the core
reduce concern about interference by non-lawyers with the professional independence of lawyers working in an MDP. It would also help maintain a mentoring atmosphere in which less experienced lawyers are trained by more experienced senior attorneys.

3. Rendering Conflict-Free Advice

Many commentators have expressed concerns about the conflicts-of-interest issues that might arise in a fully integrated multidisciplinary practice. The opponents argue that accounting firms today do not have the same conflicts-of-interest rules and that they use firewalls and client consent to resolve many conflicts. A detailed discussion of how the conflicts-of-interest rules should be reexamined for the modern legal profession is beyond the scope of this Article. Many of these issues, however, apply with equal force in a traditional law firm. Most large firms with offices in different cities face similar issues regarding conflicts of interest. Thus, when large firms in the profession argue for increased use of (1) screening to allow representations, (2) client consent including advance waivers, and (3) different rules for sophisticated parties, such rules will benefit providers of integrated services to large clients. This Article examines three aspects of the conflicts-of-interest rules that affect MDPs.

Most of the discussion in this Article has focused on the delivery of integrated services in the non-litigation context. Lawyers and non-lawyers can join together to offer clients a multidisciplinary approach to their transactions and business problems. Although this point has not been discussed extensively in the literature, nothing automatically precludes considering a multidisciplinary approach to litigation.
Securities litigation often requires proof provided by other disciplines.\textsuperscript{456} Class actions are perfect candidates for management by large accounting firms.

If one were to permit MDPs to litigate cases in court, the lawyers in the MDP would need to be solely responsible for the execution and supervision of the entire matter. This would help to ensure that the obligations of lawyers to the tribunal as officers of the court are fulfilled. The non-lawyers would simply help the lawyers in a manner similar to how paralegals and other non-lawyers help litigation attorneys. The major problem with allowing an MDP to do litigation work involves potential conflicts with the MDP's other clients. One could imagine the conflicts that a Big Five accounting firm would have if its future legal department began to litigate cases.

To deal with these problems, it is tempting to establish a rule that the legal services department of a single entity MDP should not be able to represent clients in litigation in state and federal courts.\textsuperscript{457} A litigation carve-out could be justified because of the unique role of lawyers who appear in federal and state court proceedings. Litigation is a public function of the judiciary and the judicial system needs to maintain full control over all professionals who appear in the courts. Further, it is important to maintain the role of lawyers as officers of the court.\textsuperscript{458} This litigation bar could ensure that the standards of discovery practice and duties of candor to the court are properly maintained. Ultimately, in litigation, the tasks and control of litigation should remain with the legal profession. This "core of law practice" exception could be justified by the special nature of litigation and the importance of protecting the public and the judicial system.

The litigation carve-out is, however, unnecessary. Nothing in any of the models of MDPs, including the fully integrated MDP, gives non-lawyers the power to control litigation. Lawyers, regardless of the model, must have authority and control over legal matters, including litigation. Thus, a litigation carve-out is not needed to ensure that litigation matters remain within the purview of lawyers. Moreover, in applying a litigation carve-out, it would often be difficult to categorize a matter as a litigation or non-litigation matter. For example, it is unclear whether an administrative dispute with the IRS that has not yet resulted in any court filings is a litigation matter or a non-litigation matter. Similarly, an arbitration matter or other alternative dispute resolution matter is not easily characterized. Matters that start out as

\textsuperscript{456} For example, accountants, computer-modeling experts, and MBAs all could contribute valuable services to the litigation team.

\textsuperscript{457} One of the authors made this suggestion at the ABA Commission's hearings. See Statement of Dzienkowski, supra note 266.

non-litigation matters may over the course of time become litigation matters—it is unclear when, if at all, the litigation bar on MDPs performing such services would apply. These issues would need to be considered in the design of any litigation bar on MDPs. Of course, as a practical matter, a large MDP that performs an array of different types of legal and non-legal services for a large base of clients will often be prevented from handling litigation matters because of the conflicts-of-interest rules. Moreover, for major litigation cases, clients may often prefer to hire traditional law firms whose work consists largely of litigation matters because of the specialized expertise that such firms develop.

A second important issue is how the conflicts-of-interest rules should apply to the MDP. Under the status quo, the conflicts-of-interest rules apply to each of the lawyer members of a law firm directly and to each of the non-lawyer members indirectly. In other words, the lawyers each have a duty of loyalty to their clients, and the supervisory and partner lawyers in the firm have a broader duty to ensure that all lawyers and non-lawyers in the firm are following the conflicts rules of the legal profession. The rules of the profession do not directly apply to non-lawyer employees or independent contractors in the firm; they apply indirectly by reason of the partners and supervisory lawyers requiring non-lawyers to follow the standards of the profession as a condition of employment. Thus, if a law firm hired a marketing specialist in European Union trade, the firm would need to ensure that this employee followed the conflicts-of-interest rules. All matters brought into the firm, whether involving primarily the services of lawyers or non-lawyers, would need to be handled according to the rules of the profession.

Under Model Rule 5.7, the "ancillary business" model, the application of the conflicts rules is more complicated. By definition, lawyers in a law firm have a financial interest in an ancillary business and because of this interest they will need to examine whether their ownership in the ancillary business does in fact create a conflict with the interests of prospective or current clients. Model Rule 5.7,
however, gives lawyers a choice as to whether ancillary services will be
provided along with legal services, or will be provided separately and
distinctly from legal services. If the law firm does not wish to have the
rules of the legal profession apply to ancillary business services, the
firm must keep the ancillary services separate and distinct from the
legal services, and must inform the client that the protections of the
attorney-client relationship do not apply.\textsuperscript{463} Note that this analysis
does not relax the application of the conflicts rules; the ancillary-
business client remains a client of the law firm and the law firm must
ensure that conflicting interests, regardless of the source, do not
materially limit the representation of the client.\textsuperscript{464}

In the "command and control" model, D.C. Rule 5.4 answers the
question whether the conflicts-of-interest rules apply to a non-
lawyer's activities. Because this rule contemplates law firms that
solely deliver legal services to clients, all lawyers and non-lawyers
must follow the rules of the legal profession. This means that all of
the conflicts-of-interest provisions, including the imputation rules,
apply in full force to all of the firm's matters (including those
performed by the non-lawyer partners in the firm).

In the "contract" model, each entity applies the rules of its
respective profession. Thus, for example, in the case of a contract
MDP involving a law firm and an accounting firm, the law firm is
bound by legal ethics rules, and the accounting firm is bound by the
ethics rules of the accounting profession. When a prospective client
approaches one of the separate entities, that entity will examine the
representation to determine whether a conflict of interest precludes
taking on the client matter. If the law firm is approached to begin
multidisciplinary services, it will first run a conflicts check. If a
disqualifying conflict exists, the law firm would have to decline the
representation and refer the prospective client to the accounting firm;
that accounting firm could retain another law firm to assist it in
providing the integrated multidisciplinary services. If no conflict
arises, the law firm would inform the accounting firm about the
prospective case. The accounting firm would then apply its own
conflicts rules and system for conflicts checks. If the accounting firm
is disqualified, the law firm could find another co-participant to

\textsuperscript{463} See Model Rules Rule 5.7(a)(2).

\textsuperscript{464} For example, suppose that a law firm represents a married couple in a wills
and estate representation and the law firm owns an insurance company as an ancillary
business. If the insurance company proposes the sale of a single-payment policy to
fund estate taxes, the law firm would have a conflict of interest, regardless of whether
the ancillary business activity were integrated with the legal services or separate and
distinct. Model Rule 1.7(b) would need to be satisfied for the law firm to continue the
legal representation.
handle the non-legal services in the matter. If the conflict arises between a new client of the MDP and an existing client of the MDP, however, the MDP may be disqualified from representing the new client and neither professional firm participating in the MDP may accept the representation by finding another partner to represent the new client.

In the "joint venture" model, the conflicts analysis should be similar to that of "contract" model. The professional entities are kept separate. They form a contractual or entity joint venture to provide multidisciplinary services to clients. If a potential new client of the MDP has a conflict with an existing client of the MDP, then both entities would be precluded from representing the new client. If, however, the conflict arises only with respect to an existing client from one of the separate entities, the other entity could possibly pursue the representation with another co-venturer. A complete analysis of the problem would require more information about the facts and type of representation, but the imputation from one entity of a joint venture MDP to another should not be automatic.

In applying the conflicts-of-interest rules to the single entity MDP, imputation of conflicts of interest becomes a key question for the viability of single entity MDPs. One important aspect of this issue is whether the lawyers in a single entity MDP should be required to test conflicts against all of the existing and former clients and matters of non-legal service providers in the MDP. The importance of the imputation issue depends upon the size of the MDP, the scope of services provided, and the extent to which the MDP represents competitors with ongoing matters. Large law firms with diverse practices and offices in different jurisdictions face similar problems.

If the current ethical rules regarding conflicts of interest were applied, without change, to the single entity MDP, the MDP would have to consider all of the present and former clients of all service providers in the MDP for purposes of determining whether a conflict exists for the legal department. This could have the effect of preventing many large organizations, including most large law firms and Big Five accounting firms, from fully participating in offering integrated multidisciplinary professional services. Accordingly, many

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465. A three-person MDP providing gerontological services is unlikely to encounter many present and former client-based conflicts of interest because of the imputation rule. A 300-person MDP offering estate and financial planning services in all 50 states similarly is not likely to have client-based conflicts of interests. However, a Big Five accounting firm or any large MDP with a litigation department is likely to have severe conflicts problems under a broad imputation rule.

466. See ABA Commission, 1999 Final Report, supra note 8: In connection with the delivery of legal services, all clients of an MDP should be treated as the lawyer's clients for purposes of conflicts of interest and imputation in the same manner as if the MDP were a law firm and all employees, partners, shareholders or the like were lawyers.
commentators have called upon the profession to implement concepts of screening or firewalls in the context of large law firms and single entity MDPs.\textsuperscript{467} Although a comprehensive analysis of this issue is beyond the scope of this Article, a careful reexamination of the imputation rules in the context of all large legal service organizations is in order. One leading commentator has criticized the scope of these rules, explaining that the:

geographic reach and substantive breadth of law practice today has, as a practical matter, outgrown the Model Rules. ... The notion of imputed knowledge of facts was developed during a time when law firms were small and self-contained, in one city or, at most, two cities in one state. We should not be governed by antiquated Rules.\textsuperscript{468}

The imputation rules may need to be revised to reflect the modern realities of legal practice conducted by large, multi-jurisdictional organizations operating in a global economy. For example, it may be necessary to allow a greater use of screening devices as a way of dealing with conflicts of interest. Although there are strong arguments to be made against permitting greater use of screening devices,\textsuperscript{469} the current ethical rules endorse the use of screening devices with respect to government lawyers, and this rule generally has been regarded as successful in practical application. Moreover, the American Law Institute's Restatement of the Law Governing Lawyers has endorsed screening as a method of avoiding imputation in the former client context, and when information is learned from a prospective client who ultimately hires another law firm.\textsuperscript{470} Also, as other commentators have noted, screening devices and firewalls are regularly used outside the legal profession to impede the flow of confidential information.\textsuperscript{471}

One important additional point is that whatever the profession decides to do with conflicts-of-interest rules for single entity MDPs must also apply to other large service organizations. The conflicts rules for all entities providing legal services should be consistent. Thus, if the conflicts rules are changed for single entity MDPs, they

\begin{footnotes}
\item[467] See, e.g., Fischel, MDPs, supra note 33, at 964-67; Reich, Vernick & Horn, supra note 213.
\item[468] Written Remarks of Tucker, supra note 393.
\item[469] See, e.g., Fox, Ruminations on MDPs, supra note 288, at 1110-11.
\item[471] Screening devices have been implemented in the securities industry by legislation and the Securities and Exchange Commission. See Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. 100-704, amendment to 15 U.S.C. 78 (1934); see generally Marvin A. Freedland, National Banks as Service Providers to Employee Benefit Plans, 113 Banking L.J. 994 (1996). Additionally, other regulatory systems in the financial world have considered the implementation of screening devices to limit conflicts of interest.
\end{footnotes}
must be changed in a similar way for law firms. Such consistency is important to maintain competition among different types of legal service providers and to treat all legal service providers with fairness.

Finally, a serious conflicts-of-interest concern and a potential threat to the attorney-client privilege results from a non-lawyer supervisor's conflicting professional obligations, such as an accountant's obligation in its auditing function to ensure that its clients publicly disclose material information even of a negative nature. The SEC's position is that an accounting firm that undertakes audits for SEC-registered companies is precluded from providing auditing services for a registrant client for which the auditing firm also provided legal services. In the SEC's view, an auditing firm's independence would

472. One commentator argues that one benefit of allowing a lawyer to practice law in an MDP is that lawyers in MDPs may be more likely to whistleblow to audit committees and independent directors on corporate executives who violate the law. See generally Peter C. Kostant, Paradigm Regained: How Competition from Accounting Firms May Help Corporate Attorneys to Recapture the Ethical High Ground, 20 Pace L. Rev. 43 (1999); Peter C. Kostant, Breeding Better Watchdogs: Multidisciplinary Partnerships in Corporate Legal Practice, 84 Minn. L. Rev. 1213 (2000). Another commentator suggests that corporate clients should waive attorney-client secrecy in order to make it easier for corporate lawyers to disclose corporate client fraud. See Richard W. Painter, Lawyers' Rules, Auditors' Rules and the Psychology of Concealment, 84 Minn. L. Rev. 1399 (2000). These suggestions and proposals require changes in the substantive law of confidentiality in the legal profession. See also Fischel, MDPs, supra note 33, at 964 (arguing that clients may choose to hire the same MDP to provide both legal and auditing services because they have nothing to hide and they may allow the lawyers to waive client confidentiality so as to communicate to the world that they have nothing to hide). Whether the advent of MDPs has an effect on the modification of these rules is unclear; the debate on MDPs should not, however, depend on such events.

473. See, e.g., Quinn, Preventive Regulation, supra note 187, at 344-45. The National Conference of Lawyers and Certified Public Accountants addresses the concern that an accountant may have an obligation to disclose information that a lawyer would be obligated to keep confidential. The National Conference had two responses to the issue. First, it argued that the confidentiality issues that lawyers would face in MDPs are not different from the confidentiality issues lawyers face today when advising their clients to disclose certain financial information. The National Conference reasoned that a lawyer has a duty to advise a client to disclose information pursuant to SEC regulations. If the lawyer became aware that a client had not complied with the required disclosure, the lawyer could not continue representation of the client in the matter and would have to withdraw. Second, the National Conference indicated that clients concerned with confidentiality issues can decide for themselves whether they want to use the same firm, offering both legal and auditing services, or whether to use separate firms. See Written Remarks of Treiger & Lipton, supra note 385.

be impaired if the firm provides legal as well as auditing services to a registered company.\textsuperscript{475} The SEC's position on this issue appropriately recognizes that an auditor's obligations of disclosure and independence from the client and a lawyer's obligations of confidentiality and loyalty to the client are fundamentally incompatible. The private attorney, who acts as a client's confidential and loyal adviser-advocate, has a quite different role than an accountant serving as an independent auditor, who must be totally independent of the client and owes allegiance to the corporation's shareholders, creditors and the investing public.\textsuperscript{476} This problem can

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\textsuperscript{476} In \textit{United States v. Arthur Young & Co.}, 465 U.S. 805 (1984), the Supreme Court held that an accountant's tax accrual workpapers prepared in the course of regular financial audits of a corporation are not protected from disclosure to an IRS summons by any accountant-client or work-product privilege. The Court stated:

The Hickman work-product doctrine was founded upon the private
best be remedied by providing that an MDP may not perform auditing services for a client for which it also provides legal services. Accordingly, if this proposal were adopted, an MDP would be required to choose whether it wanted to provide auditing services or legal services for a particular client—it could not do both for the same client without subjecting itself to professional discipline and enforcement action by the SEC.

Serious concerns about conflicts of interest and inconsistent professional obligations are also raised by the accounting firms providing audit clients with management consulting services and the attorney's role as the client's confidential adviser and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a public responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations.

Id. at 817-18 (emphasis in original).

477. Dean Fischel takes a contrary view and argues that there is no good reason to prohibit accounting firms from providing management consulting or legal services for their audit clients. See Fischel, MDPs, supra note 33, at 961-64. He argues that the regulators of MDPs should defer to the market and let clients determine whether it makes sense to hire different firms or the same firm to do audit and legal work. See id. In his view, some clients will choose to hire different firms to do audit services and legal services so as to avoid any inference that the auditor's independence was compromised. Other clients will purchase both auditing and legal services from a single firm in order to realize the benefits of obtaining different types of services from an integrated firm. See id. In effect, Dean Fischel views the SEC's concerns to be focused largely on the appearance that an auditor's independence could be compromised by the fact that the auditing firm provides other services to the audit client, rather than focusing on whether the auditor's independence is compromised in fact. See id. Dean Fischel believes that this kind of concern is best regulated by market forces. See id.

478. Some accountants have indicated that this restriction would be acceptable to them, if necessary to overcome regulatory hurdles to formation of MDPs involving lawyers and accountants. As noted by one author:

Some accountants make the point that even outright prohibition of the provision of legal services to auditing clients would be acceptable to them, given the fact that each of the Big Five firms necessarily would be prohibited from providing legal services to a maximum average of only twenty percent of possible publicly held clients, and that their Big Five competition for legal work from the other eighty percent of the market would consist of only three other firms, the fourth conflicted out by the audit relationship.


479. The SEC has been pressuring Big Five accounting firms to cease providing consulting services to their audit clients. Partly in response to this pressure,
selling them aggressive tax planning products. In both cases, the accounting firms’ independence in the audit area may be compromised by their performance of these other services for their audit clients. These conflicts concerns exacerbate the tensions between the accounting firms’ role as independent auditor and its role as multidisciplinary service provider, and provide further support for the idea that accounting firms should not be allowed to provide non-audit services to their audit clients.

Large accounting firms believe that these problems could instead be solved by a less drastic measure—namely, by maintaining effective firewalls or screening devices between the firm’s audit employees and the firm’s other employees providing law or other non-audit services to the clients. However, given the crucial role of the independent audit function in our society, and the need for the public to have confidence in the autonomy of accountants when they are performing their audit function, a screening approach to solving these problems is inadequate.

Some commentators have suggested that the Big Five firms divest themselves completely from auditing if they wish to provide legal services or other professional services to clients (even management consulting services). This view assumes that if an accounting firm drafted a legal structure for a non-audit client, and later audited another client with a similar structure, the accounting firm’s fear of injuring the non-audit client would discourage it from characterizing

PricewaterhouseCoopers announced plans to spin off its consulting business, and Ernst & Young announced plans to sell its consulting practice to Cap Gemini, a French company. See Elizabeth MacDonald, PricewaterhouseCoopers Nears Plan for Restructuring Involving Split or Sale, Wall St. J., Feb. 16, 2000, at C11; Elizabeth MacDonald, PricewaterhouseCoopers Will Divide Into Two or More Parts, Under Pressure, Wall St. J., Feb. 18, 2000, at B8; Anne Newman, A Big Five Firm Gets a Lot Smaller, Bus. Week, Mar. 13, 2000, at 46; John Tagliabue, Cap Gemini to Acquire Ernst & Young’s Consulting Business, N.Y. Times, Mar. 1, 2000, at C1; see generally U.S. General Accounting Office, The Accounting Profession—Major Issues: Progress and Concerns 41-42 (Sept. 1996) (concluding that none of the studies on the issue of accountant independence “reported any conclusive evidence of diminished audit quality or harm to the public interest, or any actual impairment of auditor independence, as a consequence of public accounting firms providing advisory or consulting services to their audit clients”).

480. The SEC also is reportedly examining whether accounting firms are violating conflict-of-interest rules by selling aggressive tax planning products to their audit clients. See Sheryl Stratton, SEC Looks at the Sale of Aggressive Products to Audit Clients, 87 Tax Notes 13 (2000). The SEC is particularly concerned about those situations in which the accounting firm provides those aggressive tax products on a contingent fee basis (including, in the SEC’s view, so-called “value-based” fees). See id.

481. See Fox, Preserving Professional Independence, supra note 126, at 977 (examining the Big Five accounting firm practice of steering audit clients to the other businesses of the firm).

482. See, e.g., Needham, supra note 126, at 1318-23 (stating that auditing services and other professional services must be done by different entities); Statement of Wolfman, supra note 28 (same).
the structure as "risky" or "unlikely to prevail" in the audit client's financial statements. Such positional conflicts, however, should not disqualify an MDP from providing auditing services to clients that do not receive legal or other non-audit professional services from the firm. The conflict is simply too attenuated to adopt a per se ban on auditing firms doing any other type of professional work, even if the other work is for non-audit clients of the firm. Such a ban would downgrade the quality of the auditing work performed because the "best and brightest" in the accounting world would not want to work for firms with such a limited mission, even though that mission is a very important one to our society. Such a complete ban would be justified only if there were strong empirical evidence that non-auditing work performed for non-audit clients of an accounting firm in fact undermined the independence of the firm when doing audit work for other clients. The ability of the accounting profession to provide high-quality audit services is too important to the functioning of the financial markets and economic system to risk undermining that ability by adopting an overly broad conflicts rule.

4. Rendering Competent Advice

Some of the critics of MDPs argue that non-law professionals are likely to provide less competent services to their clients. In particular, some point out that the Big Five accounting firms have been active in the marketing of "products" to their clients. "Products" refers to financial investments, tax shelter programs, and similar legal devices that an MDP might market and sell to multiple clients with similar needs. The Big Five apparently have been very successful in providing their clients with these sorts of products. Some commentators have expressed concerns about both the quality and legitimacy of the products as well as some of the tactics used in promoting them.

First, the Big Five apparently have sought to cloak their products with the protections of intellectual property law. They have been treating the products as trade secrets, and have asked prospective clients to sign non-disclosure agreements. This practice should not be cause for concern. Whether the law of intellectual property will ultimately offer legal protection to these products of professional services is still an open question. Nonetheless, the ethical rules of the

483. One concern here is that auditing services may not be sufficiently profitable to stand alone and to continue to attract talented accountants to firms that do only that type of work.
484. Similarly, there is no good reason for prohibiting accounting firms who do auditing work for SEC registrants from providing management consulting or other professional services to non-audit clients. Legitimate concerns of the SEC and others about independence in the audit function do not require a complete ban on all management consulting work by accounting firms.
legal profession do not currently and should not in the future preclude a lawyer from seeking to obtain such protection, regardless of whether the lawyer works in a law firm, MDP, or some other type of organization.

Second, some have argued that it is inappropriate for a firm to charge subsequent purchasers of a product the same price that it charged the first purchaser, given that substantially less time was spent on behalf of later purchasers. Again, however, no ethics rules regarding fee arrangements prohibit this practice. Many law firms use such billing arrangements on some fee matters—sometimes calling it value billing, other times a contingency fee. The only restrictions are that a lawyer cannot misrepresent the number of hours spent on a matter or the basis for calculating the fee. The overall fee must be “reasonable” within the meaning of Model Rule 1.5 or not “clearly excessive” within the meaning of DR 2-106(A) of the Model Code, as the case may be. Lawyers must sell such services at a flat rate or contingent fee. As noted above, however, value billing in connection with the selling of aggressive tax products raises serious issues of conflict of interest, providing additional support for the idea that accounting firms should be precluded from providing non-audit professional services to their audit clients.485

Third, Professor Bernard Wolfman has suggested that the sale of such mass produced products may reflect a lack of competence.486 Professor Wolfman assumes that a firm that sells a product to a client will not tailor it to the specific and individual needs of the client. Given the prevalence of computer generated work products, this is a danger for all professionals. The law firm, accounting firm, or MDP that fails to take into account its clients’ individual needs will undoubtedly violate its duty of care.487 Moreover, the use of “stock products,” as Professor Wolfman calls them,488 is a tried and true practice in the legal profession. Most lawyers use briefs, pleadings, or contracts from prior client matters as the starting base when drafting new ones. Similarly, many lawyers use form books or the computerized equivalent as the starting point in developing their own litigation and business documents. In fact, the major difference between lawyers and accountants in this stock practice is that lawyers are less effective marketers of their services. Indeed, the lawyer with the largest stock bag is often the most valuable to his clients, given his experience in handling similar matters for other clients. Because this problem is not unique to the accounting profession, this should not be a special concern for the regulation of MDPs.

485. See supra text accompanying notes 473-80.
486. See Written Remarks of Wolfman, supra note 28.
487. This duty is derived from Model Rules Rule 1.1 (competence).
488. See Written Remarks of Wolfman, supra note 28.
Finally, some have argued that the aggressiveness of Big Five accounting firms in marketing corporate tax shelter devices of questionable validity is another competence concern that underlies the opposition to MDPs. Undoubtedly, some of these products are of questionable validity. Professionals who promote them should be subject to discipline, and clients who use them to substantially reduce their tax liability should be subject to serious monetary penalties. It is not only accounting firms, however, that are marketing these devices; prominent lawyers working in major law firms have also been involved in creating abusive tax shelters. In any event, it is not the type of firm in which tax professionals practice that gives rise to this problem, but rather, the ethical perspectives (or lack thereof) of the tax professional involved as well as the imperfections in the tax system that provide the grist for the mill of these tax shelters. Thus, the corporate tax shelter problem is a serious one for the federal tax system and for the legal and accounting professions, but the solution lies not in impeding the formation of MDPs.

5. Control and Authorized Participants in an MDP

Under the guise of protecting the core values of the legal profession, critics raise three issues about MDPs: (1) the necessity of lawyer control over MDPs; (2) the ownership of MDPs by passive investors, i.e., owners who invest capital but do not provide services for the firm; and (3) the types of service providers permitted to join lawyers in providing integrated services.

The issue of lawyer control is derived from the requirement of professional independence from the other professions. Essentially, lawyers must maintain independence so that they have the freedom to exercise professional judgment in the representation of clients. The ABA Commission’s 2000 Final Report and many state proposals require that all MDPs must be controlled by lawyers. The extent of lawyer control varies according to the proposal. Some authorities look for functional control over the practice of law and others look to a specific percentage benchmark of ownership and voting control.489

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489. For example, Pennsylvania’s proposal (which was not adopted by the membership of the bar) provided that lawyers may share legal fees with non-lawyers, that they may form partnerships and other arrangements with non-lawyers, and that they may practice with non-lawyers in an entity delivering legal services as long as the following requirements are met:

A. No more than forty (40%) percent of the ownership of such partnership, professional corporation or other association or arrangement (collectively, the “MDP Entity”) shall be held by non-lawyers.

B. The organic law governing the internal affairs of the MDP entity shall guarantee that ultimate managerial control shall remain with the lawyer partners, shareholders or members of the same. Each non-lawyer partner, shareholder, member or employee of the MDP Entity shall be bound by all Rules of Professional Conduct applicable to the lawyer partners,
The control requirement, as stated in the ABA Commission's 2000 Report, is properly designed to protect independence in the delivery of legal services without unduly constraining the formation of the MDP entity. The control proposals tied to specified percentages of lawyer ownership are arbitrary and do not guarantee that non-lawyers will not dominate an MDP if they happen to bring in most of the profits or control the majority of the clients. The functional control as articulated by the ABA Commission is directed at the problem of non-lawyer interference and is most likely to achieve its goal of preserving this core value of the profession.

The ABA Commission articulated its position as follows: "[l]awyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services . . . provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services." The text of the Report elaborated significantly upon the "control and authority" language:

The "control and authority" . . . can be satisfied in a variety of ways, depending on the practice setting. Percentage of ownership may be a factor in certain circumstances. Some members of the Commission would have added a specific requirement in the Recommendation that there be a lawyer majority ownership of an MDP . . . and that a primary purpose of the MDP be a delivery of legal services.

In a small size MDP . . . the lawyer member might or might not hold a majority ownership interest. The partnership or shareholder agreement might specifically affirm that decisions relating to the provision of legal services to the MDP's clients lie exclusively in the lawyer's province. Neither the percentage of ownership interest nor any particular wording in the partnership or shareholder agreement will conclusively determine either control or authority. The control and authority principle looks to substance not form.

shareholders, members and employees.
C. All Rules of Professional Conduct that apply to a law firm shall also apply to an MDP Entity.
D. The lawyer partners, shareholders, or members of the MDP Entity shall assume educational and supervisory responsibility to assure the compliance by non-lawyer partners, shareholders, members, and employees of the MDP Entity with all Rules of Professional Conduct and, as such, the lawyer partners, shareholders and members shall be subject to discipline for a breach of any Rule of Professional Conduct by a non-lawyer or by the MDP Entity.


491. ABA Commission, 2000 Final Report, supra note 19 (referring to the effect of the "control and authority" principle on the structure of an MDP).
The facts and circumstances approach to control focuses on whether lawyers are in control of the delivery of legal services and not whether they are in control of the MDP. Such a requirement is consistent with the important principle that lawyers should remain in control of the delivery of legal services regardless of the type of organization in which those services may be offered.

The state bars should consider adopting the flexible "control and authority" position advocated by the ABA Commission. Under an approach that requires majority ownership by lawyers, only MDPs primarily devoted to offering non-legal services in conjunction with legal services and seeking to preserve application of the attorney-client privilege would thrive. The requirement that all non-lawyers follow the rules of legal ethics (even with respect to non-legal services) eliminates many MDPs in which the client chooses primarily a non-legal service for which a lawyer performs minor legal services. Corporate clients would seek to preserve the attorney-client privilege for non-legal services that are incident to the delivery of legal services; thus, the proposed Pennsylvania rule would accommodate clients seeking this type of multidisciplinary service. Where a primarily non-law entity seeks to hire a lawyer for a portion of the services delivered to a client, however, the ownership limit, the control requirement, and the requirement that all non-lawyers follow the legal ethics rules would discourage the formation of such an arrangement.

In the case of non-lawyer control of MDPs, there is heightened concern that laypersons on the board of directors or in management will seek confidential client information in order to assist them in determining whether the profit objectives of the organization are being met. This concern, however, can be dealt with adequately without requiring lawyers to hold majority ownership of the MDP. Model Rule 5.3 would govern such a situation, and would prevent lawyers working in the MDP from sharing client information with non-lawyer managers or directors who are not assisting in the delivery of legal services. Moreover, following the language of the version of Model Rule 5.4 proposed by the Kutak Commission, one could require lawyers joining MDPs controlled by non-lawyers to sign written employment contracts assuring protection of confidential information.492

A related question concerning lawyer independence involves whether the bar should allow non-lawyers to hold passive ownership interests in a legal practice, regardless of whether that legal practice is conducted in an MDP or a traditional law firm. The concern is that where the non-lawyer is not providing services to clients, the non-lawyer conceivably could be less sensitive to the lawyer's obligation to exercise independent judgment for the client free from the

492. See 2 Hazard & Hodes, supra note 2, § 5.4:102 n.1.
interference of non-professionals, particularly where doing so will not advance the economic interests of the firm.493 In other words, non-lawyer ownership "may give law firms perverse incentives to skimp on quality."494 This potential difficulty may be reduced somewhat if ownership of the multidisciplinary firm is limited to individuals providing client services, who also will have much to lose in terms of their business reputations if poor-quality services are provided or professional standards are violated to the detriment of the client.495

Notwithstanding these concerns, however, continuing the outright ban on passive lay ownership of legal services organizations, including MDPs, would be a mistake for three principal reasons. First, the ban on passive non-lawyer ownership is based on a faulty assumption—namely, that non-lawyer passive owners will force the legal service organization to reduce the quality of the services provided to the client and ignore the lawyer-participants' professional obligations in order to reduce costs and maximize profits. As discussed earlier in this Article, the discipline of the market, as well as various legal constraints (including concerns about tort and breach of contract liability), will create an incentive for non-lawyer owners to ensure that an MDP delivers high-quality services and that lawyer-owners observe their professional obligations.496 If not, the clients of the MDP will go to others for their services, and the MDP's profits will suffer.

Second, less drastic alternatives to a complete ban on passive equity ownership in MDPs are available to deal with the problem of lawyer

493. See id. § 5.4:102; Quinn, Preventive Regulation, supra note 187, at 339-41; Stuart P. Werling, Written Response to the ABA Commission on Multidisciplinary Practice (1999) (available at <http://www.abanet.org/cpr/werling.html>) (stating that the interest in pecuniary gain will override a lawyer's independent judgment if a law firm is owned by non-lawyers); Bernard Wolfman, Comment on Report and Recommendations of ABA Commission on Multidisciplinary Practice (July 21, 1999) (available at <http://www.abanet.org/cpr/wolfman3.html>) ("We know from common experience that the influence of those on high, of those with the controlling financial interest, will find its way to the bottom, like the water on a leaky roof that inevitably reaches and fills the basement.").

494. Ribstein, supra note 198, at 1721 (discussing a similar problem in the health care area where "HMOs, whose employees are hired by capital contributors, have incentives to compromise patient interests by avoiding high-cost treatment such as referrals to specialists"). Professor Ribstein distinguishes the non-physician owned HMO from the non-lawyer owned law firm by pointing out that "[c]ombining medical services and insurance exacerbates the misincentive problem in HMOs by causing the firm rather than the patient to bear the extra costs of high-quality medical care." Id. at 1721-22. Dean Daniel Fischel responds to the argument against passive ownership of MDPs by non-lawyers by pointing out that purchasers of integrated financial services from MDPs, unlike many patients in HMOs, are "typically sophisticated repeat players sensitive to both the quality and cost of services provided," and will go to other service providers if the MDP does not fulfill their needs. Fischel, MDPs, supra note 33, at 958.

495. Proponents of banning passive lay ownership of legal service organizations, including MDPs, generally do not intend any change in the ethical rules that would eliminate prepaid legal services plans.

496. See supra text accompanying notes 312-14.
independence. Concerns about potential impairment of the lawyer's independent professional judgment also arise in situations outside the context of MDPs where an organization pays the lawyer's fee for services rendered to an individual, such as in indemnity insurance situations. 497 In fact, in today's intensely competitive legal service organization market, there are serious concerns that the pressure on all participants in the firm to increase profits comes at the expense of ignoring or downplaying various core values of the profession, including lawyer independence. This is hardly a problem limited to passive, non-lawyer ownership of MDPs. These concerns are addressed in other provisions of the ethical rules. For example, the conflicts-of-interest provisions in Model Rule 1.7 require that a lawyer be faithful to the client's interests, even if they conflict with the lawyer's own interests or the interests of the lawyer's employer: 498 Model Rule 1.8(f) cautions that a lawyer must remain loyal to his or her client's interests even if a third party pays the lawyer's bills. 499 In addition, under the Kutak Commission's proposed version of Model Rule 5.4, one could obtain added protection on the lawyer independence issue by requiring that a lawyer working in an MDP managed by non-lawyers receive written assurances from the MDP that his or her professional judgment will not be impaired. 500

Third, and most importantly, implementing a ban on passive investment in MDPs and other legal service organizations effectively prevents MDPs from raising capital through public and private passive equity investment. MDPs need such capital for expansion, acquisition of other professional service firms, investment in new technologies, investment in new lawyer and non-lawyer employees, and myriad other purposes. 501 Stated differently, a ban on passive investment in

497. See 2 Hazard & Hodes, supra note 2, § 5.4:102.
498. See Model Rules Rule 1.7.
499. See id. Rule 1.8(f).
500. See 2 Hazard & Hodes, supra note 2, § 5.4:102.
501. See Adams & Matheson, Law Firms on the Big Board?, supra note 75, at 30-37 (advocating that prohibitions against non-lawyer investment and participation in law firms be removed); Matheson & Adams, Reflecting on the ABA Commission's Recommendations, supra note 126, at 1301 (stating that "[a]llowing law firms access to the equity markets—that is, investment by nonlawyer—is a concomitant of sanctioning MDPs and could result in law firms that are optimally capitalized and, thus, more efficient"); see also Andrews, supra note 71, at 629-31 (tracing the history of the rules prohibiting partnerships of lawyers and non-lawyers and supporting a change in those rules to allow such partnerships; also suggesting that less restrictive alternatives to a complete ban on law firms selling shares to non-lawyers exist, which would remedy the principal objections to such selling); Huber, supra note 232, at 580 (ban on non-lawyer ownership of law firms works to the detriment of new lawyers starting up their own practices by forcing them to use debt, rather than equity, financing, which is a particularly serious problem "when interest rates are high or loan capital is scarce"). For another leading commentator's view that MDPs should be allowed to sell ownership interests to passive investors, see Fischel, MDPs, supra note 33, at 967-69. For a view that Model Rule 5.4 should be modified to allow minority passive ownership of law firms by non-lawyers, see Bernard Sharfman, Note,
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MDPs puts such organizations at a competitive disadvantage by preventing MDPs from having access to a capital source that has been crucial to the development of most other types of business in our modern economy.\(^{502}\) The ban forces MDPs to use a less efficient, "second-best capital structure."\(^{503}\) In the end, concerns about the negative effects of passive ownership in MDPs on the independence of lawyers working in MDPs are overstated and the benefits of allowing such passive investment are significant enough that a ban on passive investment in MDPs cannot be logically maintained.\(^{504}\)

The final issue relating to participants in an MDP concerns whether there should be any restrictions on the type of service providers who can be a participant in an MDP. Some authorities seek to limit participants in an MDP to what one might call "non-legal professionals." Some commentators have suggested that, absent such a limitation, a tow truck driver, undertaker, beautician, or the like could enter into practice with an attorney.\(^505\) There are many lawyers...

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502. See Adams & Matheson, Law Firms on the Big Board?, supra note 75, at 40.
503. Ribstein, supra note 198, at 1722. Professor Ribstein points out that the ban on passive ownership of legal service organizations raises five economic efficiency concerns. First, the ban forces law firms "to bundle capital raising and legal services, thereby raising the cost of capital by losing the advantage of specialization of skills and financing." Id. Second, the ban "exacerbates the problem of lawyer risk aversion" by "preventing lawyers from transferring risks to outside owners with diversified portfolios." Id. at 1723. Third, the ban also may partly explain why law firms use "promotion-to-partner 'tournaments'... in which winning associates get a limited number of big partnership prizes, as a way of providing a deferred reward to motivate associates." Id. at 1723-24. Fourth, the ban limits the ability of legal service organizations "to design compensation that is calibrated to reward agency cost reduction." Id. at 1724-25. Finally, the ban creates incentives for the managers and owners of the legal service organization "to maximize customers' use of legal services by either performing excessive amounts of legal services or under-recommending such related nonlegal services as accounting and finance." Id. at 1725.
504. Professors Edward Adams and John Matheson argue that allowing MDPs and law firms to raise capital in equity markets will facilitate the financing of large and financially risky contingency fee cases, thus providing access to the legal system for plaintiffs who might otherwise go without representation. See Matheson & Adams, Reflecting on the ABA Commission's Recommendations, supra note 126, at 1301. Thus, they see this factor as one that supports lifting the ban on passive ownership of interests in MDPs and law firms.
505. See Oral Testimony of DiPiazza, supra note 428 (arguing that "there are..."
in the bar who find these prospects distasteful, and are fearful that such arrangements would demean the whole profession. Therefore, a temptation exists to craft a bright line rule that would clearly preclude these types of partnerships. Two obvious approaches are the following: (1) a rule limiting the MDP to non-lawyer professionals; and (2) the rule adopted in some states by the accounting profession limiting the practice to individuals who offered services that were not "incompatible" with the practice of law. The ABA Commission's 2000 Final Report adopts the view that an MDP may only be formed with "members of recognized professions or other disciplines that are governed by ethical standards." 506

Both of these approaches suffer from a serious definitional flaw. The term "professional" is itself ambiguous. Does an economist, an appraiser, or an investment banker with an MBA but no accounting or law degree qualify? What about an expert software designer who never graduated from college? Likewise, what services are "compatible" with the practice of law? The services offered by a private investigator may be quite compatible with the practice of a criminal lawyer, but are they compatible with the practice of a family law attorney? Undoubtedly, some who practice in the family law area would argue that a private investigator's services are essential to their work in a contested divorce situation involving allegations of marital infidelity. Moreover, who is to be the arbiter of these questions? If the state bars are to decide this issue, one can safely predict that there will be numerous, inconsistent answers to these questions that will create uncertainty concerning the validity of multidisciplinary practice arrangements involving partners who are neither lawyers nor accountants. Further, merely attempting to respond to these

compatible and incompatible professions and that most people know them when they see them"); Jay G. Foonberg, Oral Testimony Before the ABA Commission on Multidisciplinary Practice (Feb. 6, 1999) (available at <http://www.abanet.org/cpr/Foonberg.html>) (stating that tow truck drivers could be included under the present definition of MDPs); Laurel S. Terry, Remarks About the Recommendations and Report of the ABA Commission on MDPs (Mar. 12, 1999) (available at <http://www.abanet.org/cpr/terryb6.html>) (Forms of Association Item A lists the testimony of witnesses who address the issue of allowing particular individuals to join MDPs).

506. ABA Commission, 2000 Final Report, supra note 19. The ABA Commission declined to provide a specific list or other definition of what professionals may qualify. It did state, however, that such a list could include "accountants, certified financial planners, engineers, psychologists, psychiatric social workers, and real estate brokers." Id. Note that South Carolina has in fact created a list of authorized professionals. See Task Force on Multidisciplinary Practice, Recommendation to the South Carolina Bar House of Delegates (2000). This list includes, architects, CPAs, certified financial planners, enrolled agents, land planners, licensed social workers, licensed insurance agents, physicians, professional engineers, registered investment advisors, registered land surveyors, registered nurses, stock brokers and investment advisers registered with the NASD or SEC, and other members of licensed professions. See id.
questions is fraught with peril, given that it puts the bar in the uncomfortable position of deciding with whom a lawyer should associate. Although the laundry list approach does have some appeal, it would definitely be under-inclusive of the types of individuals who would be able to provide valuable services to the MDP.

It is useful, perhaps, to take a step back and analyze whether the limits on who may participate as partners in an MDP serve any valuable function. What bothers the legal profession about a lawyer partnering with a tow truck driver? The concern is that the tow truck driver will steer clients to her lawyer partner. But the ethical rules already forbid such conduct, and so the lawyer who sought to use his tow truck driver partner for such purposes would find himself forestalled by his professional obligations. The arrangements that the profession most fears, and that are held out as generating the need for a prophylactic rule, would in all likelihood not occur very often. A lawyer will only wish to enter into a partnership with someone who can add value to her practice.

E. Enforcing the Legal Profession's Rules in an MDP

When a state bar decides to accommodate multidisciplinary practice, the issue will arise whether the bar should have a special regulatory structure to regulate MDPs. The 1999 Final Report of the ABA Commission proposed that state bars impose a list of special requirements on MDPs that are not controlled by lawyers. The requirements were implemented by placing statements in a general certification document that non-lawyer controlled MDPs would need to submit each year to the regulatory authority in each state. In such a certification, the chief executive officer and board of directors of the MDP would need to sign a document attesting to the following conditions: (1) they agreed not to interfere directly or indirectly with the lawyers' professional judgment; (2) they would agree to create and maintain procedures to protect the exercise of independent judgment by the lawyers in the MDP; (3) they would honor the legal

507. See Model Rules Rules 7.2, 7.3, 8.4.

508. If a tow truck driver were made a partner in an entity with a lawyer, this would tend to advertise the violation to society and thus make it easier to ban.

509. One commentator argues that society should view the integration of the different professions into a "professional services" model similar to a healthcare network of physicians and other professionals. See Greg Billhartz, Note, Can't We All Just Get Along? Competing for Client Confidences: The Integration of the Accounting and Legal Professions, 17 St. Louis U. Pub. L. Rev. 427 (1998). Each profession is responsible for following its own rules of conduct; the entire system, however, is responsible for ensuring that clients receive competent services.


511. The recommendation actually refers to the highest court in the state. See id. In most integrated bar states the court delegates its power to regulate lawyers to a mandatory state bar. See id.
profession's obligation to maintain client trust funds; (4) they would require that the lawyers followed the rules of professional conduct in their service of the MDP's clients; and (5) they would honor the profession's commitment to pro bono services.\textsuperscript{512} The ABA Commission imposed the certification requirement on an annual basis and required each MDP to provide such information to its lawyers and to the regulatory authorities (including the courts) in the states in which the MDP operated.\textsuperscript{513} It also required non-lawyer MDPs to submit to an administrative audit, determined by the regulatory authority in the jurisdiction, and to bear the cost of the administration of audits through an annual certification fee.\textsuperscript{514}

The justification for the special requirements for non-lawyer controlled MDPs lies in the belief that non-law practice potentially threatens the core values of the legal profession. Additionally, lawyer controlled MDPs are largely regulated by the state bars through individual regulation of lawyers in an MDP, and the requirement that partner and supervisory lawyers in an MDP ensure that the rules of professional conduct are observed.\textsuperscript{515} The ABA Commission believed, however, that it needed to target the non-lawyer controlled MDPs because, in those entities, the regulation of individual lawyers may not be sufficient to protect the MDP's clients. The Commission believed that these requirements did not impose an unreasonable burden on non-lawyer controlled MDPs.

As discussed earlier in this Article,\textsuperscript{516} the notion that lawyer or non-lawyer control is the touchstone to whether the core values of the legal profession will be observed is unjustifiable. Similarly, it does not make sense to assume that the profession's rules on supervision of non-lawyer activities will be honored in a lawyer controlled MDP.\textsuperscript{517} The very presence of non-lawyers delivering other professional services is the condition that poses the threat to the core values of the

\textsuperscript{512} See id. pts. 14(A)-(E).
\textsuperscript{513} See id. pts. 14(F), (G).
\textsuperscript{514} See id. pts. 14(H), (I).
\textsuperscript{515} See Model Rules Rules 5.1, 5.2, 5.3 (addressing the requirements of partner and supervisory lawyers over supervised lawyers and non-lawyers in a law firm).
\textsuperscript{516} See supra Part IV.D.5.
\textsuperscript{517} It is likely that the ABA Commission viewed these special requirements on non-lawyer controlled MDPs as a necessary compromise to ameliorate the concerns of the opponents of MDPs. The certification and audit requirements were believed to bring under the umbrella of lawyer regulation all entities with lawyers who were delivering legal services to clients in an otherwise non-law setting. Some believed that the audit and certification requirements would discourage Big Five accounting firms from offering legal services because they would not want to subject their entire enterprises to lawyer regulation. Others thought the cost of the certification would give an advantage to lawyer controlled MDPs. Thus, as a political compromise, the audit and certification requirements made sense; as a way to protect the core values, they were underinclusive, and economically inefficient.
profession, not whether the MDP is controlled by lawyers or non-lawyers.

Critics attacked the audit requirement because it applied only to non-lawyer controlled MDPs for which the annual cost was too burdensome, and because no evidence indicated that lawyers in non-lawyer controlled MDPs were more likely to violate the rules of ethics than lawyers in lawyer controlled MDPs or in law firms. Partly in response to the criticisms, and partly because it had decided to address the concerns about lawyer independence by requiring that legal services be controlled by lawyers, the ABA Commission removed the audit requirement from the ABA Commission’s 2000 Recommendations. The May 2000 recommendations suggested that if a state permits single entity MDPs, it should “weigh carefully the advantages and disadvantages of audit and regulatory procedures such as those the Commission previously proposed or as others may formulate.”

The ABA Commission’s guidance on regulatory structures does merit consideration by the states. The premise is that, when lawyers and non-lawyers cooperate in the delivery of both legal and non-legal services, the influence of the non-lawyer’s motives may undermine the core values of the legal profession. For example, assume a situation in which non-lawyers refer clients to lawyers in a relationship in which both will perform services and share in the legal fee. The non-lawyer may wish to have some role in shaping the delivery of the legal services to the client, and perhaps in influencing the decisions of the client. Such involvement of the non-lawyer could pose professional independence problems if the non-lawyer’s actions overrode or otherwise interfered with the judgment of the lawyer. Thus, the delivery of integrated services by lawyers and non-lawyers, regardless of the model, may justify some form of special regulatory procedures.

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518. See ABA Commission, 2000 Final Report, supra note 19 (“The Commission received a number of comments to the effect that the audit and certification procedures were unworkable. Accordingly, it decided not to include them in the current Recommendation.”).

519. Id. In a footnote, the Commission takes issue with the criticism that audit and certification requirements were mere “paperwork.” Id. at n.13. It stated:

The audit and certification procedures have a valuable education function. Moreover, the lawyers in MDPs and the MDPs’ chief executive officer and board of directors are most likely to appreciate the seriousness of any written undertakings that they must execute. Both the lawyers and the nonlawyers are not likely to disregard a statement that they are signing under penalty of perjury and submitting to the highest court of the state. Furthermore, they will be cognizant that these sworn-to statements might be used against the MDP in any action for malpractice or breach of fiduciary duty in which the lawyers’ exercise of independent professional judgment is questioned.

Id.
The most basic regulatory design issue is determining whether the state regulatory authorities would have jurisdiction over the activities of an MDP operating within its borders. It should be without controversy that any individual or entity that delivers legal services must subject itself to jurisdiction of the state bar regulatory structure. Such jurisdiction would normally extend primarily over the delivery of legal services, but in some circumstances, may extend to non-lawyer activities that jeopardize the core values of the profession.520 Such regulatory jurisdiction, and a requirement that MDPs consent to such jurisdiction, whether through certification or registration, is imperative to preserve the appropriate authority of state bar regulators over the practice of law.

Once the appropriate bar regulatory authorities have jurisdiction over the MDP, the question arises whether the legal ethics disciplinary system will be directed against individuals, the MDP as an entity, or both. Historically, discipline has been focused on individual lawyers and not law firms.521 In recent years, Professor Ted Schneyer's call for firm discipline522 has been recognized in New York and New Jersey.523 Although the ABA Commission's 1999 Final Report seemed to permit firm discipline of MDPs through the audit and certification requirement, the 2000 Final Report "continues the historic tradition of directly regulating only individual lawyers."524

The system of professional regulation of lawyers is designed to protect the public through a quasi-criminal system of professional licensure. Although historically the disciplinary system has focused on individual lawyers, the rules have brought many partners and supervisory lawyers into the disciplinary realm.525 In the light of the arguments presented by Professor Schneyer in favor of extending discipline to law firms,526 the rules relating to MDPs should extend professional regulation to MDPs as entities. State regulatory authorities should have the power to discipline MDPs for both punitive and rehabilitative reasons. An MDP that compromises the quality of legal services should face possible suspension or

520. For example, if a non-lawyer offered to use the non-lawyer's professional services to effectively become a runner for the lawyer's professional services, the bar should have jurisdiction over such activities.

521. See Wolfram, Legal Ethics, supra note 7, at 79-144 (examining professional discipline for lawyers).


525. See Model Rules Rules 5.1, 5.3.

526. Professor Schneyer argued that professional discipline of firms is needed because of the change in the nature of law practice and the fact that individual discipline is not effective for lawyers practicing in large law firms. See Schneyer, Professional Discipline, supra note 522, at 13-23.
disbarment. An MDP with lax internal controls ensuring that the rules of professional conduct are followed should face remedial discipline to improve the necessary internal checks and balances. After all, the accounting and investment banking professions have subjected their business entities to professional regulation, and many positive consequences have resulted from this system of entity regulation.\footnote{527}

In a disciplinary system in which both lawyers and their entities are subject to regulation, the further question arises whether special requirements should exist for MDPs. Obviously, the ABA Commission believed that non-lawyer controlled MDPs should subject themselves to the audit requirement and should bear the cost of the audit through an annual fee. Several state bars have implemented random audit programs for lawyer trust accounts,\footnote{528} and some states are beginning to consider more seriously calls for peer review.\footnote{529}

Such proposals are positive steps for the entire legal profession to consider if the core values of the profession are to be maintained.\footnote{530} Thus, the profession should turn to implementing "audits" or peer review of all entities that deliver legal services, including law firms.\footnote{531} When such steps are implemented profession-wide, the public interest should be better protected; limiting such audits to MDPs, however, is probably not justifiable.

**CONCLUSION**

The American legal profession has historically embraced the basic tenets of a profession: education, self-regulation, and a spirit of public service.\footnote{532} The ABA, as the self-designated body to lead the


531. For an examination of peer review in the medical profession, see Matthew J. Cate, *Comment, Physician Peer Review: Serving the Patient or the Physician?*, 20 J. Legal Med. 479 (1999) (explaining that peer review is mandatory in most states for physicians with hospital privileges). This commentary suggests that it is often difficult to find doctors who want to serve on peer review committees because those committees are often characterized as being filled with tattle tales. See id.

regulation of American lawyers, has continued to insist on the importance of professionalism and the maintenance of the core values of the legal profession. These efforts are all made in the spirit of protecting the public, who must use legal services to maintain and protect legal rights in society.

Although there have been many challenges for the legal profession in the past two centuries, the global economy poses some of the most difficult problems for the regulation of American lawyers. The rise of the multinational corporation began this movement towards internationalization, and treaties and trade agreements among neighboring countries relaxed trade barriers to a limited extent. More importantly, however, the General Agreement on Tariffs and Trade (GATT), the development of the European Union, and other regional trade agreements put in place the basic international framework that spurred a worldwide movement toward free trade in goods and services across national borders.

The end to economic protectionism brings many benefits and costs to a nation. It opens markets for imports and exports and allows the market conditions of supply and demand to determine the quantity of a particular good that is produced in a country and the price at which the good exchanges hands. Ultimately, the public is viewed as the beneficiary of the free flow of goods and services. Looking at the matter solely from a national perspective, however, the costs of free trade include increased competition for national industries, and a surrender of some of the sovereignty that a nation traditionally enjoys in its status as a sovereign. The ABA and the state bar regulatory authorities are beginning to face the pressures of a global economy. Increased competition from foreign providers of legal services is imposing pressure on the way in which legal services are delivered in this country. The ABA and state bars can no longer regulate American lawyers in a vacuum that ignores the changes brought about by the growth in international business transactions. If the ABA and state bars insist on resisting change to the ethical rules to reflect modern business realities, American lawyers will no longer be competitive in delivering legal services to the world's business entities (many of which are multinational in both ownership and location of business activity).

The provision of multidisciplinary services to corporations, partnerships, and individuals is certain to occupy a prominent role in the world economy. If the United States is to remain a center of

534. See Dzienkowski, American Legal Profession, supra note 34, at 483-85 (examining the purposes of regulating the legal profession).
global commerce, the legal profession must accommodate the demand for multidisciplinary services. The state bars now have a unique opportunity to develop a regulatory structure that protects the core values of the legal profession while accommodating consumer demand for integrated services. A decision by the organized bar attempting to reinforce the status quo ultimately will lead to the American legal profession's inability to play a key role in shaping the delivery of multidisciplinary services.

The states should modify their rules of professional conduct as follows. First, Model Rule 5.4 should be modified to allow fee-sharing between lawyers and non-lawyers providing professional services to a client. No pure referral fees should be permitted to non-lawyers. Second, the rules should be amended to permit lawyer participation in the delivery of multidisciplinary services. Although a structure that permitted all models of multidisciplinary services, including the fully integrated MDP, is optimal, such a step may be too radical for many states. Thus, states should strongly consider adopting rules that would permit contractual and joint venture MDPs to exist to offer legal and non-legal services in a coordinated manner. Both contractual and joint venture MDPs would offer experimentation in how conflicts of interest would be handled in the two separate kinds of firms. The organized bar could evolve the rules on conflicts in response to the experience with such arrangements. The contractual and entity joint ventures will afford many of the benefits of multidisciplinary practice with few of the costs.

The optimal approach for allowing lawyer participation in MDPs would involve removing the ban against non-lawyer partners and shareholders in business entities that provide legal services. Lawyers and non-lawyers should be able to form a single entity to offer both legal and non-legal services to clients. The delivery of legal services must conform to the same professional responsibility rules and standards as would apply if a law firm provided the services. The delivery of legal services would need to be controlled by lawyers, although there should be no requirement that lawyers have voting control in the fully integrated, single entity MDP. In order to facilitate lawyer control over legal services, lawyers in a single entity MDP should be organized in a legal department with checks and balances similar to those implemented in a corporate counsel context. There should be no requirement that the non-lawyers in an MDP be only those from a licensed profession because such a requirement is both vague and theoretically indefensible.

The states should also promulgate professional responsibility rules and standards that apply to all MDPs. MDPs should be permitted to litigate in the federal and state courts. Passive investments should be permitted in both law firms and MDPs; if, however, rules governing law firms are not liberalized to allow such passive investment, then the
rules for MDPs on this issue must remain consistent with those for law firms. When a client is receiving legal services, a lawyer must supervise all aspects of work falling within the legal umbrella. Non-lawyer partners and managers must agree not to interfere in the delivery of legal services and must also require that all lawyers in the firm follow the rules of professional conduct. Additionally, the profession should implement peer review for law firms and other entities, including MDPs, that are delivering legal services to clients.

The question is not whether MDPs will exist and thrive in the future or whether lawyers in ever greater numbers will choose to work for MDPs. The trends in favor of MDPs are pronounced and unstoppable. Nothing the ABA or the state bars do can change that fact of economic life. The question is whether the ABA and state bars will have any significant role in regulating lawyers who work in MDPs, thereby protecting client interests and ensuring that lawyers’ participation in multidisciplinary practice does not undercut the core values of the profession.

The ABA Commission on Multidisciplinary Practice, in its 1999 and 2000 Final Reports, took a step—albeit a small step—in the right direction. The ABA House of Delegates, however, in its July 2000 attempt to forestall the movement toward multidisciplinary services, took a giant step backward in the direction of interference with competition in the market for legal services.

Client protection and protection of the core values of the legal profession should be the primary basis for regulation of MDPs. The rules of professional conduct for lawyers should permit innovation in the professional service marketplace. Unneeded and overbroad regulation, often motivated by economic protectionism, should be discarded. The state bar authorities should design their regulation of MDPs in the manner this Article suggests and thereby protect the public interest without unnecessarily interfering with the operation of market forces in the professional services arena.
Notes & Observations