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Multidisciplinary Practices: What is Wrong with the Legal Profession's Ethics Rules?

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COMMENTS

MULTIDISCIPLINARY PRACTICES: WHAT IS WRONG WITH THE LEGAL PROFESSION'S ETHICS RULES?

I. INTRODUCTION

"A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[1]

The desire and demand to provide "one-stop shopping" has led to one of the most important and controversial issues facing the legal profession today: multidisciplinary practice ("MDP").[2] According to the Commission on Multidisciplinary Practice ("Commission"), an MDP is:

> [A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, including legal services, and there is a direct or indirect sharing of profits as part of the arrangement.[3]

1. MODEL RULES OF PROFESSIONAL CONDUCT Pmbl. (1983).

2. *See ABA House of Delegates Calls for Additional Study of Multidisciplinary Practice*, PR NEWSWIRE, Aug. 10, 1999 (Fin. News) (comment by William G. Paul); Robert M. Cearley, Jr., *President's Report: Multidisciplinary Practice*, 34 ARK. LAW. 2, 2 (1999); Stuart A. Hoberman, *The Law and More: Defining Multidisciplinary Practices*, N.J. LAW., Apr. 19, 1999, at 7.

3. Commission on Multidisciplinary Practice ("MDP Comm'n"), *Recommendation* (visited Sept. 23, 1999) <http://www.abanet.org/cpr/mdprecommendation.html> [hereinafter *Recommendation*]. *See also* MDP Comm'n, *Report* (visited Sept. 23, 1999) <http://www.abanet.org/cpr/mdpreport.html> [hereinafter *Report*]; MDP Comm'n, *Report App. A* (visited Sept. 23, 1999) <http://www.abanet.org/cpr/mdpappendixa.html> [hereinafter *App. A*];

The goal of the MDP is to provide "packaged services" to clients.[4] "For example a lawyer, a social worker, and a certified financial planner might form an MDP to provide legal and nonlegal services in connection with counseling older clients about estate planning, nursing home care and living wills."[5]

In June 1999, the Commission recommended that the American Bar Association ("ABA")[6] amend the Model Rules of Professional Conduct ("Model Rules") to allow MDPs as defined by the Commission.[7] If the recommendation is adopted, it will possibly be implemented through a new Model Rule.[8]

MDP Comm'n, *Report App. C: Reporter's Notes* (visited Sept. 23, 1999) <http://www.abanet.org/cpr/mdpappendixc.html> [hereinafter *App. C*]. Different commentators define MDP differently. *See, e.g.*, Steven C. Salch, *Inter-Professional Practice Issues: A Debate and Discussion*, MAJOR TAX PLAN. ¶ 500, at 5-1, ¶ 501, at 5-3 (1998) ("Multidisciplinary practice . . . is the association of individuals with different professional backgrounds within the same organization with the goal of providing 'one stop shopping' to clients seeking professional services."); Ramon M. Mullerat, *Remarks on the Report and Recommendations of the ABA Commission on MDPs* (visited Sept. 23, 1999) <http://www.abanet.org/cpr/mullerat2.html> ("An MDP is understood to be the practice of different professions within the same structure and with common interests, whether shared directly or indirectly, and in the same or different physical places."); *FAQs About Multidisciplinary Practices*, TEX. LAW., Aug. 9, 1999, at 6 ("[A]n MDP is a commercial entity in which lawyers are partners with nonlawyers or an entity in which lawyers work for nonlawyers.").

4. Jim Flynn, *Ask a Lawyer Column*, KNIGHT-RIDDER TRIB. BUS. NEWS: THE GAZETTE (Colo. Springs, Colo.), Sept. 5, 1999, *available in* 1999 WL 22012736 ("A multidisciplinary practice is one where lawyers go into business with other professionals (engineers, accountants, architects, plumbers, etc.) to provide packaged services to clients.").

5. *Report*, *supra* note 3. *See also* Hoberman, *supra* note 2 ("Examples of MDPs include a partnership consisting of lawyers and accountants providing legal and accounting services or a professional corporation that provides legal services only but is a wholly-owned subsidiary of an accounting firm.").

6. *See ABA House of Delegates*, *supra* note 2:

> The American Bar Association is the largest voluntary professional association in the world. With more than 400,000 members, the ABA provides law school accreditation, continuing legal education, information about the law, programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public.

Id. (citing the American Bar Association).

7. *See FAQs About Multidisciplinary Practices*, *supra* note 3; *Recommendation*, *supra* note 3; *Report*, *supra* note 3; MDP Comm'n, *Report General Information Form* (visited Sept. 23, 1999) <http://www.abanet.org/cpr/mdpgeninfo.html> [hereinafter *General Information Form*].

8. *See generally App. A*, *supra* note 3. The MDP Comm'n's proposed rule, Model Rule 5.8, "Responsibilities of a Lawyer in a Multidisciplinary Practice," would read as follows:

> (a) A lawyer shall not share legal fees with a nonlawyer or form a partnership or other entity with a nonlawyer if any of the activities of the partnership or other entity consist of the practice of law except that a lawyer in an MDP controlled by lawyers may do so, subject to the present provisions limiting the holding of equity investments in any entity or organization providing legal services. A lawyer in an MDP not controlled by lawyers

Although there are various arguments both for and against MDPs, the emphasis is on the potential benefits and detriments to prospective clients of

may do so, subject to the conditions set forth in paragraphs (c)(1)-(5), and subject to the present provisions limiting the holding of equity investments in any entity or organization providing legal services.

(b) A lawyer in an MDP remains subject to all the Model Rules of Professional Conduct, unless this Rule provides otherwise.

(c) A lawyer may practice in an MDP in which lawyers do not own a controlling interest only if the MDP provides the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in the delivery of legal services written undertakings signed by the chief executive officer (or similar official) and the board of directors (or similar body) that:

(1) it will not directly or indirectly interfere with a lawyer's exercise of independent professional judgment on behalf of a client;

(2) it will establish, maintain and enforce procedures designed to protect a lawyer's exercise of independent professional judgment on behalf of a client from interference by the MDP, any member of the MDP, or any person or entity associated with the MDP;

(3) it will establish, maintain and enforce procedures to protect a lawyer's professional obligation to segregate client funds;

(4) its members will abide by the rules of professional conduct when they are engaged in the delivery of legal services to a client of the MDP;

(5) it will respect the unique role of the lawyer in society as an officer of the legal system, a representative of clients and a public citizen having special responsibility for the administration of justice. This statement should acknowledge that lawyers in an MDP have the same special obligation to render voluntary *pro bono publico* legal service as lawyers practicing solo or in law firms;

(6) it will annually review the procedures established in subsection (2) and amend them as needed to ensure their effectiveness; and annually certify its compliance with subsections (1)-(6) and provide a copy of the certification to each lawyer in the MDP;

(7) it will annually file a signed and verified copy of the certificate described in subsection (6) with the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in the delivery of legal services, along with information identifying each lawyer who has been a member of the MDP during the reporting period, the jurisdiction in which the principal office of each such lawyer is located, and the jurisdiction(s) in which those lawyers are licensed to practice law;

(8) it will permit the highest court with the authority to regulate the professional conduct of lawyers in each jurisdiction in which the MDP is engaged in the delivery of legal services to review and conduct an administrative audit of the MDP, as each such authority deems appropriate, to determine and assure compliance with subsections (1)-(7); and

(9) it will bear the cost of the administrative audit of MDPs described in subparagraph (8) through the payment of a reasonable annual certification fee.

(d) An MDP that fails to comply with its written undertaking shall be subject to withdrawal of its permission to deliver legal services or to other appropriate remedial measures ordered by the court.

Id. *See also infra* notes 225-28 and accompanying text.

MDPs. Proponents of MDPs emphasize clients' demands for efficiency and convenience.[9] Those who oppose MDPs highlight the need to protect the core values of the legal profession: the client's right of loyalty, confidentiality, and an attorney's independent professional judgment.[10] The pertinent question becomes whether "it is possible to satisfy the interests of clients and lawyers by providing the option of an MDP without compromising the core values of the legal profession that are essential for the protection of clients and the proper maintenance of the client-lawyer relationship."[11] The Commission seems to believe that its recommendation will give clients the option of an MDP and, at the same time, preserve the core values of the legal profession.[12]

This Comment will examine the issues surrounding the Commission's recommendation to allow MDPs. Part II provides the history of MDPs in the United States. Part III relates arguments for and against changing the ethical rules to allow MDPs. Part IV lays out the Commission's recommendation. Part V sets out potential problems with the recommendation. Part VI demonstrates alternative approaches and Part VII analyzes the future implications of MDPs and the Commission's recommendation. Part VIII, the author's analysis, concludes that permitting MDPs, as defined by the Commission, endangers the protections that are currently guaranteed to clients seeking legal services and should, thus, be prohibited from operating in the United States.

II. HISTORY OF MDPS IN THE UNITED STATES

A. Brief Overview

1. MDPs in Foreign Jurisdictions

MDP is not a new concept. In fact, in Europe, lawyers and tax accountants have been permitted to work together in MDPs since the end of World War II.[13] Today, MDPs are common in Europe, Australia and Canada,[14] and are rapidly being accepted in other parts of the world.[15]

9. *See* MDP Comm'n, *Background Paper on Multidisciplinary Practice: Issues and Developments* (visited Sept. 23, 1999) <http://www.abanet.org/cpr/multicomreport0199.html> [hereinafter *Background Paper*]; Debra Baker, *Voices From the Other Side: Accounting Firm Calls for Changes in Lawyer Conduct Rules*, 85 A.B.A. J. 83 (1999).

10. *See Background Paper*, *supra* note 9; Baker, *supra* note 9.

11. *Report*, *supra* note 3.

12. *See id.*

13. *See* Lloyd Turman, *Look Out Lawyers, Here We Come!*, ACCT. TODAY, July 5, 1999, at 7; Hoberman, *supra* note 2.

14. *See* Rocco Cammarere, *Panels at Odds Over MDPs: State Bar, ABA Clash*, N.J. LAW., June 28, 1999, at 1. *See also* Haydee Tillotson, Editorial, *Changing the Way Lawyers Do Business*, ORANGE COUNTY REG. (Cal.), Mar. 3, 1999, at B06 (noting that MDPs are permitted in

Although the presence of MDPs in foreign countries is becoming more evident, Switzerland is the only country that permits fully integrated MDPs, or what the Commission refers to as the "Fully Integrated Model".[16] Under this model, "there is no free standing law firm."[17] Rather, as provided for in the Commission's definition of an MDP, there is a single entity, which employs a variety of different professionals in order to provide a multitude of services.[18] In other foreign countries, the establishment of MDPs is limited to what the Commission refers to as the "Contract Model."[19] Under the "Contract Model," a professional service firm is only able to contract with an independent law firm.[20] At all times, the law firm remains an independent entity controlled and managed by lawyers.[21] This model is also considered an MDP under the Commission's definition.[22]

Spain, Switzerland, Australia and Europe); Ward Bower, *Partnership Issues; Multidisciplinary Professional Practices to Challenge Law Firms*, LAW FIRM PARTNERSHIP & BENEFITS, June 1999, at 5 [hereinafter Bower, *Partnership Issues*] (noting that reports surrounding Big Five activity in Africa and Asia occasionally arise, and that the Big Five occupy some of the largest law practices in parts of Latin America); Lucy Hickman, *Law Soc Votes for MDPs After 10-year Wait*, LAW., Oct. 18, 1999, at 2 (noting that after a 10-year consultation process, the United Kingdom's Law Society has opened the door to allow MDPs).

15. *See Lawyers Considering Non-Legal Partnerships*, PRAC. ACCT. MAG., Aug. 1, 1999, at 8, *available in* 1999 WL 11608183.

16. *App. C*, *supra* note 3. *See also* MDP Comm'n, *Hypotheticals and Models* (visited Sept. 23, 1999) <http://www.abanet.org/cpr/multicomhypos.html> [hereinafter *Hypotheticals and Models*].

17. *App. C*, *supra* note 3; *Hypotheticals and Models*, *supra* note 16.

18. *See App. C*, *supra* note 3; *Hypotheticals and Models*, *supra* note 16. Under "The Fully Integrated Model":

> There is a single professional services firm, XYZ Integrates, with organizational units, such as accounting, business consulting, and legal services. It is the "classic" multidisciplinary practice. It advertises that it provides "a seamless web" of services, including legal services. The legal services unit may represent clients who either (1) retain its services but not those of any other unit of the firm or (2) retain its services as well as the services of other units in the firm. In the case of (2), the legal and nonlegal services may be provided in connection with the same matter or different matters.

App. C, *supra* note 3. *See also Hypotheticals and Models*, *supra* note 16.

19. *App. C*, *supra* note 3. *See also Hypotheticals and Models*, *supra* note 16.

20. *App. C*, *supra* note 3; *Hypotheticals and Models*, *supra* note 16.

> A typical contract might include terms such as (1) the law firm agreeing to identify its affiliation with the professional services firm on its letterhead and business cards, and its advertising; (2) the law firm and the professional services firm agreeing to refer clients to each other on a nonexclusive basis; and (3) the law firm agreeing to purchase goods and services from the professional services firm such as staff management, communications technology, and rent for the leasing of office space and equipment.

App. C, *supra* note 3 (parenthetical information omitted); *Hypotheticals and Models*, *supra* note 16 (same).

21. *See App. C*, *supra* note 3.

In contrast to both the "Fully Integrated Model" and the "Contract Model," the United States is operating under what the Commission refers to as the "Cooperative Model."[23] Under this model, attorneys are permitted to employ or work cooperatively with nonattorney professionals directly retained by the attorney or the client.[24] "To the extent that the nonlawyer professionals are employed, retained, or associated with a lawyer, the partners in a law firm and any lawyer having direct supervisory authority over a nonlawyer professional must take steps 'to ensure that the person's conduct is compatible with the professional obligations of the lawyer . . . .'"[25]

Additionally, in the United States, the Commission's "Law-Related Services/Ancillary Business Model" is a permissible arrangement in jurisdictions that have adopted Model Rule 5.7[26] (responsibilities regarding law related services).[27] Under the "Law-Related Services/Ancillary Business Model" a law firm can operate an ancillary business that provides various professional services to clients.[28] While attorneys and nonattorneys are partners, share fees and make joint decisions in the ancillary business,

> The contract model might take different forms. In one model, the professional services firm might contract with a single law firm with only one office. In another, it might contract with a single law firm with several branch offices. And in still another, it might contract with separate independent law firms, some of which might have only a single office; others of which might have several branch offices.

Id.; *Hypotheticals and Models*, *supra* note 16.

22. *See App. C*, *supra* note 3.

23. *Id*. *Hypotheticals and Models*, *supra* note 16.

24. *See App. C*, *supra* note 3; *Hypotheticals and Models*, *supra* note 16.

25. *App. C*, *supra* note 3 (quoting MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3 (1983)); *Hypotheticals and Models*, *supra* note 16 (same).

26. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7 (1983). Model Rule 5.7 states:

> (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined by paragraph (b), if the law-related services are provided:
>
> (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
>
> (2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.
>
> (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Id.

27. *App. C*, *supra* note 3; *Hypotheticals and Models*, *supra* note 16.

28. *App. C*, *supra* note 3; *Hypotheticals and Models*, *supra* note 16.

nonattorneys are not partners and do not share fees in the law firm.[29] Moreover, the lawyers only provide consulting services, not legal services, to clients of the ancillary business.[30] Neither the "Cooperative Model" nor the "Law-Related Services/Ancillary Business Model" is considered an MDP under the Commission's definition.[31]

Accordingly, in almost all jurisdictions in the United States, partnerships between attorneys and nonattorneys to provide legal services are strictly prohibited.[32] Although in other professional settings MDPs have been in existence for some time,[33] "there are decades-old rules that prevent accounting firms, law firms and consulting firms from mingling their businesses."[34] The District of Columbia is the only jurisdiction in the United States that has modified its rules to allow attorney and nonattorney partnerships in the provision of legal services and operates under what the Commission refers to as the "Command and Control Model."[35]

29. *See App. C*, *supra* note 3; *Hypotheticals and Models*, *supra* note 16.

30. *See App. C*, *supra* note 3; *Hypotheticals and Models*, *supra* note 16.

31. *App. C*, *supra* note 3.

32. *See* Baker, *supra* note 9. *See also, e.g.*, Mich. Bar Comm. on Professional and Judicial Ethics, RI-225 (1995), *available in* 1995 WL 68958 ("A Michigan lawyer may not form a partnership for delivery of legal services with a nonlawyer, where any portion of the firm's operations will be conducted in Michigan and where the nonlawyer has any financial interest in or control over the firm's operations in Michigan or on Michigan legal matters."); Pa. Bar. Comm. on Legal Ethics and Professional Responsibility, Informal Op. 93-100 (1993), *available in* 1993 WL 851215 ("Clearly, a lawyer may not enter into a law practice with a nonlawyer in Pennsylvania."); S.C. Bar Ethic Advisory Comm., Advisory Op. 99-07 (1999), *available in* 1999 WL 463449 (citing Rule 5.4(b) of the South Carolina Rules of Professional Conduct for the proposition that "[a] lawyer shall not form a partnership with a non-lawyer if any of the practices of the partnership consist of the practice of law.").

33. *See* Association of the Bar of the City of New York, *Statement of Position on Multidisciplinary Practice* (visited Sept. 23, 1999) <http//www.abanet.org/cpr/abcny.html>. The Association of the Bar of the City of New York goes on to state:

> The juvenile and civil units of many legal services providers employ social workers. Governments and corporations often employ lawyers and other professionals under the same roof within the same unit. These organizations have discovered a lesson that is more broadly applicable – that coordination, teamwork and fully considered strategic planning are often fostered when professionals from different disciplines work within one service organization for the same clients.

Id.

34. Cindy Krischer Goodman, *Line Between Accounting, Law Professions May Soon Blur*, KNIGHT-RIDDER TRIB. BUS. NEWS: MIAMI HERALD, Mar. 14, 1999, *available in* 1999 WL 13725537. *See also* discussion *infra* Part II.C.

35. *App. C*, *supra* note 3; *Hypotheticals and Models*, *supra* note 16.

2. The District of Columbia's Rule 5.4

While the District of Columbia ("D.C.") has modified its rules to permit fee sharing between attorneys and nonattorneys, even D.C. does not permit the type of MDPs that are allowed in foreign jurisdictions.[36] D.C.'s Rule 5.4 provides that a nonlawyer can obtain an ownership or managerial interest in a law firm subject to certain requirements.[37] First such partnerships and the sharing of legal fees must be confined to organizations that provide only legal services.[38] Additionally, everyone involved must agree to be bound by the rules of professional conduct.[39] Furthermore, attorneys with managerial authority must exercise the same amount of control over nonattorneys as they would over attorneys,[40] and finally, the requirements must be in writing.[41] According to an ABA Ethics Opinion, if a law firm has offices in multiple jurisdictions, the firm cannot have nonattorney partners in the D.C. office.[42]

In 1986, a rule was proposed in North Dakota that would have allowed lawyers and nonlawyers to share fees and form partnerships to provide legal services subject to safeguards similar to those enumerated in D.C.'s modified

36. *See* George A. Riemer, *Coming to a City Near You? Issues Surrounding Non-Lawyer Ownership of Law Firms*, 59 OR. ST. B. BULL. 27, 27 (1999).

37. *See* D.C. CT. R. ANN. Rule 5.4 app. A (1999) (D.C. Rules of Professional Conduct). *See also* MDP Comm'n, *Updated Background and Informational Report and Request for Comments* (visited Dec. 27, 1999) <http://www.abanet.org/cpr/febmdp.html> [hereinafter *Updated Background Report*]:

> The text of the Rule does not define or limit the vocation of the nonlawyer partner. However, the Comment refers to certified public accountants working in conjunction with tax lawyers or others who use accountants' services in performing legal services, economists working in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers working with family law practitioners to assist in counseling clients, and nonlawyer lobbyists working with lawyers who perform legislative services. Finally, the Comment specifies the rule does not permit partnership for the purpose of investment.

Id. (footnotes omitted).

38. *See* D.C. CT. R. ANN. Rule 5.4 (b)(1) app. A (1999) (D.C. Rules of Professional Conduct). "The practical impact of the Washington D.C. rule is that accountants and other professionals may become partners in a law firm while lawyers may not become partners in an accounting firm or other professional services firm on whose behalf they deliver legal services to clients." *App. C*, *supra* note 3. In contrast to D.C.'s modified version of Rule 5.4, the MDP Comm'n's recommendation does not require the firm to be engaged solely in the practice of law. *See* Rocco Cammarere, *Multi-disciplinaries Alive and Well in Washington*, N.J. LAW., Nov. 29, 1999, at 4 [hereinafter Cammarere, *MDPs Alive in Washington*].

39. *See* D.C. CT. R. ANN. Rule 5.4 (b)(2) app. A (1999) (D.C. Rules of Professional Conduct).

40. *See id.* Rule 5.4 (b)(3).

41. *See id.* Rule 5.4 (b)(4).

42. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 (1991).

version of Rule 5.4, but the state's Supreme Court struck it down.[43] Thus, D.C. remains the only jurisdiction in the United States that allows partnerships between attorneys and nonattorneys to provide legal services[44] and, supposedly, D.C.'s version of Model Rule 5.4 has not caused any ethics complaints.[45] While the Commission's "Command and Control Model" is based on D.C.'s modified version of Model Rule 5.4, it is not considered an MDP under the Commission's definition since MDPs under the Commission's definition are not restricted to providing solely legal services.[46]

3. Development of the Model Rules in the United States

Explicit rules banning fee sharing between attorneys and nonattorneys did not exist when the ABA originally adopted the Canons of Professional Ethics ("Canons")[47] in 1908.[48] Twenty years later, "the ABA added Canons 33 through 35, Model Rule 5.4's predecessors."[49] Although these Canons expressed a ban against the formation of partnerships between attorneys and nonattorneys, this ban was expressed in "precatory," not "mandatory," language.[50] ABA Ethics Opinions, however, reinforced this precatory language.[51] According to these opinions, if an attorney was employed or

43. *See* Gianluca Morello, Note, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multidiscipline Practices Should be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190, 204 (1997) (footnotes omitted); *Partnership with Non-Lawyers*, 91 Law. Man. on Prof. Conduct (ABA/BNA) 401 (1998).

44. *See Partnership With Non-Lawyers*, *supra* note 43.

45. *See* Cammarere, *MDPs Alive in Washington*, *supra* note 38 (noting that "the head of the District of Columbia Bar's ethics office [Susan D. Gilbert] testified that the district's version of Rule 5.4(b) has not generated ethics complaints.").

46. *App. C*, *supra* note 3.

47. The Canons represent the ABA's first attempt to "study and promulgate a comprehensive set of ethical standards for the attorney. The resulting 1908 Canons of Ethics were primarily based on the Alabama Bar's 1887 Code." James E. Moliterno & John M. Levy, ETHICS OF THE LAWYER'S WORK 55 (1993).

48. *See Report*, supra note 3.

49. *Id. See also infra* note 121.

50. *Report*, *supra* note 3. *But see* L. Harold Levinson, *Comment on Report and Recommendations of ABA Commission on Multidisciplinary Practice* (visited Sept. 23, 1999) <http://www.abanet.org/cpr/levinson3.html> (noting that the concept underlying the prohibitions against MDPs has a deep history in centuries of common law); John Gibeaut, *Share the Wealth: ABA Panel Proposes Fee-Splitting with Other Professions*, 85 A.B.A.J. 14 (1999) [hereinafter Gibeaut, *Share the Wealth*] (noting that "[c]ritics of fee-sharing often suggest that the ban is inextricably rooted deep in the history of Anglo-American jurisprudence."); Martin Paskind, *The Legal Profession and the Rise of MDPs*, ALBUQUERQUE J., Aug. 30, 1999, at 5, *available in* 1999 WL 23296351 (noting that the history of Egyptian, Greek and Roman lawyers indicates they practiced law by themselves).

51. *See generally* ABA Comm. on Professional Ethics, Informal Op. C-630 (1963) (discussing the rules and circumstances under which a lawyer could share office space with a

entered into a partnership with an accountant or other professional, the attorney could no longer practice as an "attorney at law."[52] Even the sharing of office space between attorneys and other professionals was generally discouraged.[53] Many rules and safeguards were implemented so that such arrangements would not be confused with partnerships.[54]

In 1969, the ABA adopted the Model Code of Professional Responsibility ("Model Code,")[55] which prohibited the formation of partnerships between attorneys and nonattorneys in blatant and mandatory language.[56] These prohibitions were kept intact when the Model Rules[57] were adopted in 1983.[58] The ABA House of Delegates, however, critically reexamined the Model Code before adopting the Model Rules.[59]

C.P.A.); ABA Comm'n on Professional Ethics, Informal Op. 612 (1962) (discussing the unethical nature of a lawyer occupying a suite with a collection agency); ABA Comm'n on Professional Ethics, Informal Op. 608 (1962) (discussing the rules and circumstances under which a lawyer could share office space with an insurance adjuster).

52. *See generally* ABA Comm'n on Professional Ethics and Grievances, Formal Op. 269 (1945) (stating that an attorney at law who was employed or entered into a partnership with a certified public accountant could only perform the activities that an accountant traditionally performed).

53. *See generally supra* note 51.

54. *See generally id*. Even more recent ethics opinions indicate that the sharing of office space between attorneys and nonattorneys is allowed but strictly regulated:

> [t]he need to create and maintain an office setting and operation that avoids confusion as to the scope of one's dealings as a lawyer . . . is imperative . . . . Thus, the physical layout of the office must be arranged in a fashion that makes it clear to all clients and others that they are dealing with the firm at times when in fact this is the case. Door signs, telephone listings and receptionist contacts, for example, must enable those who deal with the office-sharers to discern readily whether their dealings are with one acting as a lawyer or with one acting in a private business capacity. Care also must be taken to separate legal files from those belonging to the business.

ABA Comm'n on Ethics and Professional Responsibility, Informal Op. 1482 (1982).

55. The Model Code was adopted by the ABA in 1969 in order to replace the Canons, which, due to changes in the practice of law, "seemed incapable of predictable interpretation." Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117 (1999).

56. *See Report*, *supra* note 3.

57. The Model Rules were adopted to replace the Model Code due to what were perceived to be several weaknesses in the Model Code. *See* Daly, *supra* note 55.

58. *See* Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 593 (1989).

59. *See id*.

4. The Kutack Commission's Proposed Rule

In 1982, the ABA Commission on Evaluation of Professional Standards ("Kutack Commission") proposed a rule that would have allowed nonlawyers to obtain an ownership interest in a law firm subject to certain ethical requirements.[60] The Kutack Commission spent five years reviewing the Model Code and ultimately concluded that, "it is impractical to define organizational forms that can uniquely guarantee compliance with the Rules of Professional Conduct" since "there are a variety of modern legal services, . . ." all of which "raise problems concerning the client-lawyer relationship."[61] Ultimately, however, several objections were raised and thus, the ABA House of Delegates dropped the Kutack Commission's proposal when the Model Rules were adopted.[62]

60. *See* COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS REPORT TO THE HOUSE OF DELEGATES, *reprinted in* American Bar Association (ABA), 1 MATERIALS ON MODEL RULES OF PROFESSIONAL CONDUCT 98 (1982) (1982 Annual Meeting). The Kutack Commission's proposed Rule 5.4 provided:

> A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if:
>
> (a) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
>
> (b) Information relating to representation of a client is protected as required by Rule 1.6;
>
> (c) The organization does not engage in advertising or personal contract with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rule 7.2 or 7.3; and
>
> (d) The arrangement does not result in charging a fee that violates Rule 1.5.

Id. In other words:

> The Kutack Commission's proposed Rule 5.4 permitted any organization delivering legal services, owned or managed in whole or in part by a nonlawyer, to employ an attorney if the organization respected the attorney's professional judgment, protected a client's confidential information, avoided impermissible advertising and client solicitation, and charged reasonable fees.

Morello, *supra* note 43, at 210 (footnotes omitted).

61. COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS REPORT, *supra* note 60 (quoting a Comment to the Commission's proposed Rule 5.4); Andrews, *supra* note 58, at 593-94 (same).

62. *See* Morello, *supra* note 43, at 212; *Background Paper*, *supra* note 9. The following objections were raised:

> (1) the Commission proposal would permit Sears, Montgomery Ward, H & R Block, or the Big Eight 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' [sic] regardless of the economic cost; and (4) the proposed change would have a fundamental but unknown effect on the legal profession.

5. Establishing the Commission on Multidisciplinary Practice

On August 4, 1998, the ABA established the Commission on Multidisciplinary Practice to research and examine the practice of law in the United States and abroad.[63] The twelve-person Commission consisted of attorneys, judges and academicians.[64] They were instructed to study MDPs

Id. (footnote omitted). *See also General Information Form*, *supra* note 7. (noting that in 1983 the proposal to eliminate fee sharing was ultimately rejected because it permitted passive investment and did not contain safeguards to ensure compliance with the other applicable ethical rules).

63. *See ABA President Philip S. Anderson Appoints Commission on Multidisciplinary Practice* (News Release) (visited Dec. 27, 1999) <http://www.abanet.org.cpr/newsrelease/multicom.html>; *App. C*, *supra* note 3:

> Other issues committed to the Commission's attention included: (1) the experience of clients, foreign and domestic, who have received legal services from professional services firms, and the relevant international trade developments; (2) existing state and federal legislative framework within which professional services firms may be providing legal services and any modifications to that framework that would be in the public interest; (3) the impact of receiving legal services from professional services firms on a client's ability to protect privileged communications and to have the benefit of advice free from conflicts of interest; and (4) the application of current ethical rules and principles to the provision of legal services by professional services firms and any modifications or additions that would best serve the public interest.

Id.

64. *See Background Paper*, *supra* note 9; *see also Members of the Commission on Multidisciplinary Practice* (visited Dec. 27, 1999) <http://www.abanet.org/cpr/multicommembers.html>. The MDP Comm'n is chaired by Sherwin P. Simmons, a partner and chair of the Tax Department in the Miami, Florida law firm of Steel, Hector & Davis, and a past chair of the ABA Section of Taxation and former member of the ABA Board of Governors. Other members consist of Carol O. Bradford, a judge of the U.S. District Court for the District of Columbia and a past chair of the ABA Commission on Homelessness and Poverty; Phoebe A. Haddon, a professor at Temple University School of Law and a member of the ABA Standing Committee on Professionalism; Geoffrey C. Hazzard, Jr., a professor at the University of Pennsylvania Law School, director of the American Law Institute and the reporter for the ABA Model Rules of Professional Conduct; Roberta Reiff Katz, senior vice president, general counsel and secretary of Netscape Communications Corp. and author of JUSTICE MATTERS: RESCUING THE LEGAL SYSTEM FOR THE 21ST CENTURY; Carolyn Lamm, a partner in the Washington D.C., office of White & Case and a member of the ABA House of Delegates; Robert H. Mundheim, senior executive vice president and general counsel of Salomon Smith Barney Holdings, Inc., and a member of the Council of The American Law Institute; Steven C. Nelson, a partner in the law firm of Dorsey & Whitney in Minneapolis, Minn., and a past chair of the ABA Section of International Law Practice; Burnele V. Powell, dean of the School of Law of the University of Missouri at Kansas City, and chair of the ABA Center for Professional Responsibility Governing Committee; Michael Traynor, a member of the San Francisco law firm of Cooley Godward, 2nd Vice President of the American Law Institute and Fellow of the American Bar Foundation; and Herbert S. Wander, a partner in the law firm of Katten Muchen & Zavis, Chicago, Ill., and a past chair of the ABA Section of Business Law. The Reporter for the MDP Comm'n is Mary C.

from the standpoint of the "public's best interest."[65] Although empirical data was not available,[66] the Commission conducted research and held public hearings to obtain information about MDPs within the United States and in foreign countries.[67]

The Commission "concluded that such a change [MDPs] was in the best interest of the public, would expand the availability of legal services, and would facilitate the development of a new business structure enabling lawyers to reconfigure their practices to assist clients in resolving multidisciplinary problems."[68] Thus, on June 8, 1999, the Commission issued a report and recommendation proposing amendments be made to the Model Rules to allow attorney and nonattorney partnerships which provide legal as well as nonlegal services.[69]

On August 10, 1999, the ABA's House of Delegates ("House") voted to postpone deciding the issue so that the Commission could conduct "additional study."[70] The House wanted proof that the public's interests could be served

Daly, a Professor of Legal Ethics at Fordham University School of Law and the Director of the law school's Stein Institute of Law and Ethics. *Id.*

65. *Background Paper*, *supra* note 9; *ABA President Philip S. Anderson Appoints Commission*, *supra* note 63 (noting that the MDP Comm'n "must set aside the financial interests of the profession and ensure the public interest is served.").

66. *See Report*, *supra* note 3.

67. *See* Riemer, *supra* note 36; *see also Report*, *supra* note 3 (emphasizing that "the Commission has heard sixty hours of testimony from fifty-six witness from around the world and received written and oral communications from numerous others."); *App. C*, *supra* note 3 (reporting that "the Commission conducted seven days of open hearings and met in executive session on six occasions . . . . The Commission also maintained a comprehensive web site on which it posted summaries of the testimony, significant background material, and the comments it received (*See* http:\\www.abanet.org/cpr/multicom.html)").

68. *Updated Background Report*, *supra* note 37.

69. *See* Association of the Bar of the City of New York, *supra* note 33; *General Information Form*, *supra* note 7; *Recommendation*, *supra* note 3; *Report*, *supra* note 3. The recommendation and report were unanimously supported by MDP Comm'n members. *Id.*

70. *See ABA House of Delegates Calls for Additional Study of Multidisciplinary Practice*, *supra* note 2; Janet L. Conley, *ABA Postpones Its Decision on Multidisciplinary Practice*, N.Y.L.J., Aug. 11, 1999, at 1 [hereinafter Conley, *ABA Postpones Decision*] (reporting that the call for "additional study" was approved by a 304-98 vote). The House was reacting to a resolution of The Florida Bar that read as follows:

> 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 comprising lawyer independence and the legal profession's tradition of loyalty to clients.

Updated Background Report, *supra* note 37; *Florida Bar Recommendation Statement* (visited Dec. 27, 1999) <http://www.abanet.org/cpr/flbarrec.html>.

without infringing upon the core values of the legal profession.[71] Most likely, the issue will be presented to the ABA again in July 2000.[72] The Commission intends to conduct additional research and hearings with the hope of presenting a new report to the House at that time.[73]

B. Factors Giving Rise to the ABA's Reconsideration of MDPs in the United States

1. The "Big Five" Accounting Firms

Throughout the 1990s, the Big Five accounting firms ("Big Five")[74] bought existing law firms and set up legal practices in Europe.[75] Since the ethical restraints on legal practice are more relaxed in Europe and other countries, accounting firms have been permitted to engage in all kinds of legal practice.[76] Although these firms initially employed attorneys to offer

71. *See* Conley, *ABA Postpones Decision*, *supra* note 70*; Updated Background Report*, *supra* note 37.

72. *See* Conley, *ABA Postpones Decision*, *supra* note 70.

73. *See What Do You Think About Multidisciplinary Practice*, 28 ABA SEC. LAB. & EMPLOYMENT 1, 1 (1999). *See also* Cammarere, *MDPs Alive in Washington*, *supra* note 38 (noting that "[t]he report that comes before the ABA House of Delegates this summer could be vastly different from the proposal rejected last August.").

74. *See generally Regulation of Bar: Vocal Debate on MDP Report Continues as Both Sides Prepare for Delegates' Vote*, 15 Laws. Man. on Prof. Conduct (ABA/BNA) 323, July 7, 1999 [hereinafter *Vocal Debate on MDP Report*]. PricewaterhouseCoopers, Ernst & Young, KPMG, Deloitte & Touche and Arthur Andersen are known as the "Big Five" accounting firms. *Id.* Earlier articles or journals may refer to Coopers & Lybrand L.L.P as one of the big accounting firms and thereby refer to the "Big Six" accounting firms. *See, e.g.*, Morello, *supra* note 43, at 201. However, within the past few years, Coopers & Lybrand merged with Pricewaterhouse forming PricewaterhouseCoopers. *See* Goodman, *supra* note 34.

75. *See* Gibeaut, *Share the Wealth*, *supra* note 50. *See also* Morello, *supra* note 43, at 193-203. Pricewaterhouse operates a law firm in the United Kingdom under the name Arnheim & Co. and operates a network of other law firms in Europe. Arthur Andersen operates a legal practices in the United Kingdom called Garrett & Co., the Netherlands named Wouters Advocaten, and Spain known as J & A Garrigues Andersen y Cia. KMPG Peat Marwick L.L.P. operates a legal department in France under the name KMPG Fidal Peat. Deloitte & Touche L.L.P. formed an alliance with the Dutch law firm, Van Anken Knuppe Damstra, and Ernst & Young, L.L.P. has several cooperation agreements with Dutch law firms and has legal practices in Switzerland, Spain, Germany, and France. *Id.*

76. *See* Gibeaut, *Share the Wealth*, *supra* note 50; *see also App. C*, *supra* note 3 ("While precise data on the extent to which the Big Five are offering legal services outside the United States is not available, the evidence of their emergence as an alternative provider is overwhelming."); Hoberman, *supra* note 2:

> In many European communities nonlawyers are permitted to offer legal advice as long as their credentials are not misrepresented. Although nonlawyers cannot appear in court, they may provide transactional services, advise on tax matters, etc. Accordingly,

accounting and tax consulting, over the past ten years they have expanded their consulting services to include "advising clients on the direct application of the law to the facts, negotiating transactions, and drafting legal documents."[77] Currently, the Big Five are informally considered the world's largest law firms and,[78] in addition to standard consulting services, they are "aggressively soliciting . . . traditional legal work . . . ."[79]

The Big Five were the first major proponents of MDPs in the United States.[80] Currently in the United States, attorneys in accounting firms are not permitted to offer any services beyond a straightforward consultation, such as tax saving advice.[81] However, for years the Big Five have been attempting to practice law in the United States.[82] Several key factors demonstrate the Big Five's recent expansion in the United States and their determination to become recognized legal service providers.[83]

First, in addition to informally becoming the largest law firms in other parts of the world, the Big Five have been successfully recruiting lawyers within the United States.[84] Furthermore, information suggests that lawyers

accounting firms have long been providing legal services in many parts of Europe and from that was created the first MDPs.

Id.

77. *Background Paper*, *supra* note 9.

78. *See* Goodman, *supra* note 34 ("Ernst & Young has 3,300 tax lawyers worldwide and 850 lawyers in this country . . . . PricewaterhouseCoopers employs 3,000 lawyers around the world . . . . By comparison, the country's largest law firm, Baker & McKenzie, employs 2,000 lawyers.").

79. Cearley, *supra* note 2.

80. *See id.*

81. *See* Goodman, *supra* note 34; *see also Background Paper*, *supra* note 9. ("The legal profession has generally acknowledged the right of an accounting firm to provide services to its clients that call for an understanding and application of federal law relating to the taxation of property, goods and services."); Conley, *ABA Postpones Decision*, *supra* note 70. (reporting that Sherwin Simmons, the chair of the MDP Comm'n, informed the House that "the Big Five accounting firms, American Express, H & R Block and other companies already offer 'consulting' services in areas including tax, human resources, health care and insurance law.")

82. *See Accountants Welcome MDP Breakthrough*, INT'L TAX REV., July 1, 1999, at 4; *see also* John Gibeaut, *Squeeze Play: As Accountants Edge Into the Legal Market, Lawyers May Find Themselves Not Only Blindsided by the Assault But Also Limited by the Professional Rules*, 84 A.B.A. J. 42 (1998) [hereinafter Gibeaut, *Squeeze Play*] (noting that "[i]n the United States, most observers agree, the accounting giants are also muscling into the legal market. They already offer an array of services, such as appraisals, financial planning, litigation support, alternative dispute resolution and, of course, international tax practice.").

83. *See Background Paper*, *supra* note 9.

84. *See id. See also Accountants Welcome MDP Breakthrough*, *supra* note 82 (pointing out that "[t]he recent spate of tax lawyer recruitment by the big five [sic] has confirmed their determination to offer a complete tax service, even if it would have to be through a 'parallel firm.'"); *Updated Background Report*, *supra* note 37:

employed by the Big Five are offering to represent clients in federal district courts or courts of federal claims.[85] At the same time, the Big Five have successfully lobbied Congress in support of a new federal tax practitioner-client privilege[86] to "mitigate, if not eliminate, . . . inter-professional differences."[87] Moreover, the Big Five have been building strategic alliances among themselves and law firms in the United States.[88] One of the most recent developments in the Big Five's crusade is Ernst & Young's opening of a law office (McKee Nelson Ernst & Young) in D.C.[89] Although this is not the first time one of the Big Five has attempted to encroach on legal territory in the United States, this is the first time such a firm has been so blatantly obvious in its purpose.[90]

The Big Five's determination to practice law in the United States has made them active proponents in the MDP movement and a driving force behind the ABA's decision to create the Commission.[91] At the same time, MDP is no longer just an issue among the Big Five.[92]

> While the quantitative growth in the number of lawyers is impressive, even more impressive is the firms' success in recruiting tax partners from leading law firms and prominent government lawyers to join the Big Five and in persuading law students to join their staffs directly after graduation rather than following the more traditional law-firm career path.

Id. (footnotes omitted).

85. *See Background Paper*, *supra* note 9; *see also* Gibeaut, *Squeeze Play*, *supra* note 82 (reporting that since 1992, Arthur Andersen has been filing petitions (over 60) in the Federal Tax Court in Texas).

86. *See* I.R.C. § 7525; *Background Paper*, *supra* note 9.

87. Salch, *supra* note 3, ¶ 500, at 5-2.

88. *See Background Paper*, *supra* note 9; *Updated Background Report*, *supra* note 37. In 1997, PricewaterhouseCoopers and Miller & Chevalier, a Washington D.C. law firm, built a strategic alliance. In August 1999, KPMG announced the creation of a strategic alliance with members of Saltnet, a network of state and local lawyers. Morrison & Forester and Horwood Marcus Berk are two firms that joined the alliance. *Id.*

89. *See* Cammarere, *MDPs Alive in Washington*, *supra* note 38.

90. *See* Carol M. Langford & Richard Zitrin, *Has the MDP Train Left the Station?*, N.J.L.J., Nov. 29, 1999, at 20. "[W]hile Ernst & Young claims its plan is just another strategic alliance, it is directly financing the law firm's launch. The company claims it's not actually sharing profits, but Ernst & Young is hardly doing this out of pro bono spirit. And there's no getting around that firm name." *Id.*

91. *See* Goodman, *supra* note 34; *see also* Geoffrey C. Hazzard, Jr., *Bar's MDP Moves Risky*, NAT'L L.J., Dec. 13, 1999, at A29 (noting that "the MDP 'problem' for the legal profession . . . arises primarily from the expansion and diversification of the big accounting firms . . . .").

92. *See* Lee Smalley Edmon, *President's Page: Our Changing Profession*, 22 LOS ANGELES LAW. 11, 11 (1999).

2. Current Practices

Ethical concerns surrounding the current practices of professional service firms (e.g., the Big Five) is one of the main reasons the ABA created a Commission to study MDPs.[93] Attorneys currently practicing in professional service firms in the United States claim that such firms do not offer legal services.[94] The same professional service firms found abroad claim they do provide legal services.[95] At the same time, other service arrangements in the United States may be creating problems.[96] For example, if an attorney shares a "cozy" relationship with a chiropractor or private investigator or if a financial planner has an attorney on staff to draft documents, an unethical arrangement that violates the legal profession's ethics rules may exist.[97]

Ultimately, these questionable relationships and practices have left many feeling that MDPs already exist in de facto form. [98] This general feeling has led to complaints from attorneys that "other professions are invading practice areas lawyers historically have regarded as theirs alone."[99] According to commentators, traditional divisions between different professions are no longer clear.[100] Accountants, bankers, insurers, and stockbrokers are entering

93. *See General Information Form*, *supra* note 7.

94. *See id.*

95. *See General Information Form*, *supra* note 7; *see also* Gibeaut, *Squeeze Play*, *supra* note 82 ("[W]hile the accounting firms insist they are not practicing law, it may all be a matter of semantics. What lawyers would contend is law practice, accountants call 'consulting.'"). *But see Vocal Debate on MDP Report*, *supra* note 74 (noting the comments of Bernard Wolfman of Harvard Law School who believes that "[i]f those lawyers are violating the current prohibition against fee-sharing with nonlawyers, . . . the organized bar ought to be dealing with that issue." Wolfman stated, "[w]e shouldn't assume that because they are violating the law we have to legitimate them.").

96. *See* Jennifer Gille Bacon, *President's Message: Multidisciplinary Practice*, MO. B. BULL., Sept. 1999, at 2, 8.

97. *Id.*

98. *See* Bower, *Partnership Issues*, *supra* note 14.

99. Gibeaut, *Share the Wealth*, *supra* note 50. *See also* Bower, *Partnership Issues*, *supra* note 14 (noting that "recently, major accounting firms have acquired litigation support service companies in the United States, and some have hired experienced litigators to attempt to preempt dispute resolution and front-end litigation services . . . by the law firm and to assist in the application of alternative dispute resolution (ADR) to avoid litigation.").

100. *See, e.g.*, Gibeaut, *Share the Wealth*, *supra* note 50; Edward Brodsky, *ABA Endorsement of Multidisciplinary Practices*, N.Y.L.J., July 14, 1999, at 3:

> In recent years, the sharp line between the provision of legal and the provision of non-legal services has begun to blur, in the United States and especially overseas. In the U.S., the line between lawyers and accountants has already begun to give way. Accounting firms may now represent clients in Tax Court, and Congress recently created an "accountant-client privilege" under the Internal Revenue Code. Consulting firms have recently begun offering, and aggressively promoting "services remarkably similar to those

into areas of practice that, at one time, solely belonged to attorneys.[101] Thus, the ABA created the Commission to address these complaints,[102] to guarantee that clients are protected and to insure that nonattorneys are not participating in the unauthorized practice of law.[103]

3. Competition

Another impetus behind the MDP movement is competition from professional service firms (e.g., the Big Five).[104] Traditional firms find it hard to compete with the Big Five and others who have the ability to share fees in other countries, employ many different types of professionals and provide a wider variety of services to clients.[105] Moreover, the ability to employ these different professionals has given the Big Five the advantage of "tens of thousands of employees," all of whom market and promote their firms.[106] Additionally, the size of these firms and the number of partners provides for an abundance of capital.[107]

"Brand-name recognition" also gives the Big Five an advantage over law firms in the United States because it allows them to charge premium fees to

traditionally offered by law firms, such as advice on mergers and acquisitions, estate planning, human resources, and litigation support systems."

Id. (footnotes omitted).

101. *See* Gibeaut, *Share the Wealth*, *supra* note 50. *See also* Bower, *Partnership Issues*, *supra* note 14:

> [I]t is not only accounting firms that are invading the traditional preserve of the independent law firm. Consider, for example: In Washington, D.C. nonlawyers . . . may take an ownership position in a law firm and share in profits; In many jurisdictions, labor, environmental and employee benefits consulting firms hire lawyers to provide the same services to the consultancy's clients that those lawyers previously provided to their law firm's clients; Banks, insurance companies and financial planning firms all hire lawyers to perform estate planning and estate administration services.

Id.

102. *See* Gibeaut, *Share the Wealth*, *supra* note 50.

103. *See Report*, *supra* note 3; Edmon, *supra* note 92, at 12, 15.

104. *See* Janet L. Conley, *ABA Takes on Multidisciplinary Practice*, N.Y.L.J., Aug. 5, 1999, at 1 [hereinafter Conley, *ABA Takes on MDP*] (noting a comment by Morton A. Harris, a partner at Hatcher, Stubbs, Land, Hollis & Rothschild); *see also* Mike Fimea, *Ethical Issues Worry AZ Bar*, ARIZ. BUS. GAZETTE, Aug. 19, 1999, at 1, *available in* 1999 WL 8420878 (noting that "[m]uch of the support—and the controversy—is rooted in economic issues. Law practices face increased competition from accounting firms that offer legal-related consulting services.").

105. *See* Fimea, *supra* note 104.

106. Bower, *Partnership Issues*, *supra* note 14.

107. *See id.* ("The sheer size of accounting firms means that capital is available from thousands of partners, rather than only hundreds of partners, in even the very largest of the law firms in the world.").

clients.[108] Also, in contrast to law firms in the United States, the Big Five spend significant amounts on advertising and have many years of experience in marketing intangible services.[109] The Big Five's extensive experience with advertising and the amount of money they spend developing it has assisted them in developing effective and sophisticated advertising campaigns to market and promote their name brands.[110]

Furthermore, professional service firms such as the Big Five are experienced and skilled at cross-selling intangible services, and their status as international providers allots them "a clear advantage in marketing 'one stop shopping' to multinational clients."[111] With an institutional client base, high leverage, cutting edge technology and significant investment in research and development, the Big Five easily advances their competitive edge over traditional law firms.[112]

4. Clients' Changing Demands

Clients' changing demands were yet another inspiration behind the MDP movement and the ABA's decision to create the Commission.[113] Clients' problems are not just legal anymore.[114] Recent developments in technology,

108. *Id.* ("Recent studies appear to show brand-name recognition to be worth a significant premium on fees in a professional services marketplace.").

109. *See id.* ("The advertising budgets of some of the Big Five are greater than the gross revenues of even the largest law firms.").

110. *See id.*

111. Bower, *Partnership Issues*, *supra* note 14.

112. *See id.*

113. *See Background Paper*, *supra* note 9.

114. *See* James Lafferty, *Time to Change Rules to Allow for One-Stop Law Firms*, HOUS. CHRON., Dec. 6, 1999, at A25. Various hypotheticals demonstrate the multitude of issues raised by clients' problems. "Estate planning is an excellent example. A senior citizen, not in the best of health, decides to make major changes in his will. He obviously needs a lawyer. But he also may require a financial adviser, an accountant, an expert on philanthropy and perhaps even a physician and a social worker." *Id.* Further, "[c]onsider real estate transactions. When you buy a home in some states, you need a real estate agent, a lawyer, an appraiser, a title searcher, a mortgage lender, an insurance agent and perhaps even a radon tester or termite specialist." Lora H. Weber, *Consumer Choice Crucial*, TEX. LAW., Aug. 9, 1999, at 38. Additionally:

> The same kind of innovative solution would apply to adding on to an existing home. Say you've talked to an architect about expanding the kitchen and adding a family room on the back of your house. But then you need to consult a structural engineer to look at the plans, you need a landscaper to help you figure out where to move the garden, a tax advisor to help you understand the tax implications of putting money into your home, and you need a lawyer with expertise in zoning laws to make sure the whole idea doesn't get rejected by the town zoning board. Again, the best possible outcome for many consumers is an operation that provides all these services in one package.

Written Remarks of Lora H. Weber (visited Jan. 6, 2000) <http://www.abanet.org/cpr/weber1.html>. Also, consider small business owners:

the globalization of the economy and government regulation of commercial and private activities have changed the ways in which a client requires legal services.[115] Today's clients are more sophisticated, and the issues they bring to an attorney are more complex than before.[116] A client's problem might require the input of many different professionals to obtain a complete and satisfactory answer or solution.[117] Moreover, "today, clients demand convenience and a higher quality product that comes from integrating all their financial, personal and legal needs into one comprehensive financial, legal and/or business plan."[118] Many believe the only way to meet this demand is through a team of integrated professionals.[119]

> [S]tarting a business is a complex process. It requires lawyers, accountants, financial planners, tax advisors, experts in information technology resources, perhaps even such things as printers, graphic designers and web page designers. Again, an entity that provides these and other types of services in a package would be very interesting to entrepreneurs.

Id.

115. *See id; see also* Turman, *supra* note 13 (noting that "MDPs are a direct outgrowth of the globalization of the economy: new technologies have eliminated geographical and physical boundaries and increased client sophistication demands integrated service.").

116. *See Written Remarks of Stefan F. Tucker Submitted to the Commission on Multidisciplinary Practice* (visited Oct. 18, 1999) <http://www.abanet.org/cpr/tucker1.html> [hereinafter *Written Remarks of Tucker*]; *see also* Joe Dwyer III, *Carlie, Walsh Weigh in on Law-accounting Union*, ST. LOUIS BUS. J., Aug. 2, 1999, at 1, *available in* 1999 WL 24027098 (Interview) (Tom Walsh, President of Suelthaus & Walsh, P.C., notes that "[i]n the global economy, even medium-size and family owned businesses need wide ranging, global solutions to their problems. This lends itself to a consolidation among providers of those services. The educated client is really the driving force behind these changes to create a one-stop shop for professional services.").

117. *See* Turman, *supra* note 13; *see also* Lafferty, *supra* note 114:

> In a virtual, 24-hour world, problems that involve multidisciplinary solutions need to be addressed simultaneously by seasoned advisers from four or even more professions interacting in one location . . . . As business – and life – have grown more complex, problems increasingly require the assistance of not just lawyers, but also accountants, bankers, engineers, environmental analysts, financial advisors, labor consultants, land-use specialists, realtors, scientists, social workers and tax planners – even psychologists and psychiatrists.

Id. Additionally:

> As the Baby Boomer generation ages, individual clients more than ever before need coordinated advise from lawyers, financial planners, accountants, social workers, and psychologists. As the global economy expands, both Wall Street and Main Street business clients look to teams of professionals from different disciplines for consolidated advice on complex commercial and regulatory matters.

Background Paper, *supra* note 9.

118. Turman, *supra* note 13. *See also App. C*, *supra* note 3 (noting that the testimony before the MDP Comm'n offered "overwhelming support for the proposition that individual clients need integrated professional advice in any number of areas, including estate planning, small business

C. Model Rules Traditionally Preventing the Development of MDPs

In the United States, legal ethics rules are blocking the development of MDPs.[120] Model Rule 5.4[121] (fee sharing) is probably considered the single largest barrier to MDPs.[122] However, many other ABA Model Rules and Disciplinary Rules in the ABA's Model Code (insofar as they have been adopted by the states), coupled with Unauthorized Practice of Law statutes ("UPL statutes")[123], have traditionally prevented attorneys and nonattorneys

consulting, accounting, and regulatory compliance."). *But see Regulation of Bar: Before the Vote, MDP Commission Already Knew It has a Difficult Task*, 15 Laws. Man. on Prof. Conduct (ABA/BNA) 398, Aug. 18, 1999 (reporting that "a number of those who testified questioned whether there really is any genuine consumer demand for 'one stop shopping' for professional services." Moreover, Steven C. Nelson, a member of the MDP Comm'n, noted that it is hard to tell if people want MDPs until MDPs are allowed to operate.).

119. *See, e.g.*, Lafferty, *supra* note 114; Turman, *supra* note 13; *Written Remarks of Tucker*, *supra* note 116.

120. *See* Goodman, *supra* note 34; Cearley, *supra* note 2; Morello, *supra* note 43, at 203.

121. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1983):

> (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
>
> (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
>
> (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay up to the estate or other representative of that lawyer the agreed-upon purchase price; and
>
> (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on profit sharing arrangement.
>
> (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consists of the practice of law.
>
> (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
>
> (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
>
> (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
>
> (2) a nonlawyer is a corporate director or officer thereof; or
>
> (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Id.

122. *See generally App. C*, *supra* note 3; Morello, *supra* note 43, at 205; Cearley, *supra* note 2.

123. *See, e.g.*, ALA. CODE § 34-3-1 (Michie 1997); ARK. CODE ANN. § 16-22-501 (1999); CAL. BUS. & PROF. CODE § 6126 (Deering 1976). *See also App. C*, *supra* note 3. ("Generally speaking, UPL statutes have two primary effects: to keep nonlawyers from offering legal

from forming partnerships to provide legal services, along with other services, to the public.[124] With the exception of D.C., all jurisdictions in the United States have followed the ABA's lead by implementing disciplinary rules prohibiting partnerships between attorneys and nonattorneys for the purpose of providing legal services.[125]

The UPL statutes were enacted primarily to protect the public from incompetence and to preserve an attorney's independence.[126] Likewise, the professional conduct rules were primarily implemented by the ABA and the states to guard against ethical dilemmas by preserving and protecting the independence of an attorney's judgment in serving clients.[127] Yet,

services; and to keep lawyers from offering legal services to the clients of the lawyers corporate employers.").

124. *See App. C*, *supra* note 3; Morello, *supra* note 43, at 194-95, 203-04; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) (confidentiality); *id*. Rule 1.7 (conflicts of interest); *id*. Rule 2.1 (independent professional judgment); *id*. Rule 5.4 (fee sharing, lawyer-nonlawyer partnership, and independent professional judgment); *id*. Rule 5.5. (unauthorized practice of law); id. Rule 5.7 (law-related services); *id*. Rule 7.2 (advertising); *id*. Rule 7.3 (client solicitation); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (advertising); *id*. DR 2-103(A), (B) (client solicitation); *id.* DR 3-101(A) (unauthorized practice of law); *id*. DR 3-102(A) (fee sharing); *id*. DR 3-103(A), 5-107(C) (lawyer-nonlawyer partnership); *id*. DR 4-101 (confidentiality); *id*. DR 5-101(A), 5-104(B) (conflicts of interest); *id*. DR 5-107(C) (independent professional judgment). *See also* Morello, *supra* note 43, at 252 n.25 (listing the aforementioned Rules as those that have traditionally prohibited the development of MDPs); Salch, *supra* note 3, ¶ 504, at 5-7-5-13 (noting that the difficulties in the evolution of MDPs springs from Model Rules 1.6 (confidentiality), 1.7 (conflicts of interest), 1.9 (conflicts of interest: former clients), 1.10 (imputed disqualification), 5.4 (fee sharing, lawyer-nonlawyer partnership, and independent professional judgment) 5.5 (unauthorized practice of law), 1.17 (sale of law practice)); M. Peter Moser, *Rethinking Lawyer Professional Regulation, The Argument for Change*, 9 EXPERIENCE 4, 6 (1999) (noting Model Rules 5.4 (fee sharing, lawyer-nonlawyer partnership, and independent professional judgment), 5.5 (unauthorized practice of law), 1.7 (conflicts of interest), 1.9 (conflicts of interest: former clients) and 1.10 (imputed disqualification) as a few of the professional conduct rules that prohibit openly practicing in an MDP); *App. C*, *supra* note 3 (noting that "from an historical perspective the prohibitions against a lawyer sharing legal fees or entering into a partnership with a nonlawyer are inextricably linked with the adoption and enforcement of UPL statutes.").

125. *See* Morello, *supra* note 43, at 203; Hoberman, *supra* note 2; *see also* Conley, *ABA Takes on MDP*, *supra* note 104 ("Multidisciplinary partnering has been prohibited by all 50 states since 1969 though in the District of Columbia nonlawyer partners are allowed in firms devoted solely to practicing law.")

126. *See App. C*, *supra* note 3.

127. *See Background Paper*, *supra* note 9 ("The prohibition against MDPs is rooted in the perception that it prevents a layperson from exercising undue influence over the independence of a lawyer in the representation of a client in attempt to subordinate the protection of clients to the pursuit of profit."); Morello, *supra* note 43, at 236. ("Jurisdictions adopted restrictive rules governing law firm ownership and MDPs to preserve the independent judgment of lawyers by preventing nonlawyer influences on members of the bar."); Mullerat, *supra* note 3.

commentators have suggested some supplementary functions for the rules of professional conduct. For instance, some suggest that in addition to protecting an attorney's independent judgment, the rules of professional conduct were implemented to safeguard attorneys' economic interest by preventing nonattorneys from taking work away from attorneys.[128] Another commentator notes the rules were designed to prohibit nonattorneys from improperly soliciting clients and engaging in the unauthorized practice of law.[129]

Although nothing in the Model Rules prevents an attorney from working with a nonattorney to solve a client's problem, the Model Rules do prohibit "an integrated practice in which a lawyer shares fees with a nonlawyer or enters into a partnership or an analogous relationship with a nonlawyer to deliver legal services to clients."[130] In other words, the Model Rules prohibit multidisciplinary practices under the definition adopted by the Commission.[131] Ultimately, MDPs have the potential to affect many existing rules. Arguments for and against amending these rules have been promulgated.

III. ARGUMENTS FOR AND AGAINST CHANGING THE RULES

A. Arguments for Changing the Rules

1. The Rules Need to Reflect the Reality of the Current Marketplace

Critics of the current rules emphasize that the rules do not reflect the current economic and social reality facing clients.[132] They argue that the rules do not accommodate the present marketplace with its needs and demands for MDPs.[133] The argument is that "[a]s the economy changes, so should the rules

("Independence is the quintessence of the profession. All other ethical duties of the lawyer directly emanate from the primordial right and duty of independence and find their efficient cause in the need to protect such independence.").

128. *See* Morello, *supra* note 43, at 236.

129. *See* David Hricik, *Multidisciplinary Partnerships Cause for Concern*, TEX. LAW., Nov. 1, 1999 at 24.

130. *Background Paper*, *supra* note 9:

> A lawyer may directly employ such a professional on the lawyer's staff, retain an unaffiliated professional with the client's consent, or assist a professional who is separately retained by a client. A lawyer may also own a company employing a professional or offering certain products created by the nonlawyer professional.

Id.

131. *See App. C*, *supra* note 3.

132. *See, e.g.*, *Written Remarks of Tucker*, *supra* note 116; discussion *supra* Part II.B.4.

133. *See* discussion *supra* Part II.B.4.

governing the provision of legal services."[134] If the legal profession refuses to accommodate the present market, its progression will be stunted.[135]

Currently, attorneys have a monopoly over legal services.[136] Critics view the ability of attorneys to dominate the market as an "anti-competitive guild rule."[137] They argue that modification of the rules can provide new and better services to clients.[138] Not only will competition decrease the prices consumers' pay for legal services, it will also increase the types of services available.[139]

2. Clients Need and Demand MDPs

Another argument advanced is that since the legal profession's top priority is client service, the ABA's primary goal should be finding improved ways for the legal profession to serve the public.[140] This being the case, proponents of MDPs claim a client will benefit greatly from organizations that can handle all of the legal and nonlegal issues involved in a client's problem or situation.[141]

Not only will MDPs provide more options and services to clients,[142] they will also allow clients to obtain solutions more efficiently and conveniently.[143] Moreover, proponents claim MDPs will allow attorneys to produce work more efficiently and they will thereby be able to provide services to clients at a lower cost.[144] Furthermore, critics of the current rules claim that clients should

134. Doug Bandow, Editorial, *Lawyers Need to Evolve With the Economy*, J. COMMERCE, Aug. 13, 1999, at 9, *available in* 1999 WL 6382138.

135. *See Written Remarks of Tucker*, *supra* note 116; *Statement of Kathryn A. Oberly Vice Chair and General Counsel, Ernst & Young LLP ABA Commission on Multidisciplinary Practice* (visited Oct. 18, 1999) http://www.abanet.org/cpr/oberly1.html; *see also* John S. Dzienkowski & Robert J. Peroni, *Proposal on MDPs Goes Overboard*, TEX. LAW., Aug. 9, 1999, at 38 (noting that "[p]articipating in the global marketplace is not just a goal for most corporations, but rather a necessary economic reality.").

136. *See Background Paper*, *supra* note 9.

137. *E.g.*, Dzienkowski & Peroni, *supra* note 135. *See also, e.g.*, Jeff Blumenthal & April White, *To MDP or Not to MDP?*, LEGAL INTELLIGENCER, Sept. 27, 1999, at 1 (reporting that Ward Bower, principal of Altman Weil Inc., argues that resistance to MDPs will cause lawyers to be seen as economic protectionists); Lafferty, *supra* note 114 ("While other nations are meeting consumer demands for one-stop shopping by allowing law firms to hire professional accountants and financial analysts, American law firms are forced to adhere to rules better suited for the trade guilds of the 19th century.").

138. *See, e.g.*, Bandow, *supra* note 134; discussion *supra* Part II.B.4.

139. *See* Morello, *supra* note 43, at 240.

140. *See* Weber, *supra* note 114.

141. *See* Morello, *supra* note 43, at 239; discussion *supra* Part II.B.4.

142. *See* Weber, *supra* note 114.

143. *See* Morello, *supra* note 43, at 239.

144. *See* Hoberman, *supra* note 2; *see also* Morello, *supra* note 43, at 239. "The proponents argue that MDPs cause clients to need only one firm and, thus, reduce clients' costs because there

have the ability to choose the best type of firm to solve their problems.[145] The only choice the rules currently provide for is a law firm.[146]

Critics also argue that MDPs are necessary because clients are currently receiving bad advice from nonlegal professionals who do not have access to lawyers.[147] They believe that if attorneys and nonattorneys were allowed to

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is only one company to instruct, communication between members of the same firm is better, there is a better liaison between advisors and projects are streamlined." *Id.* (footnote omitted). *But see id.* at 241:

> Opponents to MDPs argue that if the U.S. legal services market was opened to MDP the Big Six would immediately dominate because of their advantage in size, diversity, resources and client base . . . . The opponents argue that the resulting Big Six MDPs' oligopoly would undermine any efficiency gained from economies of scale . . . and thus, lead to fee increases.

Id. (footnotes omitted).

145. *See, e.g.*, Weber, *supra* note 114 (noting that "[f]rom the consumer perspective, there is one basic issue: choice. Consumers want choices, whether it is the brand of potato chips they buy, the Internet service provider they select for their home computer or where they go for professional services."); *Testimony of Laurel S. Terry, Professor, Penn State Dickinson School of Law Before the ABA Commission on Multidisciplinary Practice* (visited Jan. 6, 2000) <http://www.abanet.org/cpr/terryremarks.html> [hereinafter *Testimony of Terry*] (noting that while she is not sure attorneys in MDPs will honor their ethical obligations, she could not bring herself to override client choice on that basis).

146. *See* Weber, *supra* note 114. *But see* Mullerat, *supra* note 3:

> Clients should be guaranteed a genuinely free choice of legal advisor. Clients' free choice would be jeopardized by MDPs marketing "packaged services." Were MDPs to be permitted, the trend would undoubtedly be towards the MDP endeavoring to monopolize legal and financial advice as well as the auditing of a given client (particularly in Continental Europe where there are few large law firms). This may eventually place the client in a state of dependency on the MDP, especially if the "package" includes auditing. Besides, changing auditors is a most serious move, apt to alarm creditors.

Id. According to Lawrence J. Fox:

> A client hires a lawyer at the Big 5. The lawyer performs services for eighteen months. The client is now told the auditing firm is taking on the client's adverse party in a (let us hope) unrelated matter. What is the choice? The client can accept the fact that its multi-disciplinary provider is working for the other side and worry how many punches will be pulled to assure that the new offending representation stays put. Or the client can fire the Big 5 firm, waste the fees, time and learning curve the firm provided, and look for another firm to represent the client. The only choice presented is the one our friend Hobson was given.

Written Remarks of Lawrence J. Fox (visited Jan. 6, 2000) <http://www.abanet.org/cpr/fox1.html>.

147. *See, e.g.*, *Regulation of Bar: N.Y. City Bar's Conception of MDPs Would Prevent Firms' Auditing Work*, 15 Law. Man. on Prof. Conduct (ABA/BNA) 373, Aug. 4, 1999 (comment by Association of the Bar of the City of New York).

practice together, clients would not be facing these problems.[148] Although nothing prevents an attorney from working with other professionals to solve a client's problem, critics do not think clients can achieve the benefits of an MDP by hiring different professionals to work with an attorney.[149] In fact, critics of the current rules point out that many professionals refuse to be employed by attorneys because they feel it devalues the services they provide and prevents them from sharing in valuable profits.[150] Ultimately, pro-MDP commentators are not the only ones who foresee the benefits MDPs may have for clients. The potential clients of MDPs, both individual and corporate, are expressing support and demand for relaxing the rules to allow MDPs.[151]

3. MDPs Will Not Harm Clients

Critics of the current rules argue that changing the rules to allow MDPs will not harm clients as long as they understand the facts involved.[152] At least one commentator argues that instead of changing Model Rule 1.6[153] (confidentiality) the issues simply need to be disclosed to the client so the client can decide whether to consent.[154] The same argument is advanced with respect to conflicts of interest.[155] Critics believe that if clients are willing to waive conflict and confidentiality issues, the current professional conduct rules

148. *See id.* According to a New York Bar Committee, "[a] significant number of lawsuits . . . could have been prevented if the right 'professional team' had been consulted or involved at the outset." *Id.*

149. *See Background Paper*, *supra* note 9.

150. *See id.*

151. *See Report*, *supra* note 3.

152. *See, e.g.*, *Written Remarks of Tucker*, *supra* note 116.

153. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). Model Rule 1.6 reads as follows:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id.

154. *See Written Remarks of Tucker*, *supra* note 116 (noting that "[t]oo many of our problems with clients are not attributable to perceived breaches of the protection of client confidentiality or conflict of interest, but, rather, to failures of communication, whether due to incompetence, lack of promptness, lack of diligence or just plain arrogance, or any combination of the same.").

155. *See id.*

are not protecting clients, rather, the rules are impeding clients' ability to choose a firm.[156]

Critics of the current rules also argue that perceived conflicts of interest are already difficult to avoid in this "multi-jurisdictional world."[157] For instance, a law firm with offices around the world may not be aware of the business conducted in its affiliated offices.[158] Likewise, with respect to the claim that the rules are needed to safeguard attorneys' independent professional judgment, critics of the rules believe attorneys are already forced to compromise their professional judgment.[159] They argue that contingent fees, success bonuses, interests in clients' entities in exchange for services, preferential acquisition opportunities or preferential terms in acquiring such interest all pose more serious threats to an attorney's independent judgment than changing the rules to allow MDPs.[160]

156. *See id.*; *see also* Bandow, *supra* note 134:

> There is also concern about variations in professional rules governing confidentiality, conflicts of interest, and attorney-client privilege. But these could all be worked through. In some, the actual requirements could apply to individual attorneys. In others, such as handling conflicts, clients could be informed and allowed to accept or forgo representation.

Id.

157. *E.g.*, *Written Remarks of Tucker*, *supra* note 116.

158. *See id.*

159. *See, e.g.*, *id.* *See also, e.g.*, Eleanor W. Myers, *Multidisciplinary Practice Debate Continues*, LEGAL INTELLIGENCER, Oct. 12, 1999, at 11 (According to the comments of Peter Glenn, Dean of Dickinson Law School, "[t]he stresses on lawyer independence are clearly present today in many law practices."); *Updated Background Report*, *supra* note 37 (indicating interferences with attorneys' independent judgment already exist).

160. *See, e.g.*, *Written remarks of Tucker*, supra note 116. There are various practicies that potentially impair an attorney's independent professional judgment. For example:

> We hear stories of lawyers working inhumane hours, sharply rising levels of professional dissatisfaction and burnout. Lawyer compensation hinges on business personally generated for the firm over all other measures of productivity. Discussions abound on the importance of marketing your firm, running your firm with strong management and developing efficient systems, pro-active competitive strategies and leadership. To suggest that today's law practice operates free of the influence of profit flies in the face of every recent trend . . . . The stresses on lawyer independence are clearly present today in many law practices.

Myers, *supra* note 159. Moreover, the MDP Comm'n recently noted:

> The most common concern expressed about MDPs is that working in such a practice setting will inevitably lead to the erosion of a lawyer's professional independence. This concern is highly selective, however. It ignores other practice settings in which the problem is more frequent and may be more severe. Among these settings are full time employment by a single client (e.g., in-house corporate counsel, lawyers employed by a union providing services directly to union members, and lawyers employed by a legal services organization under the direction of a nonlawyer board), employment as an associate under the direction of a partner (see Rule 5.2, allowing a subordinate lawyer to

Furthermore, at least one commentator notes that attorneys will act ethically even if they are working with non-attorneys.[161] MDPs do not eliminate an attorney's ethical duties,[162] and based on testimony heard by the Commission about places where MDPs are currently operating, no evidence exists to indicate MDPs will affect the core values of the legal profession.[163]

4. Other Professions Have Ethical Rules and Concerns

Critics of the current rules claim attorneys are not the only profession with a long and honorable tradition of values and ethics.[164] At least one commentator points out that almost every profession has concerns about "integrity, public service, deceptive advertising, self-dealing, and the like . . . ."[165] For example, critics point out that under the American Institute of Certified Public Accountants Rules of Conduct ("AICPA Rules"), Certified Public Accountants ("CPAs"), like attorneys, must protect client confidences.[166] A CPA who violates this principle faces disciplinary action as well as liability for damages caused by the disclosure.[167] Similarly, critics of the rules point out that CPAs, like attorneys, are required to maintain integrity and guard against conflicts of interests under the AICPA Rules.[168] Some

> take direction from a supervisory lawyer regarding difficult ethical issues), and membership in a partnership in which difficult ethical issues are frequently resolved by a managing partner or an executive committee and in which compensation is dependent on billings (e.g., whether to take a new matter in the face of a possible conflict of interest or to disclose alleged client fraud).

Updated Background Report, *supra* note 37.

161. *See* Edmon, *supra* note 92, at 15.

162. *See* Bandow, *supra* note 134.

163. *See Testimony of Terry*, *supra* note 145 (citing testimony from Gerard Nicolay, Thomas Verhoeven, Neil Cochran (all of whom practice in an MDP) and Allison Crawley, Michel Gout, Andrew Scott, and Gerard Mazet (all of whom are regulators or bar advisors in countries with MDPs)).

164. *See, e.g.*, *Regulation of Bar: N.Y. City Bar's Conception of MDPs Would Prevent Firms' Auditing Work*, *supra* note 147 (noting a suggestion by the Association of the Bar of the City of New York).

165. *Id.* (comment by the Association of the Bar of the City of New York).

166. *See, e.g.*, Turman, *supra* note 13. *See also* AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS Rule 301 (1978) [hereinafter AICPA]. Under AICPA Rule 301, a CPA "shall not disclose any confidential information obtained in the course of a professional engagement except with the consent of the client." *Id.*

167. *See* Turman, *supra* note 13 ("Not only do state accountancy laws make it illegal for accountants to disclose certain information, but . . . the Internal Revenue Code now provides criminal penalties for improper disclosures.").

168. *See, e.g.*, Turman, *supra* note 13. *See also* AICPA Rule 102 (requiring CPAs to maintain objectivity and integrity). "[T]he rule [AICPA 102] expresses that conflicts of interest can be created if a CPA or his firm has a relationship with another client that the client would view as an impairment to objectivity." Turman, *supra* note 13.

critics assert that the only difference between the AICPA Rules and the ABA Model Rules is that the former provides that the client can waive such conflicts.[169]

B. Arguments Against Changing the Rules

1. The Current Rules are Deeply Rooted in History

Those who oppose modifying existing rules claim that the legal profession and its bans against MDPs are deeply rooted in the history of the United States.[170] According to opponents, the tradition and history of the legal profession's ethics rules and obligations are what make the legal profession unique.[171] Thus, any modification of the rules to permit MDPs will result in "the end of the legal profession as it now exists."[172] At least one opponent believes that relaxing the rules will trivialize lawyers' ethical obligations.[173] Additionally, opponents point out that MDPs are not as difficult to implement in Europe because Europe's legal ethics rules are more relaxed[174] and have a completely different history.[175] For instance, Europe's civil law system is not founded on advocacy or the unauthorized practice of law, both of which are central features of the United States' legal system.[176] As one commentator

169. *See, e.g.*, Turman, *supra* note 13.

170. *See, e.g.*, Levinson, *supra* note 50; Baker, *supra* note 9. *See also* Bacon, *supra* note 96, at 2:

> The law as we know it today evolved slowly in Anglo Saxon culture, from the Magna Carta and religious canons to the common law that English colonists imported into this country. As the law developed so did the lawyer. And although the law and the practice of law have changed in many ways, certain hallmarks have remained unshakable—the twin duties of client loyalty and confidentiality, and the conflicts of interest that grew out of those duties.

Id.

171. *See, e.g.*, Mullerat, *supra* note 3; *infra* note 172.

172. Baker, *supra* note 9. *See also* Mullerat, *supra* note 3 (noting that "[i]f such duties were to be abandoned or unduly relaxed, the legal profession would become a mere business, an honest business perhaps, but it would cease to be a profession."); *Written Remarks of Lawrence J. Fox*, *supra* note 146 (noting that if the rules are amended to allow MDPs, the legal profession will lose both "its independence and its soul.").

173. *See Written Remarks of Lawrence J. Fox*, *supra* note 146.

174. *See, e.g.*, Bacon, *supra* note 96, at 2.

175. *See, e.g.*, *Regulation of Bar: ABA Refuses to Change Ethics Rules Unless Studies of MDPs Dispel Concerns*, 15 Law. Man. on Prof. Conduct (ABA/BNA) 396, Aug. 18, 1999 (comment by Leslie W. Jacobs).

176. *See id.* (comment by Leslie W. Jacobs).

notes, just because MDPs are appropriate or acceptable in Europe does not mean they are appropriate or acceptable for the United States.[177]

2. Differences Between the Professions

a. Different Ethics Rules Governing the Different Professions

Opponents to MDPs claim that MDPs will have severe consequences due to the differences between the ethical rules of other professions and the legal profession's ethics rules. While CPAs or members of other professions may have rules regarding client confidentiality and conflicts of interest, the interpretation given to these common terms differs considerably from the legal profession's interpretation.[178] For instance, there is no uniformity among the professions regarding client confidentiality or the "circumstances under which client information may, must or must not be disclosed to a third party."[179]

Even more troubling, according to MDP opponents, is the fact that the Model Rules often come into direct conflict with the conduct rules of other professions.[180] For example, the Model Rules provide for the attorney-client privilege, whereas an accountant has a duty to provide full disclosure to the public.[181] Moreover, although accountants have rules regarding confidentiality,[182] one commentator believes that the "duties of disclosure with respect to certified financial statements would override any duty to keep

177. *See Regulation of the Bar: Before the Vote, MDP Commission Already Knew it has a Difficult Task*, *supra* note 118 (comment by John Kouris appearing before the MDP Comm'n on behalf of the Defense Research Institute).

178. *See* Salch, *supra* note 3, ¶ 507, at 5-31. An examination of the ethical rules of attorneys versus the ethical rules of CPAs:

> [D]emonstrates that there are differences, including differences in the meaning or interpretation given to common terms, like conflict of interest and maintaining confidentiality, and differences in the approach to non-professional ownership of professional firms . . . . Thus, to those who would argue that lawyers and accountants are "the same," "on a par," or "equal," I would respond, "No, they are different, and we should carefully guard and maintain those differences lest both professions lose their historic, public role, and public trust."

Id.

179. *Report*, *supra* note 3.

180. *See* Edmon, *supra* note 92, at 12.

181. *See id.*; Cearley, *supra* note 2; *see also* Anna Snider, *NYC Bar Panel Bar Give MDP Conditional Approval*, FULTON COUNTY DAILY REP., July 23, 1999, *available in* Lexis, News Group File, All (reporting that the New York City Bar's primary objection to the MDP Comm'n's recommendation is the "irreconcilable difference" between the attorneys ethics rules regarding client confidentiality and the public disclosure obligations of accountants).

182. *See supra* note 166.

material confidential."[183] Furthermore, while attorneys have a duty to act as advocates, accountants have a duty to objectively analyze information.[184] With respect to conflict rules, attorneys are prohibited from representing clients with competing interests, whereas accountants can represent clients with adverse interests.[185]

Additionally, opponents point out that while a court cannot force attorneys to testify about clients and their confidences, a court can require other professionals to provide such testimony.[186] No matter what a client tells an attorney in confidence, the client does not have to worry about the information coming out in the courtroom.[187] There is no guarantee that a court will extend the attorney-client privilege or the work product doctrine to those outside of the legal profession.[188]

b. Problems Imposing the Model Rules on Other Professionals

Opponents to MDPs point out many potential problems associated with imposing the legal profession's ethics rules on other professionals. For example, opponents do not think nonattorneys will ever agree to be bound by the strict ethical rules of attorneys.[189] Moreover, even if nonattorneys do agree to be bound by legal ethical rules, evidence indicating that the Big Five have encountered problems complying with their own conflict of interest rules already exists.[190] According to one opponent, nonattorneys will fail to appreciate the legal profession's ethics rules if for no other reason than they

183. *Written Materials of Linda Galler, Hofstra University* (visited Jan. 6, 1999) <http://www.abanet.org/cpr/galler.html>.

184. *See* Cearley, *supra* note 2.

185. *See id.*

186. *See* Paskind, *supra* note 50.

187. *See* Flynn, *supra* note 4.

188. *See* Snider, *supra* note 181 (comment by Association of the Bar of the City of New York executive committee).

189. *See* Edmon, *supra* note 92, at 12; *see also* Mullerat, *supra* note 3 ("No convincing argument has been put forward to sustain the notion that 'non-lawyers', who will control the MDP, will abide readily, or without substantial friction, by the lawyers' stringent rules regarding criminal matters related to the provision of their services.").

190. *See, e.g.*, *Karen D. Powell's Response to MDP Report* (visited Sept. 23, 1999) <http://www.abanet.org/cpr/powell.html>. Recently, the media reported that the Securities Exchange Commission ("SEC") brought an action against PricewaterhouseCoopers alleging conflicts of interest. According to reports, PricewaterhouseCoopers allegedly failed to comply with SEC regulations forbidding "the firm or its partners from participating in audits of publicly traded companies in which they also hold a financial interest." *Id. See also, e.g.*, Mullerat, *supra* note 3 ("Law firms, especially multinational law firms, are already facing serious difficulties in dealing with conflicts of interests[.] MDPs, with their conflicting services, would make this problem intolerable.").

simply do not understand them.[191] Other opponents find it difficult to ask nonattorneys to follow the same strict standards as attorneys.[192]

c. Attorneys' Pro Bono Commitment

According to MDP opponents, MDPs may have a negative impact on attorneys' pro bono commitments. Opponents to MDPs point out that the legal profession has traditionally maintained a strong commitment to pro bono work.[193] Although the Model Rules do not require attorneys to perform pro bono services, they do indicate that an attorney should provide such services.[194] Since other professions do not have the same commitment to pro bono and public services, MDPs could decrease the scope and range of such services currently provided by attorneys.[195]

191. *See Statement of the Defense Research Institute on Commission Proposal for Facilitating Multidisciplinary Practice* (visited Jan. 6, 2000) <http://www.abanet.org/cpr/dri.html> [hereinafter *Statement of DRI*] (noting "[n]on-lawyer managers of litigation often times disregard important canons relating to client confidences and the independent exercise of professional judgment. Probably innocently, they simply do not understand the rules that govern our conduct.").

192. *See, e.g.*, Mullerat, *supra* note 3; *see also, e.g.*, Lafferty, *supra* note 114 (claiming that "the imposition of lawyers' rules on other highly qualified professionals, who don't happen to be lawyers, smacks of arrogance. Lawyers would do well to ponder whether this type of arrogance is a contributing factor in repeated opinion polls that show lawyers generally are held in low self esteem.").

193. *See* Edmon, *supra* note 92, at 12.

194. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983) ("A lawyer should aspire to render at least (50) hours of pro bono public services per year."); *Written Remarks of Judge Judith Billings Submitted to the Commission on Multidisciplinary Practice* (visited Jan. 6, 2000) <http://www.abanet.org/cpr/billings1.html>. *See also id.*:

> Every state has some provision in its rules of professional conduct focusing on the responsibility of each lawyer to provide pro bono public service. 37 states have rules identical or similar to either the current version of ABA Model Rules of Professional Conduct Rule 6.1 (adopted in 1993) or the 1983 version of the rule.

Id.

195. *See* Edmon, *supra* note 92, at 12 (noting "pro bono services, volunteer services for the organized bar, MCLE courses, and public education about the legal system will all suffer."); *see also* Gary Spencer, *State Bar Leader Sees Threat to Profession's 'Core Values'*, N.Y.L.J., June 21, 1999, at 1 (demonstrating that some opponents (e.g., Thomas O. Rice, the New York State Bar Association President) will go so far as to say attorneys have a duty to perform pro bono work and public services). *But see Report*, *supra* note 3 (According to the MDP Comm'n, under its recommendation, lawyers in an MDP should be required to fulfill their pro bono commitment in the same way as is required of an attorney in a traditional law firm.); The Association of the Bar of the City of New York, *supra* note 33 (noting that "[w]ays will have to be found to encourage *pro bono* service and activities to improve the legal system by lawyers in MDPs (a problem faced already by many government and in-house corporate attorneys and by a distressingly large and growing number of lawyers in private practice.)"); *Written Remarks of Judge Judith Billings*, *supra* note 194 (noting that lawyers in various corporate departments have

3. The Current Rules Protect the Core Values

Those who oppose MDPs generally feel the current rules are necessary to protect the core values of the legal profession.[196] For instance, they believe that MDPs will impair an attorney's independent judgment due to influence by personal interests and external pressure.[197] Ultimately, the argument is that an attorney's judgment should be free from influence by clients, courts and third parties.[198] Opponents claim that such advice will be impossible to obtain in an MDP since clients will not be able to receive independent advice free from business considerations.[199] Others suggest that attorneys may feel pressure to refer clients to nonlawyers in the partnership, even if a professional outside of the partnership is better suited to a client's needs.[200] Additionally, MDPs may encourage attorneys to cross-sell services that the client really does not need.[201]

Opponents also point out that the attorney-client privilege may be impaired if the rules are amended to allow MDPs.[202] The duties of other professionals regarding this privilege may not be as important or emphasized as strongly as it is for attorneys, and opponents fear that the attorney-client privilege will be diluted if the client is not informed about the activities of the MDP and the potential implications of representation by an MDP.[203] Additionally, there are no guarantees that clients, even if informed, will

been participating in pro bono services and there is a growing movement in such departments to contribute such services. Accordingly, many have benefited from corporate counsels' contributions.). Judge Billings further remarks:

> These benefits have been achieved in the corporate counsel environment because individual lawyers have committed themselves to fulfilling professional responsibility to engage in pro bono service, and their employers have been willing to support these efforts. This same result can and should be achieved in the context of multidisciplinary practices.

Id.

196. *See Background Paper*, *supra* note 9; Baker, *supra* note 9; Edmon, *supra* note 92, at 11.

197. *See, e.g.*, Mullerat, *supra* note 3; *Statement of DRI*, *supra* note 191. In response to the MDP Comm'n's statement that "[i]n today's world, many lawyers routinely work a [sic] practice settings in which they are subject to management oversight by non-lawyers . . . . Independence has been maintained in those settings," the Defense Research Institute claims that "[t]o the contrary, professional independence of judgment has in fact been severely impacted in some of those settings. Defense lawyers have experienced numerous instances of non-lawyers hindering their representation of clients." *Id.*

198. *See* Mullerat, *supra* note 3.

199. *See, e.g.*, Patricia Manson, *ABA Puts Off Vote on Eased Practice Rule*, CHI. DAILY L. BULL., Aug. 10, 1999, at 1.

200. *See* Goodman, *supra* note 34.

201. *See* Conley, *ABA Takes on MDP*, *supra* note 104 (comment by Bruce H. Gaynes).

202. *See supra* notes 186-88 and accompanying text.

203. *See* Snider, *supra* note 181.

understand that a lawyer and nonlawyer in an MDP have different responsibilities relating to client information and confidentiality.[204]

IV. THE COMMISSION'S RECOMMENDATION

According to the Commission, "it is possible to satisfy the interests of clients and lawyers by providing the option of an MDP without compromising the core values of the legal profession that are essential for the protection of clients and the proper maintenance of the client-lawyer relationship."[205] To achieve this result, the Commission recommended that any amendments to the Model Rules be consistent with fifteen principles.[206]

First, the Commission recommended that "[t]he legal profession . . . adopt and maintain rules of professional conduct that protect its core values . . ., but should not permit existing rules to unnecessarily inhibit the development of new structures for the more effective delivery of services and better public access to the legal system."[207] Accordingly, the Commission recommended that attorneys be able to deliver "legal services"[208] through an MDP as defined by the Commission.[209]

The Commission further recommended that the rules be modified to permit fee sharing between attorneys and nonattorneys subject to certain safeguards designed to protect the core values of the legal profession.[210] An attorney, however, "should not be permitted to share fees with a nonlawyer if any activities of the partnership or other entity consist of the practice of law except that a lawyer in an MDP . . ." controlled by attorneys or nonattorneys should be permitted to do so subject to certain safeguards.[211] Additionally,

204. *See* Mullerat, *supra* note 3 (noting that clients "would be confused because they would not understand if they are giving their information to a lawyer to be defended or to an accountant to be evaluated."); *Oral Testimony of Jay G. Foonberg*, Feb. 1999 (visited Jan. 6, 2000) <http://www.abanet.org/cpr/Foonberg.html> (noting that "[h]e is concerned that the person seeking waiver from clients on conflicts may have no legal training.").

205. *General Information Form*, *supra* note 7.

206. *See Recommendation*, *supra* note 3.

207. *Id.* (listing independence of professional judgment, protection of confidential client information, and loyalty to the client through avoidance of conflicts of interest as the core values of the legal profession); *see also Updated Background Report*, *supra* note 37 (noting that in all future reports and recommendations, competency will be included as a core value of the legal profession).

208. *See App. A*, *supra* note 3. "'Legal services' denote those services which, if provided by a lawyer engaged in the practice of law, would be regarded as part of such practice of law for purposes of application of the rules of professional conduct." *Id.*

209. *Recommendation*, *supra* note 3.

210. *See id.*

211. *Id*; *see also App. C*, *supra* note 3 (noting that the purpose of prohibiting fee sharing and partnership except in an MDP, is to protect professional independence of judgment. "'Finder's

"[a]llowing fee-sharing and ownership interest in an MDP does not change the rules of professional conduct prohibiting fee-sharing and partnership in any other respect, including the current provisions limiting the holding of equity investments in any entity or organization providing legal services."[212]

Although the Commission proposed that a lawyer should be able to deliver legal services through an MDP, the Commission recommended that nonattorneys be strictly prohibited from delivering legal services.[213] Following this recommendation, the professional rules of conduct would still apply to an attorney in an MDP,[214] even if the attorney were to act under a nonattorney supervisor.[215]

Moreover, under the recommendation, all rules that apply to a law firm should apply equally to MDPs.[216] For purposes of conflict of interest and imputation rules, all clients of an MDP are treated as clients of the attorney.[217] In addition, "[t]o the extent that the delivery of nonlegal services to a client is

fees' to third parties, 'ambulance chasing,' and the like would remain barred."); *Updated Background Report*, *supra* note 37. The MDP Comm'n's decision to include both attorney and nonattorney-owned MDPs:

> [R]ested upon the conviction that the ABA should expand the opportunities for client choice as much as possible, consistent with the protection of the legal profession's core values . . . . In addition, the Commission viewed allowing nonlawyer controlled MDP's as the most effective way of properly bringing those lawyers currently working at professional service firms under the legal profession's regulatory umbrella.

Id.

212. *Recommendation*, *supra* note 3. *See also Updated Background Report*, *supra* note 37:

> The Commission's decision to continue the present prohibition on equity investments rested primarily on two considerations. First, the Commission was concerned that equity investment could pose a particular threat to lawyer independence of professional judgment. The Commission was concerned that equity investors would be more interested in the bottom line rather than in service. Second, the Commission was well aware that the House of Delegates had previously rejected a proposal to permit passive investment and agreed with that decision. The Commission did not consider lifting the ban at this time to be a necessary step to accomplish the goal of best serving the public through the relaxation of the rules that currently prevent multidisciplinary practice.

Id: see also id. (noting the MDP Comm'n is willing to consider "well documented comments . . . indicating that the continuation of the ban would have a deleterious economic impact . . . . ").

213. *See Recommendation*, *supra* note 3. *See also Report*, *supra* note 3. (emphasizing that the MDP Comm'n was not recommending nonattorneys be permitted to deliver legal services, rather, the purpose of the recommendation was to allow attorneys to practice in a wider variety of settings).

214. *See Recommendation*, *supra* note 3.

215. *See id; see also App. C*, *supra* note 3 (noting that the purpose of the principle is to ensure that an attorney's indpendent judgment is not weakened); *Report*, *supra* note 3 (same).

216. *See Recommendation*, *supra* note 3; *see also App. C*, *supra* note 3 (noting that the purpose of this principle is to ensure an attorney's independent judgment is not weakened).

217. *See Recommendation*, *supra* note 3; *see also App. C*, *supra* note 3 (noting that the purpose of this principle is to protect the core value of loyalty to the client).

compatible with the delivery of legal services to the same client and with the rules of professional conduct . . . [,]" attorneys are required to make a "reasonable effort" to ensure that clients understand the difference between attorneys' and nonattorneys' obligations regarding the disclosure of confidential information.[218] An attorney must make a "reasonable effort" to ensure that clients understand that courts may treat these respective obligations accordingly.[219]

The Commission further recommended that attorneys who work with, or are assisted by, nonattorneys in an MDP be required to make "reasonable efforts" to ensure the MDP enacts measures that make the conduct of nonattorneys compatible with the professional obligations of attorneys.[220] According to the Commission, services that would constitute the "practice of law,"[221] if provided by a lawyer in a law firm, must be represented as such by an MDP.[222]

218. *See Recommendation*, *supra* note 3.

219. *See id.*; *see also App. C*, *supra* note 3 (noting that the MDP Comm'n believes that such disclosure and understanding will adequately protect the attorney-client privilege); *Updated Background Report*, *supra* note 37 (noting that the MDP Comm'n takes the position that the role of auditor and attorney are incompatible under federal securities law).

220. *Recommendation*, *supra* note 3. *See also App. C*, *supra* note 3 (noting that the purpose of this provision is to protect the attorney-client privilege and confidentiality).

221. *See App. A*, *supra* note 3:

> "Practice of Law" means the provision of professional legal advice or services where there is a client relationship or trust or reliance. One is presumed to be practicing law when engaging in any of the following conduct on behalf of another:
>
> (a) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect the disposition of personal property, wills, codicils, instruments intended to affect the disposition of property of decedents' estates, documents relating to business and corporate transactions, other instruments intended to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business;
>
> (b) Preparing or expressing legal opinions;
>
> (c) Appearing or acting as an attorney in any tribunal;
>
> (d) Preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal;
>
> (e) Providing advice or counsel as to how any of the activities described in subparagraph (a) through (d) might be done, or whether they were done, in accordance with applicable law;
>
> (f) Furnishing an attorney or attorneys, or other persons, to render the services described in subparagraphs (a) through (e) above.

Id.

222. *Recommendation*, *supra* note 3. *See also Report*, *supra* note 3 (noting that the purpose of this principle is to guarantee that the protections offered clients are not lost by regulating the manner in which the lawyer is identified to clients).

Finally, the Commission recommended that nonattorney operated MDPs be subject to the authority of the highest court in each state in which the MDP is operating and be required to submit a written undertaking to that court.[223] Failure to comply with the written undertaking requirement will subject the

223. *See Recommendation*, *supra* note 3. A chief executive officer (or similar official) and the board of directors (or similar body) must sign the written undertaking. *Id.* Moreover, the written undertaking must contain the following:

> (A) it will not directly or indirectly interfere with a lawyer's exercise of independent professional judgment on behalf of a client;
>
> (B) it will establish, maintain and enforce procedures designed to protect a lawyer's exercise of independent professional judgment on behalf of a client from interference by the MDP, any member of the MDP, or any person or entity controlled by the MDP;
>
> (C) it will establish, maintain and enforce procedures to protect a lawyer's professional obligation to segregate client funds;
>
> (D) the members of the MDP delivering or assisting in the delivery of legal services will abide by the rules of professional conduct;
>
> (E) it will respect the unique role of the lawyer in society as an officer of the legal system, a representative of clients and a public citizen having special responsibility for the administration of justice. This undertaking should acknowledge that lawyers in an MDP have the same special obligation to render voluntary *pro bono publico* legal service as lawyers practicing solo or in law firms;
>
> (F) it will annually review the procedures established in subsection (B) and amend them as needed to ensure their effectiveness; and annually certify its compliance with subsections (A)-(F) and provide a copy of the certification to each lawyer in the MDP;
>
> (G) it will annually file a signed and verified copy of the certificate described in subsection (F) with the court, along with relevant information about each lawyer who is a member of the MDP;
>
> (H) it will permit the court to review and conduct an administrative audit of the MDP, as each such authority deems appropriate, to determine and assure compliance with subsections (A)-(G); and
>
> (I) it will bear the cost of the administrative audit of MDPs described in subparagraph (H) through the payment of an annual certification fee.

Id. See also App. A, *supra* note 3 (noting that "'[m]ember' of an MDP denotes any employee, partner, shareholder, or the like to the extent permitted of lawyers organized in law firms."). According to the Comm'n on MDP, "[t]hese undertakings are directed toward MDPs that are controlled by nonlawyers because the commission believes that it is unnecessary to require MDPs under the control of lawyers to comply with the safeguard certification process since lawyers' duties under the rules of professional conduct already provide those protections." *Report*, *supra* note 3. Moreover:

> [T]he Commission considers that the certification process, the filing procedures and the payment of the annual fee are reasonable measures designed to protect MDP's clients and the public from possible interference with the client-lawyer relationship by nonlawyers in an MDP. Because the likelihood of such interference is significantly diminished if lawyers control the MDP, the undertakings set forth in Recommendation (A)-(I) are not required of an MDP in which control is exercised by lawyers.

App. C, *supra* note 3.

MDP to the withdrawal of its ability to deliver legal services and any other remedial measures that a court feels is appropriate.[224]

In an attempt to ensure the formal recommendation is carried out, the Commission proposed Model Rule 5.8, "Responsibilities of a Lawyer in a Multidisciplinary Practice." [225] It "delineates some of the duties, controls and safeguards discussed in the formal recommendation."[226] At the same time, however, Model Rule 5.8 was offered for illustrative purposes and was intended only as one example "of how the principles in the Commission's recommendation might be implemented."[227] Ultimately, the Commission was only asking the House to approve the recommendation consisting of the aforementioned principles.[228]

In compliance with the aforementioned principles and Model Rule 5.8, the Commission proposed an amendment to Model Rule 5.4[229] which would permit fee sharing in MDPs.[230] The Commission also proposed limited amendments to Model Rule 1.6[231] (confidentiality), Model Rule 1.10[232]

224. *See Recommendation*, *supra* note 3.

225. *See Regulation of Bar: ABA Multidisciplinary Practice Commission Recommends Amending Rules to Allow MDPs*, 15 Law. Man. on Prof. Conduct (ABA/BNA) 250, July 9, 1999; *supra* note 8.

226. *Regulation of Bar: ABA Multidisciplinary Practice Commission Recommends Amending Rules to Allow MDPs*, *supra* note 225.

227. *App. C*, *supra* note 3.

228. *See id.*

229. *See App. A*, *supra* note 3. Under the MDP Comm'n's proposal the following subsection would be added to Model Rule 5.4: "(e) To the extent provided in Rule 5.8, the provisions in subsections (a), (b), or (d) above do not apply to a lawyer in an MDP." *Id.*

230. *See Regulation of Bar: ABA Multidisciplinary Practice Commission Recommends Amending Rules to Allow MDPs*, *supra* note 225; *App. A*, *supra* note 3.

231. *See App. A*, *supra* note 3. Under the MDP Comm'n's proposal, the following additions would be made to Rule 1.6, "Confidentiality of Information":

> [23] A lawyer in an MDP who provides legal services to the MDP's clients may encounter confidentiality problems that require special attention. The lawyer should scrupulously observe the rules of professional conduct relating to the protection of confidential client information.
>
> [24] A lawyer in an MDP who delivers legal services to the MDP's clients and who works with, or is assisted by, a nonlawyer in the MDP who is delivering nonlegal services in connection with the delivery of legal services to a client should make reasonable efforts to ensure that the nonlawyer behaves in a manner that discharges the lawyer's obligation of confidentiality.
>
> [25] In the context of an MDP, there is a particular concern about the potential loss of the attorney-client privilege, arising out of the possibility that the MDP's clients might not be properly informed as to the separate functions performed by the MDP and that the members of the MDP would not treat legal matters in a fashion appropriate to the preservation of the privilege. A lawyer in an MDP should take special care to avoid endangering the privilege by either the lawyer's own conduct or that of the MDP itself, or

(imputed disqualification), and minor changes to Model Rules 5.1[233] (responsibilities of a partner or supervisory lawyer), 5.2[234] (responsibilities of a subordinate lawyer) and 5.3[235] (responsibilities regarding nonlawyer

its nonlawyer members, and should take such measures as shall be necessary to prevent disclosure of confidential information to members of the MDP who are not providing services in connection with the delivery of the legal services to the client.

Id.

232. *See App. A, supra* note 3. The MDP Commission's proposed Rule 1.10, "Imputed Disqualification: General Rule," provides: "[w]ith respect to an MDP, imputed disqualification of a lawyer applies if the conflict in regard to the legal services the lawyer is providing is with any client of the MDP, not just a client of a legal services division of the MDP or of an individual lawyer member of the MDP." *Id.*

233. *See id*. Under the MDP Comm'n's report, Model Rule 5.1, "Responsibilities of a Partner or Supervisory Lawyer," would be modified to include the following specific references to MDPs:

(a) A partner *or person in a similar position* in a law firm *or in an MDP* shall make reasonable efforts to ensure that the firm *or MDP* has in effect measures giving reasonable assurance that all lawyers in the firm *or MDP* conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

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

(2) the lawyer is a partner in the law firm *or the MDP* in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated.

Id.

234. *See App. A, supra* note 3. Under the report, the substance of Model Rule 5.2, "Responsibilities of a Subordinate Lawyer," remains the same. *Id.* It provides:

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Id.; MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1983). The MDP Comm'n's modification comes in the form of a comment which provides: "[t]he exception contained in paragraph (b) does not apply to acts by the lawyer in accordance with the instructions of a nonlawyer supervisor." *App. A, supra* note 3.

235. *See id*. Under the MDP Commission's report, Model Rule 5.3, "Responsibilities Regarding Nonlawyer Assistants or Associates," would be amended to include the following specific references to MDPs:

(a) a partner *or person with a comparable role* in a law firm *or an MDP* shall make reasonable efforts to ensure that the firm *or MDP* has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

assistants or associates).[236] However, the proposed amendments are only illustrations and were not intended to be binding with respect to specific language.[237]

V. PROBLEMS WITH THE RECOMMENDATION

Commentators both for and against MDPs have found problems with the Commission's recommendation.[238] The complaints include the following: failure to provide adequate safeguards that will protect the core values of the legal profession;[239] discrimination between attorney-owned and nonattorney-owned MDPs;[240] unclear language and ambiguous interpretations;[241] problems with the Commission's definition of the "practice of law";[242] and the potential problems created for the states.[243] Although this list is hardly exhaustive of the complaints put forth by commentators, it does indicate many of the main complaints and demonstrates the fact that many issues will need to be addressed if the rules are amended to allow MDPs.

A. Recommendation Fails to Protect the Core Values of the Legal Profession

Almost all commentators have commended the Commission for attempting to preserve core values of the legal profession.[244] At the same time, however, one of the largest criticisms of the report and recommendation is that the Commission did not specify how attorneys would be able to stay within the

> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
>
> (c) a lawyer shall be responsible for conduct of such person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner in the law firm *or in the MDP* in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action.

Id.

236. *See Regulation of Bar: ABA Multidisciplinary Practice Commission Recommends Amending Rules to Allow MDPs*, *supra* note 225; *App. A*, *supra* note 3.

237. *See App. C*, *supra* note 3.

238. *See FAQs About Multidisciplinary Practices*, *supra* note 3 (noting that "there has been little, if any, commentary fully endorsing the recommendation.").

239. *See infra* notes 244-57 and accompanying text.

240. *See infra* notes 258-66 and accompanying text.

241. *See infra* notes 267-80 and accompanying text.

242. *See infra* notes 281-93 and accompanying text.

243. *See infra* notes 294-308 and accompanying text.

244. *See FAQs About Multidisciplinary Practices*, *supra* note 3.

ethical rules.[245] Since these types of concerns were not addressed, the recommendation fails to protect the core values of the legal profession and thereby fails to provide adequate safeguards to protect clients.[246]

The recommendation and report have been criticized because the Commission erroneously assumes nonlawyers will respect and enforce the legal profession's ethical rules.[247] The recommendation does not thoroughly address the potential problems that will arise when nonlawyers, whose values and guiding principles are different from the values and principles of the legal profession, control MDPs.[248] As one commentator notes "[i]f someone else controls the money, someone else controls you."[249] For these reasons, among others, the Commission fails to provide procedures that will protect an attorney's independent judgment and undivided loyalty to clients.[250]

Moreover, the recommendation lacks the language necessary to protect confidentiality and to require lawyers to bind their nonattorney colleagues in the same way that law firms do now with nonattorney staff.[251] Thus, even if the attorney is not subordinate to the nonattorney, the Commission's proposal does not address how lawyers and nonlawyers can "work with" each other without jeopardizing the core values of the legal profession.[252]

Theoretically, additional safeguards could be implemented in an attempt to protect the core values of the legal profession. One commentator argues that although the Commission cannot impose legal ethics rules on nonattorneys, the

245. *See Updated Background Report*, *supra* note 37. *See also, e.g.*, Ritchenya A. Shepherd, *Lawyers Accountants & Beyond: ABA Fee-Splitting Idea Would Spark Multidisciplinary Firms*, NAT'L L.J., June 21, 1999, at A1; *The State Bar of California Report with Recommendation to The House of Delegates* (visited Sept. 23, 1999) <http://www.abanet.org/cpr/sbcalif.html> [hereinafter *State Bar of Cal. Response to MDP Report*].

246. *See State Bar of Cal. Response to MDP Report*, *supra* note 245.

247. *See Vocal Debate on MDP Report*, *supra* note 74 (comment by Lawrence J. Fox of Drinker Biddle & Reath).

248. *See id.; see also Updated Background Report*, *supra* note 37 (inviting comments as to how the MDP Comm'n should address this concern).

249. Blumenthal & White, *supra* note 137, at 2 (quoting Lawrence J. Fox). *See also Vocal Debate on MDP Report*, *supra* note 74. Bernard Wolfman of Harvard Law School "suggested that it is 'naïve' to think that law firms dominated by large accounting companies won't 'just do what the owners want them to do.'" *Id.* Sydney M. Cone III, counsel to Cleary, Gottlieb, Steen & Hamilton in New York City, claimed that " [e]ven if lawyers do not receive specific instructions to subordinate the interests of a particular client to economic concerns of the nonlawyers who run the MDP . . . lawyers within an MDP will be clearly alert to management's expectations and their own career opportunities." *Id.*

250. *See* Blumenthal & White, *supra* note 137, at 3.

251. *See* Langford & Zitrin, *supra* note 90; *see also Testimony of Terry*, *supra* note 145 (noting that "[t]he Commission must face the issue of the degree to which it expects MDP nonlawyers to comply with legal ethics rules.").

252. *State Bar of Cal. Response to MDP Report*, supra note 245.

Commission could take steps to ensure that attorneys and MDPs are able to stay within the legal profession's ethics rules.[253] For example, the Commission could provide that attorneys will only be able to work in an MDP if the nonattorneys in the MDP comply with the professional rules of conduct.[254] Alternatively, the Commission could suggest, "nonlawyers in an MDP be required to register with the bar, . . ." the corollary of which could be use of the legal profession's ethics rules.[255] Additionally, certain management procedures could be implemented to insure the core values of the legal profession will not be compromised.[256] On the other hand, some will question whether the core values can ever be completely protected in an MDP controlled by nonattorneys.[257]

B. Discrimination Between Attorney and Nonattorney-Controlled MDPs

Another criticism of the recommendation concerns the additional regulations imposed solely on nonattorney-controlled MDPs.[258] In addition to fulfilling the universal requirements, the nonattorney-controlled MDP must

253. *See generally Testimony of Terry*, supra note 145; Turman, *supra* note 13.

254. *See Testimony of Terry*, *surpa* note 145 (noting that this approach was adopted by the German mandatory bar association BundesrechtsanwaltsKammern).

255. *See id.* (noting that this is the approach suggested by the Consultation Paper of the Law Society of England Wales).

256. *See* Turman, *supra* note 13. Management procedures that could protect the attorney's independent judgment include the following:

> 1. segregating all lawyers in an MDP into separate corporate or administrative units headed or supervised by lawyers;
>
> 2. requiring that evaluation, compensation and promotion of lawyers be principally undertaken and decided by lawyers; and
>
> 3. establishing special ombudsman process to provide a confidential means of management access for any lawyer who believes that the independence of his or her professional judgment has been, or threatens to be, compromised.

Id. Moreover:

> Adequate management procedures should be in place to assure that confidential client information is communicated only to such persons (lawyers and non-lawyers) within the MDP who have a need to know such information in connection with the delivery of legal services to the client . . . . Further, management procedures should include a comprehensive and well-understood policy on client confidentiality within the MDP organization, the maintenance of segregated filing and record-keeping systems for clients receiving legal services, and the maintenance of segregated accounting and billing systems for clients receiving legal services.

Id.

257. *See generally* discussion *supra* Part III.B.3.

258. *See* Weber, *supra* note 114; *FAQs About Multidisciplinary Practices*, *supra* note 3.

submit to an annual certification and audit requirement.[259] Criticisms to this proposal are that such distinctions are discriminatory and create obstacles for the nonattorney-controlled law firm that cannot be overcome.[260]

Moreover, even if the obstacles can be overcome, the claim is that nonattorneys would have little incentive to form MDPs since they would incur cost and inconvenience that attorney-owned MDPs would not incur.[261] The American Institute of Certified Public Accountants ("AICPA"), for one, already announced their opposition to the proposal, claiming they would not subject themselves to attorneys' standards.[262] According to the AICPA, the Commission's "regulatory approach" is impractical and will inhibit rather than further client choice.[263] In addition, the AICPA asserts that there is no evidence that indicates such burdensome regulations are necessary and argues that even if they are necessary, there are no reasons why attorney-controlled MDPs should not have to submit to them.[264]

To address these complaints, the Commission seems to be considering subjecting all MDPs to the audit and certification procedures, and/or extending the audit and certification requirements to a firm (as defined in the Model Rules) and each lawyer in a firm.[265] While this may be the only way to avoid discrimination complaints in this area, the burdens already imposed on the state courts under the recommendation will probably multiply if both attorney and nonattorney-owned MDPs must submit to the regulatory requirements.[266]

C. Recommendation Provides Inadequate Explanations

Some have criticized the proposal for vague language and incomplete specifications, both of which lead to a variety of often creative and competing

259. *See supra* note 223 and accompanying text. *But see Updated Background Report*, *supra* note 37 ("The Recommendation endeavored to assure that clients would be informed of the differences in the services and protections offered, thereby reducing client confusion.").

260. *See* Weber, *supra* note 114. *But see Report*, *supra* note 3:

> The Commission believes that the recommended procedures required of such MDPs do not constitute an unreasonable burden . . . . Since the MDP and its members must conduct themselves so as not to permit violations of the rules of professional conduct, these procedures will make senior officials of the MDP sensitive to these special obligations.

Id.

261. *See* Weber, *supra* note 114.

262. *See* Bacon, *supra* note 96, at 8.

263. *Resolution of the AICPA Regarding ABA's MDP Recommendation*, *reprinted in Multidisciplinary Practice*: *Is it the Wave of the Future or Only a Ripple*, 66 DEF. COUNS. J. 460, 463-64 (1999).

264. *See id.*

265. *See Updated Background Report*, *supra* note 37.

266. *See* discussion *infra* Part V.E.

interpretations.[267] For instance, although the report prohibits passive investment in general, it is not necessarily prohibited in the context of an MDP.[268] Moreover, under the recommendation, a professional service firm can intentionally form alliances with law firms or lawyers who represent clients adverse to the professional service firm's clients and thereby disqualify the law firm or lawyers from representing the adverse clients.[269] In other words, a professional service firm could intentionally create conflicts to protect its clients.[270] Such attempts will threaten attorneys' independent judgment and will potentially inhibit access to legal representation.[271]

Additionally, the Commission does not adequately define certain ambiguous terms.[272] For instance, the term "disciplines" is not adequately explained so that there are no limits on the types of service providers that can join law firms to form an MDP.[273] Accordingly, professionals that are unable or unwilling to respect legal ethics rules are able to join MDPs.[274] The Board of Governors for the State of California claims that the Commission never provides an adequate definition for the "reasonable efforts" attorneys are

267. *See, e.g.*, Levinson, *supra* note 50. *See also, e.g.*, *State Bar of Cal. Response to MDP Report*, *supra* note 245 ("The principles recommended by the ABA lack the clarity and specificity necessary to ascertain the types of legal practice that will result from these principles.").

268. *See* Levinson, *supra* note 50. According to Levinson:

> Professional Service Firm (PSF), with no attorneys, enters into a profit-sharing alliance with Law Firm (LF), qualifying as a non-lawyer-controlled MDP. The firms make no attempt to offer legal and nonlegal services to the same clients. PSF invests capital into LF, and periodically collects its share of the profits. Result – PSF is virtually a passive investor.

Id.

269. *See id.*

270. *See id.*

271. *See id.*

272. *See generally supra* note 267.

273. Levinson, *supra* note 50. *See also* Harold Levinson, *The Risks of Multidisciplinary Practice*, N.Y.L.J., June 21, 1999, at 2 (noting that "[t]he ABA report gives an open-ended list of who, in addition to lawyers, may own interests in an MDP. The list includes accountants, economic forecasters, financial planners, lobbyists, psychological counselors, social workers, architects and tax preparers."); Molly McDonough, *ISBA at Odds with Proposal for Combined Practices*, CHI. DAILY BULL., June 28, 1999, at 1 (reporting that an ABA Delegate of Santa Monica, California remarked, "[l]iterally, a lawyer and a prostitute can go into business . . . . There is no end to the number of people lawyers can form partnerships with and hard-sell their products and services.").

274. *See* Levinson, *supra* note 50 (noting that "[t]he Commission's examples could encourage even more troublesome interpretations of the 'disciplines' that qualify for inclusion in MDPs, extending to a wide variety of relatively uneducated, unlicensed, unregulated and uncontrollable occupations. Members of these occupations might be unwilling or unable to respect the 'unique role of the legal profession.'").

required to demonstrate in an MDP.[275] It also notes further ambiguity regarding the term "all clients" of an MDP.[276]

Additionally, although the Commission makes the distinction between attorney-controlled and nonattorney-controlled MDPs, the Commission does not define "control."[277] Obviously, the omission of a clear definition could lead to difficulties in enforcing the additional regulations upon nonattorney controlled MDPs.[278] For example, if the nonattorneys are only employees of the MDP and the control test is essentially based on the number of partners, the control test is not met.[279] However, the nonattorneys could "virtually control" the MDP if they either outnumber the partners in the law firm or bring a substantial amount of new clients to the law firm.[280] Ultimately, the vague language and ambiguous definitions employed by the Commission will potentially lead to various interpretations, some of which impair the core values of the legal profession.

D. Problems with the Commission's Definition of "Practice of Law"

Another problem with the Commission's recommendation is that it expands the definition of the term "practice of law" so that it encompasses anything a lawyer does.[281] This creates a problem because many of the

275. *State Bar of Cal. Response to MDP Report*, *supra* note 245. *See also* Langford & Zitrin, *supra* note 90 (noting that "[r]easonable efforts aren't good enough; attorneys can and should be required to get this job done, period, or suffer the consequences.").

276. *Id.* The Board of Governors claims the following questions regarding the term "all clients" are left unresolved by the MDP Comm'n's recommendation:

> Are those "clients" only those persons who engage the MDP for legal services? If so, does a customer who initially receives only non-legal services become a "client" for legal services upon learning that a lawyer within the MDP is assisting the nonlawyers? Is there automatic transformance? Is there "delivery of legal services" if the lawyer's work is internal only? If a lawyer is assisting nonlawyers or works only behind the scenes, is the customer a "client?"

Id.

277. Levinson, *supra* note 50.

278. *See id.*; Sydney M. Cone, *Multidisciplinary Practice ("MDP"): Comments on ABA Commission Report Released June 8, 1999 (the "Report")* (visited Jan. 6, 2000) <http://www.abanet.org/cpr/cone3.html>.

279. *See* Levinson, *supra* note 50.

280. *Id. See also* Cone, *supra* note 278. "For this purpose, a state that decides to permit lawyers to practice in MDPs might adopt a black-letter definition of 'control' or might leave the concept of 'control' to common law definition by the courts." *Id.*

281. Michael Paul, *Manager's Journal: Law Firms Shouldn't Be for Lawyers Only*, WALL ST. J., Aug. 9, 1999, at A18; *FAQs About Multidisciplinary Practices*, *supra* note 3. *See also supra* note 221; *Vocal Debate on MDP Report*, *supra* note 74 (noting that the definition provided by the MDP Comm'n goes beyond any definition anyone advocated in their testimony). *But see id*. (reporting that Sherwin Simmons, the Chair of the MDP Comm'n, claims the MDP Comm'n

lawyer's activities do not directly fall under the definition of "practice of law."[282] For instance, even though activities such as lobbying, media relations, estate planning and marriage counseling are not necessarily related to the "practice of law," such services would probably be included in the Commission's definition since they are also provided by attorneys.[283]

Obviously the tax and "consulting" services that the Big Five currently offer would fall under the Commission's definition.[284] Thus, under this definition a "non-law firm" that employs attorneys, can become a *de facto* law firm, and thus be subject to the legal profession's ethics rules.[285] Likewise, nonattorneys may avoid MDPs because they do not want to be accused of practicing law and thereby be forced to adhere to the legal profession's ethics rules.[286] Some fear that disciplinary proceedings will be brought against a nonattorney whose activities traverse legal services and services offered by other professionals.[287] Others fear that non-law firms might stop offering the services they do today because they do not want to be charged with the unauthorized practice of law.[288]

Yet the Commission has since made it clear that its intent in defining the "practice of law" as it did was to "leave the definition to the individual jurisdictions."[289] The Commission never intended its definition to be

came across more than 3000 definitions of the "practice of law" and, thus, had difficulty in attempting to define it accurately).

282. Paul, *supra* note 281. *But see Vocal Debate on MDP Report*, *supra* note 74. Robert H. Mundheim, a member of the MDP Comm'n, remarked that although the MDP Comm'n's definition of "the practice of law" would include many borderline activities, this might simply "be one of the trade-offs to working in an MDP." *Id.*

283. Paul, *supra* note 281.

284. *See* Weber, *supra* note 114 (noting that under the MDP Comm'n's definition of the term "practice of law," "the tax preparation firm and the information technology consultancy become de facto law firms, subject to bar rules.").

285. Weber, *supra* note 114.

286. *See id.*

287. *See* Dzienkowski & Peroni, *supra* note 135. Such proceedings:

> [W]ould be a giant leap backward for the legal profession. The delivery of legal and law-related services through nonlawyer controlled entities has long been accepted in this country. The first legalized MDPs in this country were accounting firms offering tax law services under the auspices of federal statutes and regulations, which pre-empt state attempts to interfere with such activities . . . . The American Institute of Certified Public Accountants has adopted a resolution, objecting to the commission's proposal on these grounds.

Id.

288. *See* Weber, *supra* note 114. The result would be fewer choices then are available today. *Id.*

289. *Updated Background Report*, *supra* note 37.

exclusive;[290] rather, it was intended as an example of one possible definition.[291] At the same time, if states are as apt to follow the ABA as many believe,[292] providing even an illustrative definition of the "practice of law" will create a number of problems for the legal profession.[293]

E. Problems for the State Courts

The recommendation has also been criticized for the problems it poses to the state courts.[294] First, the proposal may place huge burdens on the state courts to regulate "multijurisdictional" MDPs.[295] While the report mentions multijurisdictional MDPs, it does not explain how the proposal will apply to them.[296] Furthermore, the Commission gives little guidance regarding how states should audit and monitor MDPs.[297] The Commission does not clarify the "logistics of a court audit."[298] For example, the Commission does not specify who will conduct the audit, it does not promulgate rules of procedure to be followed in conducting the audit and it does not express standards an entity should use in making a judgment.[299]

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290. *See id.*

291. *See id.*

292. *See generally infra* note 368 and accompanying text. *See also Vocal Debate on MDP Report*, *supra* note 74. According to Sherwin Simmons, the definition was provided by the MDP Comm'n, in part, because the states may be unwilling "to tackle the definition" on their own. *Id.*

293. Due to the criticism received regarding its attempt to define the "practice of law", the MDP Comm'n is questioning whether it should include a definition at all in subsequent recommendations and has invited comments on this issue. *See Updated Background Report*, *supra* note 37.

294. *See e.g.*, Cone, *supra* note 278; Levinson, *supra* note 50; *Statement of DRI*, *supra* note 191.

295. Levinson, *supra* note 50.

296. *See id*; *see also* Dzienkowski & Peroni, *supra* note 135:

> Suppose, for example, an MDP with lawyers licensed and working in Washington, D.C., and Austin wished to provide advice about intellectual property matters to a company headquartered in Alabama. The proposal would require the MDP to register with the Alabama Supreme Court, and be subject to audit by that court. But what happens if the Alabama Court demands that the MDP adopt procedures inconsistent with those imposed on it by the Texas Supreme Court and the D.C. Court of Appeals? If adopted, the commission's recommendations would establish barriers to entry and substantially inhibit the formation of nonlawyer-controlled MDPs in the United States.

Id.

297. *See Vocal Debate on MDP Report*, *supra* note 74. Laurel Terry, a Professor at Pennsylvania State University Dickinson School of Law, contended that "[t]he commission has acquired tremendous expertise in this area . . . and at a minimum it should help out the state courts by drafting, for example, a list of items that a state court should request in the context of an MDP audit." *Id*.

298. *FAQs About Multidisciplinary Practices*, *supra* note 3.

299. *See id.*

Additionally, insofar as the Commission's recommendation proposes that state courts monitor and audit MDPs to ensure compliance with the Model Rules, the courts' resources will be heavily overburdened.[300] State Supreme Courts already have enough to do without having to license and monitor MDPs and attorneys who practice in them.[301] Moreover, at least one commentator claims, "it is at best wishful thinking and at worst naïve to suggest that underfunded court systems can regulate powerful economic interests."[302]

Furthermore, state constitutional problems may arise.[303] Traditionally, the state legislatures and administrative agencies have exercised control over many businesses and professions and any attempt for courts to exercise dominion over these entities might violate separation of powers under state constitutions.[304]

The Commission is considering "whether and to what extent it can contribute any guidance to the states to assist them in structuring the regulatory and certification procedures."[305] In addition, the Commission seems to be considering peer review as an alternative to the audit and certification process.[306] At the same time, however, the Commission clearly felt its recommendation was "feasible," and thus, may be reluctant to alter its position on this issue.[307] Moreover, the Commission clearly believes that the details of the process need "to be worked out within each jurisdiction in

300. *See* Anna Snider, *City Bar Endorses New Types of Practices*, N.Y.L.J., July 21, 1999, at 1.

301. *See* Phillip S. Anderson, *If a Multidisciplinary Practice Offers Legal Services, Its Lawyers Must Be Regulated*, NAT'L L.J., Aug. 9, 1999, at B7. *But see id.:*

> If state supreme courts do not protect the public, however, who will. MDP lawyers receive licenses to practice from their states' highest courts. The rules of professional conduct should make clear that these lawyers are subject to regulation to the same degree as those in traditional practice and that entities that employ them, traditional or otherwise, must be regulated as well . . . . The alternatives are to permit MDP lawyers to remain unregulated, to attempt to evaluate them without their employers' consent or to prohibit lawyers from providing services in MDPs.

Id.

302. *Statement of DRI*, *supra* note 191.

303. *See* Levinson, *supra* note 50.

304. *See id*; *see also* Cone, *supra* note 278. ("[T]he Report would turn the court into an administrative agency having the open-ended assignment of policing MDP compliance with legal rules of ethics."); *Vocal Debate on MDP Report*, *supra* note 74 (Bernard Wolfman notes that although someone will have to regulate and monitor MDPs, people cannot expect state Supreme Courts to undertake that task because it will "sidetrack them from their principal role.").

305. *Updated Background Report*, *supra* note 37.

306. *See id.* (requesting comments regarding peer review as an alternative to the audit and certification process).

307. *Id.*

response to local needs, practices, and concerns."[308] Insofar as the details are left to the states, many of the aforementioned criticisms are still relevant.

F. A Few Other Criticisms

The recommendation has been criticized for various other reasons. Although there are too many to identify here, a few other criticisms can be mentioned. For instance, although the Commission recommended the elimination of fee-splitting, it fails to explain why the elimination is necessary or desirable in order to have MDPs.[309] As the Commission itself points out, "[p]rovided that the contractual arrangement is not a sham masking fee sharing or papering over what is really a partnership relationship with respect to the control and management of the law firm, it does not appear that the Contract or Affiliation Model violates the Model Rules of Professional Conduct."[310] Thus, even though the Commission relies on the European models to support its recommendation, it ultimately goes beyond what these models permit.[311]

Another major problem arises from the so-called "imputation rule."[312] Under the imputation rule, conflict of interest rules are applied to law firms.[313] Thus, "a relatively minor conflict of interest involving an associate in the United States could foil the rainmaking efforts of a partner in Hong Kong . . . . [,]" if she were unable to comply with the shielding provisions necessary to avoid conflicts of interest. [314] The Commission, however, has been criticized for failing to adequately address this issue.[315]

Also, "the proposal opens the door to lawyers providing services to the public through any kind of for-profit organization that chooses to provide legal services to the public, provided only that it hold itself out as providing some nonlegal service."[316] Thus, any number of companies or businesses could hire attorneys and thereby provide legal services.[317]

308. *Id.*

309. *See State Bar of Cal. Response to MDP Report*, *supra* note 245. The Board of Governors refers to *App. C* for the proposition that in other countries, with the exception of Switzerland, "one stop shopping is permitted while having lawyers remain in control of, and billing for, the legal service separately from nonlegal services." *Id.*

310. *Updated Background Report*, *supra* note 37.

311. *See State Bar of Cal. Response to MDP Report*, *supra* note 245.

312. *FAQs About Multidisciplinary Practices*, *supra* note 3.

313. *See id.*

314. *Id.*

315. *See id.*

316. *State Bar of Cal. Response to MDP Report*, *supra* note 245.

317. *See id.*

VI. ALTERNATIVE APPROACHES FOR THE FUTURE

There are alternatives to the Commission's recommendation. Obviously, the Model Rules could be left alone.[318] In the alternative, a number of different amendments could be made to the Model Rules to regulate MDPs and, at the same time, attempt to protect the core values of the legal profession.[319] In addition, there are different structures through which MDPs could be permitted to operate.[320] The Commission appeared to be exploring some of the different options before making its recommendation.[321] Although the Commission failed to examine the implementation of alternatives in detail,[322] it may be willing to consider some of the alternatives more critically in its upcoming report and recommendation.[323]

A. Leave the Rules Alone

One alternative to the entire MDP movement is to leave the rules alone.[324] Leaving the rules alone is certainly a viable, and perhaps necessary, alternative. Within the course of leaving the rules alone, the legal profession has two options.[325]

First and most simply, the legal profession could do nothing.[326] Instead of taking any type of immediate action, the legal profession could simply wait and watch the actions of clients and the unregulated actions of professional service firms to see what happens.[327]

In the alternative, the legal profession could take immediate action and, at the same time, leave the rules alone by strictly enforcing UPL statutes and other ethics rules.[328] Additionally, the legal profession could focus on ways to improve the profession and the services it provides to the public.[329] For example, if the concern is that the legal profession needs to be able to compete in a global market, the profession could upgrade its quality of service, adopt

318. *See infra* notes 324-37 and accompanying text.

319. *See infra* notes 338-49 and accompanying text.

320. *See infra* notes 350-63 and accompanying text; *supra* notes 16-46 and accompanying text.

321. *See Hypotheticals and Models*, *supra* note 16.

322. *See generally Recommendation*, *supra* note 3; *General Information Form*, *supra* note 7; *Report*, *supra* note 3; *App. A*, *supra* note 3; *App. C*, *supra* note 3; *Hypotheticals and Models*, *supra* note 16.

323. *See Updated Background Report*, *supra* note 37.

324. *Hypotheticals and Models*, *supra* note 16.

325. *See generally* Toby Brown, *Accounting 101 for Lawyers or Too Late, You Lose?*, 12 UTAH B. J. 8, 11 (1999).

326. *See id.*

327. *See id.*

328. *See Updated Background Report*, *supra* note 37; Brown, *supra* note 325, at 11.

329. *See generally* Levinson, *supra* note 50.

attractive methods of professional service firms and explain the benefit of independent law firms to the public.[330] Moreover, if the concern is providing clients with more effective and efficient services, the Commission could also consider "ancillary business law firms; networks including law firms and other professional firms; referrals to members of non-law professions; and expanded roles of in-house professionals in non-law professions."[331] Thus, instead of changing the rules, the Commission could have proposed clarifying and enforcing the existing rules in a way that would accommodate some of the recognized needs of our current economy.[332]

Although the Commission mentions and finds support for leaving the rules alone as an alternative,[333] it ultimately seems to presume MDPs are inevitable and proceeds accordingly.[334] According to the Commission, professional service firms, such as the Big Five, are already delivering legal services and the states are doing nothing to enforce existing rules.[335] In its future report or recommendation, however, the Commission might be willing to consider whether increased enforcement of UPL statutes and related professional conduct rules is in the best interest of the public or an achievable objective.[336] Moreover, assuming increased enforcement is not an achievable objective, the Commission seems willing to consider simply maintaining the status quo.[337]

330. *See* Levinson, *supra* note 50.

331. *Id. But see App. C*, *supra* note 3:

> In consumer groups' collective opinion, a dual practice model cannot meet these [integrated professional advice] needs. There are not enough lawyers with the requisite skill in the other disciplines. Given the demand of modern law practice and ever growing complexity of all subject matter areas, it is difficult for lawyers to keep abreast of the developments in more than one discipline.

Id.

332. *See generally* Levinson, *supra* note 50.

333. *See Hypotheticals and Models*, *supra* note 16; *Updated Background Report*, *supra* note 37 (noting that many critics of the MDP Comm'n's recommendation "call for stepped up enforcement of (1) the ethics rules prohibiting a lawyer from assisting a nonlawyer in the practice of law and (2) unauthorized practice of law (UPL) statutes prohibiting the delivery of legal services by corporations and other business entities controlled by nonlawyers.").

334. *See* Levinson, *supra* note 50.

335. *See Updated Background Report*, *supra* note 37:

> For example, in 1998 the UPL Committee of the Texas Supreme Court announced that it would not file a complaint against Arthur Anderson after an eleven month investigation. In 1999, Virginia bar counsel made a similar statement with respect to the compliance law services offered by an unnamed professional services firm.

Id. (footnotes omitted).

336. *See id*. (inviting comments in this area).

337. *See id.* The MDP Comm'n has also has requested comments on whether "*assuming arguendo* that such enforcement is unlikely, whether the public interest would be served by continuing the status quo in which the lawyers working for the Big Five and other professional and consulting firms are essentially unregulated by the bar." *Id.*

B. Alternative Amendments or Safeguards

Initially, the Commission mentioned two alternative amendments that could be made to the Model Rules.[338] First, while Model Rule 5.4 could simply be amended to permit nonlawyer principals in a law firm, legal conflict of interest rules, including imputation, could be extended to everyone.[339] Second, the Commission mentioned simply amending Model Rules 5.4 and 1.10(a).[340] The Commission stated that "[a]n amended Rule 1.10(a) could provide either (1) that there is no imputation, only disqualification by personal participation, or (2) that imputation exists among the professionals in any service firm holding itself out as providing legal services."[341] The amendment to Rule 1.10(a) would require departmentalization within the MDP, since the lawyer's rules would apply to "law" departments, but not to "non-lawyer" departments.[342] In its upcoming report and recommendation the Commission could certainly consider various other limited amendments to the Model Rules. In the alternative, the Commission could analyze and make amendments for each Model Rule that has traditionally prevented the development of fully integrated MDPs.[343]

Additionally, the Commission could analyze and discuss additional safeguards to be implemented through a new Model Rule.[344] For instance, in addition to requiring some sort of departmentalization, the Commission could require oversight by a supervisory attorney who would have ultimate authority with respect to the lawyers in a particular department.[345] Moreover, it could recommend that only those attorneys practicing in such separate departments

338. *See Hypotheticals and Models*, *supra* note 16.

339. *See id.*

340. *See id.*

341. *Id.*

342. *Id.*

343. *See Testimony of Terry*, *supra* note 145:

> For example, the Commission should consider additions that could be made to the definition of a firm, and to MRPC 1.6, 1.7, 1.8, 1.9, 1.10, 5.3 and 5.4. In addition, the Commission should consider how it would interpret the "publicity or marketing" provisions found in MRPC 7.1-7.5; money related issues found in MRPC 1.15, as well as state random audit statutes and client security fund provisions; fee issues arising under MRPC 1.5; pro bono requirements under MRPC 6.1; competence requirements under MRPC 1.1 (and the relationship of this requirement to lawyers participating in selling standardized "products"); training and supervision requirements such as those found in MRPC 5.1-5.3; and disclosure obligations, such as those found in MRPC 3.3 and 4.1.

Id.

344. *See generally Updated Background Report*, *supra* note 37.

345. *See id.* The supervisory attorney's duties would include "for example, deciding the number of lawyers and support personnel necessary to staff a matter and which lawyers to assign to a matter, and fixing the terms and conditions of the compensation of the lawyers in the unit." *Id.*

be able to present themselves as practicing law.[346] In other words, if an attorney were assigned to a "non-legal" unit of the MDP, the attorney would not be able to provide legal services to clients.[347] Furthermore, the Commission could recommend "specific practices and procedures to preserve the attorney-client and work product privileges . . . ."[348] Ultimately, it seems that a number of different practices and procedures could be implemented in an attempt to protect the core values of the legal profession.[349] Whether any of them will actually ameliorate threats to the core values is another question.

C. Different Models

While the Commission mentioned and illustrated several alternative models, it did not consider implementing them in any detail in its report or recommendation.[350] Rather, it simply urged that the Model Rules be amended to permit fully integrated MDPs.[351] The Commission may, however, be willing to consider alternative models more critically in the future.[352]

One alternative is the "Command and Control Model" (the "D.C. Model") with or without modification.[353] While the Commission could simply recommend replacing Model Rule 5.4 with D.C.'s version of the rule, other options are available.[354] For instance, instead of requiring the practice of law to be the "sole purpose" of the MDP, the Commission could require the practice of law to be a " principle purpose" of the MDP.[355] Moreover, it could limit the vocation of a "nonlawyer partner" to a "nonlawyer professional."[356]

346. *See id.*

347. *Id.* "Furthermore, it would be the responsibility of the MDP and each such person to make reasonable efforts to ensure that the MDP's clients understand that the person is not acting as a lawyer even though that person is licensed to practice law." *Id.*

348. *Id.* (requesting comments regarding what those practices and procedures should be).

349. *See, e.g.*, *supra* notes 253-56 and accompanying text.

350. *See generally Report*, *supra* note 3; *Recommendation*, *supra* note 3; *App. A*, *supra* note 3; *App. C*, *supra* note 3; *Hypotheticals and Models*, *supra* note 16.

351. *See Updated Background Report*, *supra* note 37.

352. *See generally id.* (The MDP Comm'n has requested Comments regarding adopting the D.C. Model with or without modification as an alternative to "the Fully Integrated Model.").

353. *Hypotheticals and Models*, *supra* note 16; *Updated Background Report*, *supra* note 37.

354. *See Updated Background Report*, *supra* note 37.

355. *Id*. (requesting comments on this modification).

356. *Id.* (requesting comments on this modification). The MDP Comm'n has requested comments on:

> [*A*]*ssuming arguendo* that partnership with only a nonlawyer professional is in the public interest,
>
> a) how "nonlawyer professional" should be defined;
>
> b) whether the public's interest would be adequately protected by defining a nonlawyer professional as "a member of a recognized profession whose conduct is governed by ethical standards;"

Another option is the "Contract Model."[357] According to the Commission, theoretically this model may be permissible under the Model Rule's current framework.[358] However, if this model is recognized as permissible, problems may arise.[359] While the law firm is a separate legal entity, the Commission recognizes that at "some point even if there is no formal fee sharing, economic interdependence may so entwine legal firms with nonlegal firms that they become a single entity."[360] The law firm may become so financially dependent on the non-law firm that attorneys' independent professional judgment will be threatened.[361] The Commission could, however, implement standards of evaluation to determine whether the law firm and professional services firm have become so interdependent that they have become a single entity.[362] Additionally, the Commission could recommend that the highest state court with jurisdiction review each contract between the law firm and the non-law firm, even though such a proposal would be burdensome and unwieldy at best.[363]

> c) whether the definition in item b) should be supplemented in the text or accompanying commentary by an illustrative recitation of nonlawyer professionals similar to that found in the comments to the Model Rule 5.7 and the Washington D.C. version of Rule 5.4 or should be left to the states.
>
> d) what measurements should be used to determine that the lawyer-principals of the MDP actually possess the power to resolve issues relating to the firm's finances, management, operations, and ethical responsibilities. Is it sufficient simply to require that fifty-one percent of the firm's principals be lawyers? Should supra-majority requirements for all or certain types of decisions be required in MDPs?
>
> e) what specific practices and policies capable of expression in a rule of professional conduct exist to create and foster an institutional culture conducive to the observance of ethical norms?

Id.

357. *Id.*

358. *See supra* note 310 and accompanying text.

359. *See Updated Background Report*, *supra* note 37.

360. *Updated Background Report*, *supra* note 37. "Evidence of such interdependence might include, for example, brand naming, concessions or other economic benefits to offshore affiliates, and benefits to each other's clients." *Id*.

361. *See id*. At the same time, "a similar danger can arise in any instance in which a law firm is dependent on a single client for a substantial portion of its revenue. Fear of antagonizing the client may interfere with the exercise of independent professional judgment by the firm's lawyers." *Id.*

362. *See id*. (requesting comments on this procedure).

363. *See id*. (requesting comments on this procedure); *see also* discussion *supra* Part V.E.

VII. FUTURE IMPACT OF THE RECOMMENDATION

A. What Does the Recommendation Mean?

For now, the Commission's recommendation is just that, a recommendation, and it will not be the official position of the ABA until passed by the House of Delegates.[364] Moreover, even if the House agrees to adopt the Commission's recommendation, it will take two to three years to draft and approve amendments to the Model Rules.[365] Subsequently, the individual states would have ample opportunity to decide whether they want to allow MDPs.[366]

Since the states and D.C. are autonomous jurisdictions, the Model Rules are just a recommended approach. As such, they are not binding on the various jurisdictions.[367] Some believe that because most states' legal ethics rules already mirror the Model Rules, there is reason to believe the states will adopt the Commission's recommendation if the ABA approves it.[368] Yet, states' responses to the Commission's proposal make it clear that the issues are both complex and troubling, and indicate they will not modify their rules without careful consideration of all the implications.[369]

364. *See* James Wilber, *Multidisciplinary Practice: American Bar Association States Out Position on MDPs*, *reprinted in* 7 NEVADA LAW. 8, 8 (1999); *see also* Shepherd, *supra* note 245 (noting that although under normal circumstances all that is needed to approve an action is a majority of the House of Delegates, since MDPs would involve such a drastic change in the legal profession, opponents may call for a supermajority vote).

365. *See Vocal Debate on MDP Report*, *supra* note 74 (comment by Sherwin Simmons, Chair of the Commission); *see also Regulation of Bar: ABA Multidisciplinary Practice Commission Recommends Amending the Rules to Allow MDPs*, *supra* note 225. If the recommendation is approved by the House of Delegates, the matter would have to be referred to the ABA Standing Committee on Ethics of Professional Responsibility and the ABA's Ethics 2000 Commission who would make and propose the necessary amendments. The amendments would then come back to the House of Delegates for their approval. *Id.*

366. *See* Wilber, *supra* note 364, at 8.

367. *See id; see also* Andrews, *supra* note 58, at 596 ("The ABA, because it is only a professional association, has absolutely no authority over the practice of law anywhere in the country. That authority, instead, is exercised primarily by the state court systems, and to a lesser extent, by the state legislatures, and by the three branches of the federal government.").

368. *See id*; *see also* Andrews, *supra* note 58, at 596 (noting that "ABA ethics codes have been copied or heavily relied upon by state courts and legislatures, and thus given the force of law.").

369. *See, e.g.*, *Updated Background* Report, *supra* note 37 (Prior to the vote, the Florida Bar submitted a motion directing the ABA to postpone voting until "additional study" indicated the profession's core values would not be impaired.); Rocco Commarere, *Multidisciplinary Practices: State Bar Turns Guns on Plan, Fears Radical Change for Profession*, N.J. LAW., July 26, 1999, at 851 (noting that the New Jersey State Bar Association had many problems with the MDP Comm'n's recommendation and would not allow MDPs in accordance with the proposal); *State Bar of Cal. Response to MDP Repor*t, *supra* note 245 (taking the position that the ABA

B. Impact of the Recommendation and MDPs in General

The Commission's recommendation, if adopted, would have an immense impact on both the legal profession and the public.[370] MDPs will lead to dramatic changes in the way legal and other services are provided in the United States.[371] At least one commentator claims that, if MDPs are permitted to operate, the legal profession will undergo more change in the next ten years than has occurred in the past 3,000 years.[372]

1. The Potential Impact on Law Firms

a. Small Law Firms

Large law firms and the Big Five are not the only parties potentially affected by MDPs. Although the nature and extent of the impact are unknown, small firms and solo practitioners will certainly feel an impact.[373] One fear is that MDPs will put small firms and solo practitioners out of business altogether.[374] Another concern is that small firms may try to do too much for

should defer final action until demand for and meaning of MDPs could be better understood and until the MDP Comm'n could ensure the core values of the legal profession would not be affected); *Multidisciplinary Practice*: *Is It the Wave of the Future or Only a Ripple*, 66 DEF. COUNS. J. 460, 461:

> The original wording of the Florida resolution had used the words "extensive and well-reasoned analysis" in the place of the substituted words "additional study." In that form, the resolution had been supported by state bars in Alabama, Georgia, Kansas, Kentucky, Maryland, New Hampshire, New York, Oregon, and South Carolina, as well [as] local bars in Broward County (Florida), Monroe County (New York) and San Diego County (California).

Id.

370. *See State Bar of Cal. Response to MDP Report*, *supra* note 245. *See also Background Paper*, *supra* note 9 (noting that "this development impacts every American lawyer, as well as our colleagues around the world . . . .").

371. *See* Brodsky, *supra* note 100 (noting the change "could cause an amalgamation of law firms and accounting firms as has been seen in Europe in recent years.").

372. *See* Paskind, *supra* note 50; *see also* Edward Fennell, *US Moves to One-Stop Shops*, TIMES (London), June 22, 1999, at 39. Stuart Benson, a legal consultant with Howard Nash Management, compared the use of MDPs with mobile phones stating "[a]t first they will be considered unnecessary and no one will use them. But within a short time they will be a major feature." *Id.*

373. *See* Conley, *ABA Takes on MDP*, *supra* note 104:

> The lawyer running a solo practice out of the same brick storefront on the town square where his father practiced, the law school classmates who formed a tax boutique and the 25-lawyer powerhouse firm also stand to gain or lose if lawyers are allowed to join forces with nonlegal professionals.

Id.

374. *See* Rocco Cammarere, *Panals at Odds over MDPs: State Bar ABA Clash*, N.J. LAW., June 28, 1999, at 1.

the client to keep the client from going somewhere else.[375] Furthermore, since small firms and solo practitioners do not compete internationally, they may not have the same desire to see the rules amended to allow MDPs.[376]

Nevertheless, the Commission heard support from both small firms and solo practitioners who desired to combine legal work with other professional services.[377] Some commentators even argue that small firms and solo practitioners will benefit the most from the recommendation.[378] If small firms and solo practitioners were able to form MDPs, clients would no longer have to turn to large firms to provide the same services.[379] Also, a greater risk might exist for large firms because the nonattorney professions might not fit in well with the large firm, or the firm might misjudge the public's demand for other services.[380] Moreover, small firms may benefit more than larger firms from the development of MDPs because the larger the law firm is, the more likely a conflict of interest will develop.[381] Thus, there seems to be a direct relation between the size of the firm and the ability to take advantage of the Commission's recommendation.[382]

375. *See* Conley, *ABA Takes on MDP*, *supra* note 104 (comment by Bruce H. Gaynes, a principal at Kitchens Kelley Gaynes and a certified public accountant).

376. *See id.* (comment by Morton A. Harris of Hatcher, Stubbs, Land, Hollis & Rothschild).

377. *See* Brodsky, *supra* note 100. "The commission heard from lawyers from small firms or legal services organizations who desired to combine legal services with social work, psychology, accounting, engineering or other non-legal professional expertise that clients would currently need to turn to a larger firm and outside experts to find." *Id.*

378. *See FAQs About Multidisciplinary Practices*, *supra* note 3. (noting "[w]hile many [small and solo practitioners] are wary, some see an opportunity and feel their practices would thrive if they could offer packaged services to their clients.").

379. *See* Brodsky, *supra* note 100; *see also* Donna Dudickand & Nina A. Landsberg, *One-Stop Shopping for Services Challenges Suburban Lawyers*, LEGAL INTELLIGENCER, July 14, 1999, at 1. Louis Teti, an attorney with Macelree, Harvey, Gallagher, Featherman & Sebastian and President of the Pennsylvania Bar Association, notes "some small firms believe they could become more competitive if they join hands with other professionals such as psychologists, accountants and financial advisors." *Id.*

380. *See* Conley, *ABA Takes on MDP*, *supra* note 104 (comment by Frank S. McGaughey, a member of the executive committee at Powell, Goldstein, Frazer & Murphy).

381. *See id.* According to Ralph B. Levy:

> [T]here is huge potential for conflicts if a big law firm such as Jones, Day, Reavis & Pogue merged with a large accounting firm such as Arthur Andersen. Both have global client bases and represent some of the world's major companies and competitors. Small firms with smaller, less geographically diverse client bases are less likely to have conflicts . . . .

Id.

382. *See id.* (comment by Ralph B. Levy). *But see id.* Bruce Gaynes, a principal at an Atlanta law firm and a certified public accountant argues that "a small firm might be reluctant to join forces with a CPA for fear of losing referrals from other accountants in the community." *Id.*

b. Large Law Firms

One of the driving forces behind the MDP movement is the large law firms' desire to compete with the Big Five.[383] While the Commission's recommendation attempts to advance this desire, large law firms may in fact face increased competition since the Big Five will set up MDPs in the United States.[384] Although independent law firms already face competition from the Big Five and other professional service firms in areas such as labor, environmental, tax, regulatory and business practice, if MDPs are permitted to operate, such firms will also face competition in the area of purely legal services such as litigation.[385] Thus, as much as thirty billion dollars in annual fee revenues to United States law firms could be jeopardized.[386] At the same time, large firms may not readily make changes that affect the way they practice.[387] Most law firms' primary interest is to practice law.[388]

c. Medium Sized Law Firms

Some believe MDPs will have the most detrimental effect on medium-sized firms.[389] Many medium-sized firms already feel pressure from larger firms.[390] Thus, if multinational MDPs are also allowed to compete, the pressure already felt by medium-sized firms is likely to increase dramatically.[391]

2. The Potential Impact on the Public

Although MDPs will certainly have an effect on the public, the precise impact they will have has not been widely recognized.[392] At least one commentator believes there will be a huge demand for the services provided

383. *See* discussion *supra* Part II.B.3.

384. *See FAQs About Multidisciplinary Practices*, *supra* note 3.

385. *See* Ward Bower, *Strategic Planning; ABA Report Endorses MDPs: What Should Your Firm Do?*, LAW FIRM PARTNERSHIP & BENEFITS, July 1999, at 3 [hereinafter Bower, *Strategic Planning*].

386. *See id.*

387. *See* Shepherd, *supra* note 245.

388. *See id.* James P. Holden, a tax lawyer with Washington D.C.'s Steptoe & Johnson, states "I suspect that law firms are going to be slow to go into other businesses. Lawyers are predominantly interested in practicing law." *Id.*

389. *See FAQs About Multidisciplinary Practices*, *supra* note 3; Ward Bower, *Multidisciplinary Practices: The Impact of MDPS on Law Firms*, 18 NO. 5 LEGAL MGMT., Sept./Oct., 1999, at 46.

390. *See FAQs About Multidisciplinary Practices*, *supra* note 3.

391. *See id.*

392. *See* Bower, *Strategic Planning*, *supra* note 385.

by an MDP if for no other reason than convenience.[393] Clients will certainly be taking risks in areas of confidentiality, conflicts of interest, and independence of professional judgment if they choose to engage the services of an MDP.[394] Although the full impact of these risks appears somewhat unclear, the commentator suggests that clients will be willing to forego these risks for the sake of convenience.[395]

C. Impact of MDPs despite the recommendation

Some believe MDPs are inevitable despite the ABA's position on the matter.[396] Others believe that if the rules are not amended to allow MDPs, Europe will become this century's "hub of legal services" as multinational and United States corporations seek firms that can address all of the issues their problems entail.[397] At least one commentator believes it is already too late for attorneys to successfully react to the MDP movement.[398] Yet, one thing seems certain: the MDP issue is not likely to go away anytime soon. Instead, for the foreseeable future, it will remain a dominant issue for both the states and the federal government.[399]

393. Donald S. Gray, *Multidisciplinary Practice ("MDP") Part II: The Most Important Issue Facing the Legal Profession Today*, 41 ORANGE COUNTY LAW. 5, 6 (1999). *But see Report*, *supra* note 3 (noting that "[t]here is . . . no assurance that lawyers will choose to practice in MDPs or that clients will prefer to purchase legal services from such providers.").

394. *See* Bower, *Strategic Planning*, *supra* note 385; *see also* discussion *supra* Part VI.A.

395. *See* Gray, *supra* note 393, at 6.

396. *See* Editorial, *Umbrella's for Lawyers, et al.*, PROVIDENCE J. BULL., Aug. 29, 1999, at K08. "In an increasingly global economy, permitting American lawyers to en-ter [sic] MDPs here may be inevitable, if only as a pragmatic, defensive maneuver." *Id. But see* Levinson, *supra* note 50:

> The Report appears to assume that a member of an MDP will be more readily available to the client than would be an independent professional; That services rendered by a member of an MDP will be at least as competent as those rendered by an independent professional; That the client will save time and money by one stop shopping.

Id. Moreover, the MDP Comm'n relied on purely speculative testimony to support the proposition that MDPs are inevitable. *Id.*

397. *See* Dzienkowski & Peroni, *supra* note 135; *see also* Bower, *Strategic Planning*, *supra* note 385 (noting that "in today's marketplace, a scenario in which the major accounting firms have taken over the worldwide provision of international corporate legal services is not implausible.").

398. *See* Brown, *supra* note 325, at 12. Brown notes, "I can think of no economic scenarios where lawyers maintain their position in the market. The best the profession can hope for is a level playing field where, in order to compete, lawyers are forced to make major change to their business structures." *Id.*

399. *See* Myers, *supra* note 159; Bacon, *supra* note 96, at 2.

VIII. CRITICAL ANALYSIS

The ABA's decision to delay voting on MDPs was more than appropriate due to the threats MDPs pose to clients and the core values of the legal profession. Although the Commission made an honest attempt to protect the core values of the legal profession, the obvious problems with the recommendation and potential consequences of MDPs in general indicate that clients may be harmed by MDPs.[400] Since MDPs are going to change the way the legal profession operates and the way clients receive legal services, the rules should not be amended until the ABA, the states, the legal profession, and consumers have fully analyzed the implications of such a change.[401] July 2000 will clearly be too early for such an analysis to be complete and for the issue to be decided. But since the United States has never permitted MDPs, there seems to be no reason why the ABA cannot postpone deciding the issue until the potential consequences of MDPs have been fully addressed. Until the ABA feels confident that clients will not be harmed by amendments to the Model Rules, it needs to abstain from taking a position.

At the same time, regardless of the amount of study conducted on the issue, one can legitimately question whether the legal profession's core values can ever be entirely protected if MDPs are permitted to operate.[402] Nonattorney supervisors will inevitably, even if not intentionally, exert their influence over subordinate attorneys.[403] Furthermore, attorneys are bound to encounter problems maintaining confidentiality even if they comply with all the necessary safeguards.[404] More specifically, an attorney in an MDP may have no control over nonattorney supervisors who incidentally overhear or intentionally seek out information that should be held confidential. Additionally, even if attorneys can convey the meaning and importance of the legal profession's ethics rules, accountants are already resisting them and are not legally bound to follow them.[405]

The legal profession is in the business of serving clients. Notwithstanding that focus, the core values of the legal profession should not be abdicated for the sake of clients' demands. The main purpose of the legal profession's ethics rules is to protect clients by avoiding interferences with attorneys' independent professional judgment.[406] Moreover, the fact that the Big Five

400. *See generally* discussion *supra* Parts III.B, V.A, V.C.

401. *See generally ABA House of Delegates Calls for Additional Study of Multidisciplinary Practice*, *supra* note 2 (according to William G. Paul, MDPs are "so important that we need more time to listen to one another and review what we have learned.").

402. *See generally* discussion *supra* Parts III.B,V.

403. *See generally supra* notes 197-201 and accompany text; 245-50 and accompanying text.

404. *See generally supra* notes 200-04 and accompanying text; 251 and accompanying text.

405. *See generally supra* notes 189-92 and accompanying text; 262 and accompanying text.

406. *See supra* note 127 and accompanying text.

and other professional service firms may already be de facto MDPs is not a sufficient reason to change the rules. First, even if the ABA amends its rules to bring the Big Five under legal regulations, the states may choose not to follow the ABA's lead, and thus, de facto MDPs will still exist in various states.[407] Moreover, the ABA and the states should at least make an attempt to enforce disciplinary rules and UPL statutes against firms engaging in unethical conduct before concluding that MDPs are inevitable. Ultimately, if law firms or professional service firms are not complying with the rules they are violating the law and should be reprimanded accordingly.[408]

Also, insofar as MDPs are going to change the way the legal profession operates, a tremendous burden is going to be placed on the ABA and the states. Obviously the rule prohibiting fee sharing is not the only rule or protection implicated by MDPs. In fact, all of the Model Rules as well as UPL statutes will be affected by the change since they are all based on protecting attorneys' independent professional judgment.[409] Thus, in addition to implementing safeguards through new Model Rules, the Commission and the ABA must consider and propose amendments to all of the current Model Rules to ensure that clients are protected.[410] Subsequently, the individual states will have to consider what amendments and additions should be made to their own professional conduct rules. Moreover, the ABA and the states will then have to consider which model it ultimately wants to adopt.[411] The states may or may not follow the recommended approach of the ABA. Additional obstacles and confusion will be created if the amendments made and the models adopted are not uniform from state to state.[412]

Since MDPs will pose a tremendous burden on the ABA and the states and since there is no guarantee MDPs will be capable of preserving the core values of the legal profession, MDPs should not be permitted to operate in the United States. This does not mean, however, that the legal profession should do nothing. Regardless of the side of the debate the legal profession takes regarding MDPs, the emergence of the issue should be seen as a "wake-up call" that some type of change is necessary.[413]

To improve the services provided by the legal profession and guarantee clients are protected, two discrete courses of action are available. First, the legal profession can recognize and increase enforcement of existing rules.[414]

407. *See generally supra* note 367 and accompanying text.
408. *See supra* note 95.
409. *See generally* discussion *supra* Part II.C.
410. *See, e.g.*, *supra* note 343 and accompanying text.
411. *See supra* notes 16-46 and accompanying text, 350-63 and accompanying text.
412. *See, e.g.*, *supra* note 296.
413. *See* Myers, *supra* note 159; Bacon, *supra* note 96, at 2.
414. *See supra* note 328 and accompanying text.

If properly enforced, the current rules are capable of protecting clients and the core values of the legal profession even in the wake of emerging MDPs. At the same time, the legal profession can focus on how it can compete in a global market and provide more efficient and effective services.[415] As one attorney notes, "we must begin to teach and practice those skills and qualities that will allow us to become indispensable advisers to our clients, so that they willingly turn to us for counsel on their most important problems."[416]

In the alternative, the "D.C. Model" may be a viable option for the United States. This model, which has already been implemented in one jurisdiction in the United States, requires limited amendments.[417] Moreover, since it has not caused any ethics complaints, it appears to be preserving the core values of the legal profession.[418] Since the "D.C. Model" is limited to providing "solely" legal services, it does not seem to provide consumers with a single entity that can solve all of a client's problems.[419] Thus, the "D.C. Model" does not meet consumers' demands. Yet, the ability to hire various professionals to work with an attorney may provide some of the benefits of an MDP.[420] At the same time, however, the "D.C. Model" does not solve the problems created by the current practices of professional service firms such as the Big Five. These firms probably will not give up the other services they provide in order to provide only legal services and thereby be brought within the legal profession's ethics rules. Rather, they will continue to operate as they have been for years. Thus, if this model is implemented, increased enforcement of legal ethics rules and UPL statutes will still be necessary. Although the "D.C. Model" is not considered an MDP under the Commission's definition, it will not require a fundamental change to the Model Rules and it seems capable of preserving the core values of the legal profession while providing some of the benefits of an MDP.[421]

Both of these options are better suited for the legal profession in the United States than MDPs under the Commission's definition. Since neither option requires a complete overhaul of the current rules, they should at least be attempted before implementing a practice that will completely change the legal profession and will potentially harm clients.

415. *See supra* notes 329-32 and accompanying text.

416. Myers, *supra* note 159.

417. *See generally* discussion *supra* Part II.A.2.

418. *See supra* note 15 and accompanying text.

419. *See App. C*, *supra* note 3.

420. *See id.* (noting that the Model Rules' defenders believe "that a client can achieve the benefits of a full-service or one-stop practice by hiring professionals from different disciplines to work with a lawyer.").

421. *See supra* note 46.

IX. CONCLUSION

Clients may demand MDPs and professional service firms such as the Big Five may already be taking steps to fulfilling this demand. The legal profession can certainly allow these factors to dictate its response to the MDP movement despite the potential consequences MDPs will have on the legal profession and the general public. In the alternative, the legal profession can focus on protecting clients by emphasizing its commitment to loyalty, integrity, and uncompromised representation. Ultimately, the only genuinely effective way to emphasize and protect the core values that safeguard clients' interests is to resist the expansion of MDPs.

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