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Cover Page Footnote

Associate Professor and Director, Ethics Across the Professions Initiative, University of the Pacific, McGeorge School of Law. I acknowledge with great thanks the support of Eli Wald and Bruce Green, Jessi Tamayo, and the editors of the Fordham Law Review, especially Leigh Van Ostrand, for this work. I am indebted to Carole Silver for her thoughtful commentary and to all of the participants in the Fordham Law Review Symposium for their feedback. Any errors or omissions, of course, remain my responsibility.

MULTIDISCIPLINARY PRACTICE REDUX: GLOBALIZATION, CORE VALUES, AND REVIVING THE MDP DEBATE IN AMERICA

*Paul D. Paton**

INTRODUCTION: THE DEATH AND LIFE OF THE MDP

When in August 2000 the American Bar Association's House of Delegates rejected the recommendations of its own Commission on Multidisciplinary Practice that the Model Rules of Professional Conduct be amended to permit integrated multidisciplinary practices (MDPs) involving lawyers and other professionals, it did so with a vengeance. The passage of Resolution 10F followed a nearly three-year investigation and rancorous debate within the ABA. The Resolution emphatically rejected fee sharing with nonlawyers and nonlawyer ownership and control of law firms as "inconsistent with the core values of the legal profession" and proposed that rules barring such alternative service delivery innovations be preserved.¹ The Resolution provided a nonexhaustive list of "core values" and urged that each jurisdiction responsible for lawyer regulation implement the "principles" set out in the resolution, all of which would function as a bulwark against encroachment on the traditional law firm model.² For all intents and purposes, the MDP was dead, buried in "core values" rhetoric. That rhetoric served to preserve a regime for the delivery of legal services,

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1. AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, THE HOUSE ADOPTED REVISED RECOMMENDATION 10F (2000), <http://www.abanet.org/cpr/mdp/mdprecom10f.html> [hereinafter Recommendation 10F].

2. *Id.*; see also Sydney M. Cone, III, *Views on Multidisciplinary Practice with Particular Reference to Law and Economics*, New York, and North Carolina, 36 WAKE FOREST L. REV. 1, 4 (2001); L. Harold Levinson, *Collaboration Between Lawyers and Others: Coping with the ABA Model Rules After Resolution 10F*, 36 WAKE FOREST L. REV. 133, 135-36 (2001). *Contra* Marc N. Biamonte, *Multidisciplinary Practices: Must a Change to Model Rule 5.4 Apply to All Law Firms Uniformly?*, 42 B.C. L. REV. 1161, 1164 (2001) (posing contrary view of the uncertainty left by the ABA July 2000 vote, calling the ABA move to disband its MDP Commission "shortsighted and irresponsible"); Adam A. Shulenburg, *Would You Like Fries with That? The Future of Multidisciplinary Practices*, 87 IOWA L. REV. 327, 329 (2001).

which, while anchored in legitimate concerns about conflicts of interest, independence, and preserving privilege, also functioned to prevent competition and to protect lawyers' turf.³

But the MDP may have new life in America. In August 2009, the ABA created its new Ethics 20/20 Commission and gave it explicit instructions to "review lawyer ethics rules and regulation across the United States in the context of a global legal services marketplace."⁴ This means that the ABA will need to assess how "alternative business structures" for the delivery of legal services adopted in the intervening decade since Resolution 10F—including the MDP—are now functioning in other major common-law jurisdictions, including England, Australia, and Canada. In announcing the creation of the Commission, ABA President Carolyn Lamm signaled that the Commission should consider how regulatory structures can enable U.S. legal providers to compete with those in other countries while continuing to protect the public and—again—the "core values" of the profession.⁵ She subsequently signaled that MDPs "may well be" one of the topics of consideration for the Commission.⁶

Including the MDP as a topic for discussion by the Ethics 20/20 Commission is essential if the profession is to refute the contention that "[r]egulation of the legal profession has been designed primarily by and for the profession, and too often protects its concerns at the public's expense."⁷ The Commission's challenge is to assess the lessons from the history of the MDP debate of the late 1990s in a new international or globalized context, particularly when both the economic realities facing the profession in the United States and the regulation of the profession elsewhere have changed dramatically in the decade since Resolution 10F. As a December 2009 Law Society of Upper Canada (LSUC) Task Force report neatly summarized, "[t]here is now a worldwide market for legal services, driven by clients seeking to operate globally," clients are "looking for lawyers who are tapped in to the global market and are able to provide seamless service," "[t]he legal profession is facing increasing competition from other service

3. See Paul D. Paton, *Competition Bureau Report: Competition, Self-Regulation and the Challenge of Change*, BRIEFLY SPEAKING (Can.), May 2008, at 15 (reviewing COMPETITION BUREAU CAN., SELF-REGULATED PROFESSIONS—BALANCING COMPETITION AND REGULATION (2007), available at [http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/\\$FILE/Professions%20study%20final%20E.pdf](http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/$FILE/Professions%20study%20final%20E.pdf)); see also Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers"*, 2008 J. PROF. LAW. 189, 201; Press Release, Competition Bureau Can., Consumers and Economy Would Benefit from Reduction in Regulation in Professions, a Competition Bureau Study Finds (Dec. 11, 2007), <http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/02540.html>.

4. Press Release, Am. Bar Ass'n, ABA President Carolyn B. Lamm Creates Ethics Commission To Address Technology and Global Practice Challenges Facing U.S. Lawyers (Aug. 4, 2009), http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=730.

5. *Id.*

6. James Podgers, *Off the Mat*, A.B.A. J., Aug. 2009, at 65.

7. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 208 (2000).

providers,” the “business structure of the profession is shifting,” and the “profession’s ability to maintain self-regulation has been eroded.”⁸ Some of the myriad challenges facing the profession as a result of globalization are also identified in the ABA Ethics 20/20 Preliminary Issues Outline released on November 19, 2009. As the introduction to that document notes, “already the profession is encountering the competitive and ethical implications of U.S. lawyers and law firms seeking to represent American and foreign clients abroad and foreign lawyers seeking access to the U.S. legal market”; this “increase in globalized law practice raise[s] serious questions about whether existing ethical rules and regulatory structures adequately address the realities and challenges of 21st Century law practice.”⁹

Indeed, in confronting the issue of “alternative business structures,” including MDPs, the Ethics 20/20 Commission notes that such structures “raise ethical and regulatory questions for U.S. lawyers and law firms of all sizes employed, associated, or otherwise doing business with these entities and their clients.”¹⁰ The Issues Outline asks whether the Model Rules of Professional Conduct need to be amended to take account of those structures, and frames the “core values” discussion this way: “How can core principles of client and public protection be satisfied while simultaneously permitting U.S. lawyers and law firms to participate on a level playing field in a global legal services marketplace that includes the increased use of one or more forms of alternative business structures?”¹¹

Revisiting both the tenor and the substance of the MDP debates of a decade ago is therefore both timely and necessary in order to assess various questions: When national bar association commissions in both the United States and Canada in the late 1990s had recommended the adoption of rules permitting MDPs, why did the governing bodies responsible for the ultimate decisions so forcefully reject them? Were the recommendations fundamentally flawed, or was the political and economic context within the profession at the time such that domestic adoption of liberal rules was impossible? What happened in the intervening period internationally to change the competitive environment in which U.S. firms must now operate? Is the search for new revenue by firms dealing with the impact of the 2008–2009 economic downturn, combined with the pressures of globalization,

8. THE LAW SOC’Y OF UPPER CAN., GOVERNANCE TASK FORCE, FINAL REPORT TO CONVOCATION 74–75 (2009), *available at* http://www.lsuc.on.ca/media/convdec09_governance.pdf.

9. AM. BAR ASS’N, ABA COMMISSION ON ETHICS 20/20, PRELIMINARY ISSUES OUTLINE 1 (2009) [hereinafter ABA ETHICS 20/20 PRELIMINARY ISSUES OUTLINE]; *see also* Stephen Mayson, Global Law Firms: A Strategy Looking for a Market? 12 (Apr. 2008) (unpublished discussion paper), *available at* <http://www.law.georgetown.edu/LegalProfession/documents/MaysonWebsiteArticle.pdf> (“As these dynamics of globalisation and competition play out, there are potentially significant challenges for law firms in maintaining strategic, cultural and professional integrity.”).

10. ABA ETHICS 20/20 PRELIMINARY ISSUES OUTLINE, *supra* note 9, at 6.

11. *Id.*

sufficient to propel a different outcome if the MDP comes before the ABA House of Delegates again? Now that England has adopted legislation permitting alternative business structures (including the MDP) in order to encourage competition and consumer choice in legal services provision, how have authorities there managed to address the ethical, “core values” challenges posed by the MDP and reconcile that with a government-driven agenda to reform the profession in the public interest?

A review of the history of the MDP debates and developments in the intervening period detailed below suggests that when domestic economic interests of the profession and increased government awareness of a consumer welfare perspective are taken into account, the “core values” rhetoric that previously served to prevent MDP adoption will be torqued in such a way as to open the door to other models of service delivery. Initial steps to do so had taken place domestically in the United States in the aftermath of the ABA August 2000 Resolution; more dramatic leaps have taken place internationally in the intervening period, most notably in England and Australia. The answer seems to be as blunt as the Legal Services Board in England put it in a 2009 discussion paper: the question of *whether* alternative business structures ought to be permitted is settled and a new reality. Rather, the focus needs to be on *when* and *how* the market should be opened.¹²

Accordingly, this article dedicates its primary focus to a historical review of the MDP debate in the United States and Canada and a summary of changes in England and Australia that set the stage for the Ethics 20/20 reconsideration of the MDP and alternative business structures in the United States in the face of new global realities facing the legal profession. It attempts to frame answers to a number of the questions posed above in order to situate what ought to happen next. The challenge thereafter—for both the Ethics 20/20 Commission and for a subsequent paper to follow this one—is then to dissect and assess these international developments for clues as to what new MDP rules in the United States ought to be. For present purposes, however, the objectives are simpler: to pore over the entrails of prior debates and subsequent international developments for lessons about how the MDP debate should even be engaged this time.

In Australia, the multidisciplinary practice, nonlawyer ownership, and even public ownership of shares in law firms is a new reality.¹³ Certain

12. LEGAL SERVS. BD., WIDER ACCESS, BETTER VALUE, STRONG PROTECTION: DISCUSSION PAPER ON DEVELOPING A REGULATORY REGIME FOR ALTERNATIVE BUSINESS STRUCTURES 4 (2009).

13. See the discussion of Australian regulatory changes in Paul D. Paton, *Between a Rock and a Hard Place: The Future of Self-Regulation—Canada Between the United States and the English/Australian Experience*, 2008 J. PROF. LAW. 87, 104–07; Christine Parker, *Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible*, 23 U. QUEENSL. L.J. 347 (2004) [hereinafter Parker, *Law Firms Incorporated*] (discussing MDPs and ILPs in Australia); Christine Parker, *Peering Over the Ethical Precipice: Incorporation, Listing and the Ethical Responsibilities of Law Firms* (Univ. of Melbourne, Melbourne Law Sch., Legal Studies Research Paper No. 339, 2008) [hereinafter

Canadian regulations adopted after 2000 permit a modified form of MDP as well as an “affiliated law firm” model in which law firms establish relationships with other professional services firms for the joint marketing, promotion, and delivery of legal and other services to clients.¹⁴ In England, the 2007 Legal Services Act, which transformed and effectively ended the self-regulation of the legal profession in that country, was the direct result of political debate and direct government involvement.¹⁵ That Act provides specific authorization for the establishment of alternative business structures for the delivery of legal services by lawyers and nonlawyers together.¹⁶ In the United States, a California State Bar Long Range Strategic Plan in 2002 had recommended continuing assessment of the “feasibility and ethical implications of permitting lawyers to join with non-lawyer professionals in a practice where both legal and non-legal professional services are offered to the public.”¹⁷ A 2001 California State Bar Task Force report found that a fully integrated professional services firm would permit the “‘core values’ of the legal profession not only [to] be maintained, but [to] be reaffirmed.”¹⁸ A Demonstration Project was proposed to translate Task Force recommendations into reality.¹⁹ But the MDP still does not exist in the United States in a form that would be recognized elsewhere; in all U.S. jurisdictions except for the District of

Parker, *Peering Over the Ethical Precipice*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1132926 (analyzing the implications of the incorporation and listing on the Australian Securities Exchange of Slater & Gordon, the “first law firm in the world to list”); see also Andrew Grech & Kirsten Morrison, *Slater & Gordon: The Listing Experience*, 22 GEO. J. LEGAL ETHICS 535 (2009).

14. See *infra* notes 103–33 and accompanying text (discussing the adoption of By-laws governing multidisciplinary practices and affiliated law firms by The Law Society of Upper Canada); see also BY-LAW No. 7, pts. III–IV (Law Soc’y of Upper Can. 2009) [hereinafter LAW SOC’Y BY-LAW 7], available at <http://www.lsuc.on.ca/media/bylaw7.pdf>; Paul D. Paton, *What Happens After “Happily Ever After”? Regulatory Resistance and Rule-Making After Canadian and American Bar Association Resolutions on Multidisciplinary Practice*, 36 U. B.C. L. REV. 259 (2003); Paul D. Paton, “In the Public Interest”: Threats to Self-Regulation of the Legal Profession in Ontario, 1998–2006 (Feb. 2008) (unpublished JSD dissertation, Stanford University) (on file with the Library of Congress) (from which portions of the historical record here have been drawn and updated).

15. Legal Services Act, 2007, c. 29 (U.K.). The history of events leading up to its passage is canvassed in Paton, *supra* note 13, at 88, 96–104; see also Judith L. Maute, *Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?*, 2008 J. PROF. LAW. 53; Judith L. Maute, *Revolutionary Changes to the English Legal Profession or Much Ado About Nothing?*, PROF. LAW., 2006, at 1 [hereinafter Maute, *Revolutionary Changes*]; John Flood, *Future Directions in the UK Legal Profession: Life After the Legal Services Act 2007* (Apr. 17–18, 2008) (unpublished paper), available at <http://www.law.georgetown.edu/LegalProfession/documents/FloodWebsitePaper.doc>. For a seminal history of the English legal profession setting the stage for these recent developments, see RICHARD L. ABEL, *ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM* (2003).

16. Legal Services Act, c. 29, pt. 5.

17. THE STATE BAR OF CAL., LONG-RANGE STRATEGIC PLAN 11 (2002).

18. THE STATE BAR OF CAL., TASK FORCE ON MULTIDISCIPLINARY PRACTICE, REPORT AND FINDINGS ON MULTIDISCIPLINARY PRACTICE, at vi (2001) [hereinafter THE STATE BAR OF CAL., TASK FORCE ON MDP].

19. *Id.* at 23.

Columbia, firms cannot be organized for the practice of law if nonlawyers have ownership interests in them.²⁰

The changed economic reality for law firms in the United States in the aftermath of the economic downturn of 2008–2009 and the dramatic lawyer and staff job losses of early 2009 may mean a new imperative—self-serving or otherwise—to reconsider whether “core values” rhetoric needs to be viewed through a new lens and new forms of business models including the MDP need to be permitted.²¹ The profession is continuing to experience “growing internal political dissension at the very moment when it also confronts the profound and permanent external challenges of the new economy.”²² Looking to the history of the MDP debate can therefore provide signs not only about the way forward for legal service delivery, but also for the profession’s own conception of how its essential values and principles can be sustained in this “brave new world.”

I. THE MDP DEBATE IN THE UNITED STATES AND CANADA, 1998–2002

A close examination of MDP debate in North America between 1998 and 2002 reveals that despite an overt focus on “core values,” the subtext was largely about the status of lawyers in the face of various threats, particularly competitive threats from other professionals in the commercial marketplace. Characterized as a struggle of “epic proportions” between the legal and accounting professions, opponents of change cast the MDP challenge as

20. D.C. RULES OF PROF’L CONDUCT R. 5.7 (2006); see also Larry E. Ribstein, *The Death of Big Law* 32–33 (Univ. Ill. Law & Econ. Research Paper Series, Research Paper No. LE09-025, 2009), available at <http://ssrn.com/abstract=1467730>.

21. A sampling of legal press reports of the impact of the economic downturn of 2008–2009 on law firms confirms the dramatic results. See Adam Cohen, *With the Downturn, It’s Time To Rethink the Legal Profession*, N.Y. TIMES, Apr. 2, 2009, at A26; Ross Todd, *Fading Away*, AM. LAW., Aug. 2009, at 64 (“Since January 2008, Am Law 200 firms have laid off more than 2,900 lawyers.”); Debra Cassens Weiss, *2009’s Toll: More Than 10,000 Law Firm Layoffs and Lower Pay Trend*, A.B.A. J., May 28, 2009, http://www.abajournal.com/news/article/2009s_toll_more_than_10000_law_firm_layoffs (reporting that year to date, 3881 lawyers and 6282 law firm staff had been laid off by major U.S. law firms); see also Martha Neil, *After Early March Mayhem, Law Firm Layoffs Slow: Month’s Total Nears 3,500*, A.B.A. J., Mar. 26, 2009, http://www.abajournal.com/news/article/march_began_with_mayhem_but_blistering_layoffs_pace_is_slowing; Martha Neil, *March Mayhem: Law Firm Layoffs in 1 Week Total Nearly 1,500*, A.B.A. J., Mar. 4, 2009, http://www.abajournal.com/news/article/march_mayhem_law_firm_layoffs_top_500_today_over_1200_since_friday; Martha Neil, *Partner Pay Cuts Are New Signpost in Dismal Law Firm Economic Landscape*, A.B.A. J., Mar. 24, 2009, http://www.abajournal.com/news/article/partner_pay_cuts_are_new_signpost_in_dismal_law_firm_economic_landscape; Posting of Brian Baxter to The Am Law Daily, <http://amlawdaily.typepad.com/amlawdaily/2009/08/unemployment-rate-falls-but-legal-sector-still-contracting.html> (Aug. 7, 2009, 12:45 EST); *Legal Strategy 101: It’s Time for Law Firms To Re-think Their Business Model*, KNOWLEDGE@WHARTON, Apr. 29, 2009, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2231> (subscription required, on file with the Fordham Law Review). For an analysis of the impact of the 2008–2009 downturn on law firms in America beyond the companion articles in this volume, see Ribstein, *supra* note 20.

22. Harry W. Arthurs & Robert Kreklewich, *Law, Legal Institutions, and the Legal Profession in the New Economy*, 34 OSGOODE HALL L.J. 1, 48 (1996).

threatening the “core values” of the legal profession and successfully relied on the rhetoric of “core values” to propel decisions in Canada against permitting MDPs to operate in a meaningful way, and in the United States against permitting MDPs from operating at all.²³ The history offers important insights into how regulators addressed the ethics of multidisciplinary practice, and into how they used “core values” and “public interest” rhetoric to insulate the legal profession from external influences in an age of increasing globalization.²⁴ Reliance on that rhetoric to substantiate restrictive rules served neither the profession nor the public. Those terms became proxies for an “antimarket, anticompetitive attitude of the bar that impedes change in [the] rules of professional conduct.”²⁵ Although the language central to the “concept of a profession may set the practice apart as a normative ideal, . . . the structuring of the profession is still the structuring of a market,”²⁶ pitting the interests of the “legal profession” against the reality of changes to “legal practice.”²⁷ Beyond the nuances of whether or not to adopt a more open approach to modes of legal service delivery, the MDP debate then—as now—put directly into issue whether legal regulators were accountable to the interests of clients and the public, or simply their own. Significant functional change in self-regulation of the legal profession in the United States was the direct result of careful scrutiny over a period of nearly twenty-five years.²⁸ Together, the

23. Robert A. Prentice, *The SEC and MDP: Implications of the Self-Serving Bias for Independent Auditing*, 61 OHIO ST. L.J. 1597, 1599 (2000); Jack Giles, *Why Multidisciplinary Practices Should Be Controlled by Lawyers*, 59 ADVOCATE 695 (2000). As noted above, Resolution 10F prevented MDPs from operating in the United States; regulators in Ontario, Canada, adopted a form of MDP that is assessed below, but that I characterize as “law firm plus” rather than a fully integrated multidisciplinary, multiprofessional partnership.

24. For a detailed consideration of the rhetoric of “core values” in the context of the multidisciplinary practice debate in the United States, see Nathan M. Crystal, *Core Values: False and True*, 70 FORDHAM L. REV. 747 (2001), and Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1144–49 (2000).

25. See Crystal, *supra* note 24, at 748.

26. Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 956 (2000); see also ROBERT G. EVANS & MICHAEL J. TREBILCOCK, *LAWYERS AND THE CONSUMER INTEREST*, at xi–xiii (1982); John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach To Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83 (2000); Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008).

27. Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931, 931 (1993).

28. A sampling of considerations of self-regulatory models and structures in the United States during the period includes RICHARD L. ABEL, *AMERICAN LAWYERS* (1989); Benjamin Hoorn Barton, *Why Do We Regulate Lawyers? An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429 (2001); Crystal, *supra* note 24; Garth, *supra* note 27; Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1833 (2001); James W. Jones, *Future Structure and Regulation of Law Practice: An Iconoclast’s Perspective*, 44 ARIZ. L. REV. 537 (2002); Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professional Ideology*

challenge of the economic downturn in 2008–2009, and the changed global legal practice environment that the ABA's Ethics 20/20 Commission is charged with assessing, mandate a similar shift in approach and reconsideration of the place of the MDP in America.²⁹

II. THE MDP DEBATE IN CONTEXT

The concept of the multidisciplinary practice, or MDP, is fairly simple: an integrated entity that provides legal services as one of several professional services offerings through a single firm or provider. The Canadian Bar Association committee studying multidisciplinary practices described MDPs as “business arrangements in which individuals with different professional qualifications practise together in partnership or in other business arrangements. . . . to combine different skills to provide a

Will Improve the Conduct and Reputation of the Bar, 70 N.Y.U. L. REV. 1229 (1995); Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977 (2003); Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273 (1998); John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio's Struggle To Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65 (1999); Ted Schneyer, *Introduction: The Future Structure and Regulation of Law Practice*, 44 ARIZ. L. REV. 521 (2002); Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25 (1999); Paul R. Tremblay, *Shared Norms, Bad Lawyers, and the Virtues of Casuistry*, 36 U.S.F. L. REV. 659 (2002); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1 (1999); David B. Wilkins, *Afterword: How Should We Determine Who Should Regulate Lawyers?—Managing Conflict and Context in Professional Regulation*, 65 FORDHAM L. REV. 465 (1996); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992); Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359 (1998); Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829 (2002). See also more recent considerations in JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005) (assessing forces of transformation and change in the Chicago bar over a twenty-year period), and Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009) [hereinafter Zacharias, *The Myth of Self-Regulation*].

29. In addition to the other references cited below, literature during the prior debate of particular importance includes, on multidisciplinary practice, MULTIDISCIPLINARY PRACTICE: STAYING COMPETITIVE AND ADAPTING TO CHANGE (Gary A. Munneke & Ann L. MacNaughton eds., 2001), and in particular, NAT'L MULTIDISCIPLINARY P'SHIPS COMM., FEDERATION OF LAW SOCIETIES OF CANADA MULTIDISCIPLINARY PARTNERSHIPS: REPORT TO DELEGATES (1999), reprinted in MULTIDISCIPLINARY PRACTICE: STAYING COMPETITIVE AND ADAPTING TO CHANGE, *supra*, app. 3 at 145; also Gary A. Munneke, *Lawyers, Accountants, and the Battle To Own Professional Services*, 20 PACE L. REV. 73 (1999); on globalization of legal services, THE INTERNATIONALIZATION OF THE PRACTICE OF LAW (Jens Drolshammer & Michael Pfeifer eds., 2001); Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 LAW & POL'Y INT'L BUS. 1093 (2000); Detlev F. Vagts, *The Impact of Globalization on the Legal Profession*, 2 EUR. J.L. REFORM 403 (2000). A remarkably prescient commentary on both globalization and multidisciplinary practice is found in Roderick A. Macdonald, *Let Our Future Not Be Behind Us: The Legal Profession in Changing Times*, 64 SASK. L. REV. 1 (2001).

broad range of advice to consumers.”³⁰ The MDP was different in both conception and design from an affiliated practice or subsidiary business (such as political consulting or lobbying) developed by a law firm that the law firm could market to its legal and other clientele, and it represented a new and revolutionary way of bringing legal services to the commercial marketplace. This was not simply an abstract idea, however. The MDP posed professional and ethical challenges in particular because of moves during the late 1990s through to roughly 2002 by the then “Big Five” accounting firms to provide legal services. At one stage, Big Five accounting firm MDPs “seemed to represent an irresistible force,” with numbers of lawyers in Andersen Legal, KLegal, and Landwell (the legal networks or firms affiliated with accounting firms Arthur Andersen, KPMG, and PricewaterhouseCoopers, respectively) in 2000 rivaling those of the largest global law firms, Clifford Chance and Baker & McKenzie.³¹ In addition to the obvious competitive threat, the fundamental issue was control: whether lawyers could maintain their professional values and standards in an organization controlled by nonlawyers, particularly in an organization controlled by accounting firms. Through the 1990s, accounting firms had expanded into nontraditional areas of practice, explained by the decline of audit services from the most prestigious and profitable professional-service offering to a lower-profit, high-risk activity

30. CANADIAN BAR ASS’N, INT’L PRACTICE OF LAW COMM., STRIKING A BALANCE: THE REPORT OF THE INTERNATIONAL PRACTICE OF LAW COMMITTEE ON MULTI-DISCIPLINARY PRACTICES AND THE LEGAL PROFESSION 11 (1999) [hereinafter STRIKING A BALANCE] (citation omitted). The issue of how to define multidisciplinary practice was the subject of considerable debate itself. The Canadian Bar Association’s (CBA) August 2000 Council Resolution 00-03-A encompassed more than the fundamentally integrated “one-stop shop” envisioned by the looser 1999 definition. It provided that

MDPs are business arrangements in which lawyers [including Quebec notaries] and non-lawyers practice together to provide a broad range of advice, including legal advice, to consumers, and which encompass a variety of forms, from highly integrated organizations with lawyers and non-lawyers working under one ownership structure to loose referral networks.

Canadian Bar Ass’n, Council Res. 00-03-A (2000). The Federation of Law Societies of Canada tabled draft Model Rules for Multi-Disciplinary Practices at its meeting on February 26, 2000, that defined MDPs as encompassing both integrated and affiliated law firm models. Fed’n of Law Soc’ys of Can., Nat’l Multi-Disciplinary P’ships Comm., Model Rules for MDPs—Draft (Jan. 25, 2000) (on file with the author). The Federation failed to reach a “consensus such as would be necessary to have the federation adopt a model rule of any form.” V. RANDELL J. EARLE, REPORT OF THE NATIONAL MDP COMMITTEE OF THE FEDERATION OF LAW SOCIETIES OF CANADA 2000 ANNUAL MEETING, HALIFAX, NS (2000), available at <http://www.flsc.ca/en/documents/2000mdpreport.doc>. The Law Society of Upper Canada, for example, separated the concept of the MDP from affiliation arrangements between law firms and other providers. Other regulators have not made similar distinctions and prefer to treat all alliances, from fully integrated firms to looser referral arrangements, as MDPs. For ease of understanding and reference, I adopt the Canadian Bar Association’s *Striking a Balance* conception and definition of the MDP unless making specific reference to other definitional choices.

31. Bryant G. Garth, *Multidisciplinary Practice After Enron: Eliminating a Competitor but Not the Competition*, 29 LAW & SOC. INQUIRY 591, 592 (2004).

that could be used as a “loss-leader” through which client connections could be made to sell other, more profitable, tax and consulting services.³²

The opponents of change cast the issue of MDPs as threatening the “core values” of the legal profession, the foundation upon which the legal profession operates and by which some have argued that democracy is protected.³³ These “core values”—maintaining independence, protecting privilege, and avoiding conflicts of interest—became the vocabulary that defined and hijacked the debate. Reliance on “core values” rhetoric supported claims of critics that the profession cannot be trusted to regulate itself in the public interest. As one critic argued at the time, such reliance placed the profession

in the position of arguing that market forces are irrelevant to the debate over ethics. They are not. . . . The profession would be much better served by fostering realistic debates that take into account a full range of values, including market values, rather than by using the rhetoric of core values as a kind of veto over change in rules of professional conduct.³⁴

Regrettably, the MDP debates in the United States and Canada often lacked those characteristics, especially the debate conducted by the legal regulator in Ontario. The next section provides a summary overview of the history of the MDP debate at the American Bar Association, the Canadian Bar Association, and in two Canadian provinces and two U.S. states. The stories are different but instructive both about process and result. The American Bar Association (ABA)—and, to a lesser degree, the Canadian Bar Association (CBA)—had open processes and considered a wide range of inputs and perspectives. Additionally, the committees for each recommended liberalization of MDP rules, which the governing bodies of both associations then rejected. The Law Society of Upper Canada, granted statutory responsibility for regulating the legal profession in the province of Ontario in the public interest, adopted processes that included little or no direct public input and thereby excluded views that might have allowed for better policy decisions. Good process is not a prophylactic. But inadequate process virtually guarantees an unsound result, leaving policy making open to the overt political manipulation with which the MDP debate in Ontario was infused. The Law Society demonstrated a willingness to ignore its own academic experts and the available constitutional analysis, both of which supported a more open MDP regime than what the Law Society eventually put in place. Further, the Law Society ignored the available economic analysis of consumer needs to arrive at predestined policy conclusions. Held entirely within the profession, the MDP debate in Ontario became a direct illustration of the perils of a “professional community that is too inward-looking, that is content to regulate itself without checks from the

32. COLIN BOYD, *THE TRANSFORMATION OF THE ACCOUNTING PROFESSION: THE HISTORY BEHIND THE BIG 5 ACCOUNTING FIRMS DIVERSIFYING INTO LAW* 13 (1999).

33. See Giles, *supra* note 23 (discussing the “core values” of the legal profession).

34. See Crystal, *supra* note 24, at 774 (footnote omitted).

outside,” prone to “pernicious norms,” and resistant to change.³⁵ Lawyers were content to determine what constituted the public interest and to proceed in a fashion that was blatantly self-serving and exclusionary. Elsewhere, process was better even if the results were essentially the same.

III. AMERICAN BAR ASSOCIATION AND CANADIAN BAR ASSOCIATION MDP CONSIDERATIONS: INTRODUCTION AND OVERVIEW

Formal authority for governance of the legal profession in the United States lies with state courts, which assert “inherent power” to regulate the practice of law;³⁶ in Canada, responsibility rests with the provincial Law Societies acting under statute.³⁷ However, the ABA and the CBA play significant roles in developing the codes of professional conduct and perspectives on ethics that regulators frequently adopt or are guided by to govern the legal profession.³⁸ Accordingly, ABA and CBA debates were crucial to shaping the fate of the MDP at the turn of the century.

July 2000’s Resolution 10F of the American Bar Association House of Delegates and Canadian Bar Association Resolutions 00-03-A and 01-01-M from August 2000 and February 2001 on MDPs were touchstones for the broader debate. After more than two years of deep investigation by its own Commission on Multidisciplinary Practice, the ABA House of Delegates in August 2000 not only rejected the Commission’s recommendations to permit integrated multidisciplinary practices involving lawyers and other professionals, but also struck back with a resolution that disbanded the Commission and left the ABA without any draft model rules to deal with the reality of MDPs in the United States.

Resolution 10F rejected fee sharing with nonlawyers and nonlawyer ownership and control of law firms as “inconsistent with the core values of the legal profession” and proposed rules that prevented the preservation of such innovations.³⁹ The Resolution provided a nonexhaustive list of “core values” of the legal profession.⁴⁰ State bars, however, would have to strike out on their own and find appropriate models for themselves, thereby risking the prospect of a patchwork response.⁴¹

35. W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 1953 (2001) (abstract).

36. See the discussion in RHODE, *supra* note 7, at 144–47, and Zacharias, *The Myth of Self-Regulation*, *supra* note 28, at 1147–48.

37. See, e.g., Law Society Act, R.S.O., ch. L 8 (1990) (Can.).

38. MODEL RULES OF PROF’L CONDUCT, at ix–x (2009); About the Canadian Bar Association, <http://www.cba.org/CBA/about/main/> (last visited Mar. 19, 2010); CBA Code of Professional Conduct, <http://www.cba.org/CBA/activities/code/> (last visited Mar. 19, 2010).

39. Levinson, *supra* note 2, at 135.

40. *Id.* at 135–36.

41. *Id.* at 143–44. Harold Levinson, an advisor to the New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation in 1999–2000, did not see the resolution as particularly problematic in this regard. This perhaps reflected his confidence that the New York model set out in that state bar’s committee report provided the answers other state bars required.

After the Canadian Bar Association's International Practice of Law Committee initially rejected the MDP in an interim report, it and the CBA as a whole dramatically reversed course. In August 2000, CBA Council approved a "final" August 2000 resolution⁴² that, in contrast to the ABA resolution adopted only a few weeks earlier, permitted lawyers to engage in "business arrangements in which individuals with different professional qualifications practise together . . . to combine different skills to provide a broad range of advice to consumers."⁴³ In a further stark reversal, however, the CBA Council subsequently "clarified" the resolution in February 2001 with a further resolution that so restricted the arrangements approved six months earlier that their essence was lost and the preresolution status quo retrenched.⁴⁴ The CBA model was rendered useless for provincial regulators seeking an example of how they might implement change.

The merits and drawbacks of MDPs and the policy options available to regulators had been canvassed extensively elsewhere in anticipation of decisions by regulators about what to do.⁴⁵ Despite the resounding defeat at the ABA and the muted one at the CBA, the manner in which both ABA

42. Canadian Bar Ass'n, Council Res. 00-03-A (2000).

43. STRIKING A BALANCE, *supra* note 30, at 11.

44. Canadian Bar Ass'n, Council Res. 00-01-M (2000) (Multi-Disciplinary Practices).

45. For a Canadian perspective, see, for example, Kent Roach & Edward M. Iacobucci, *Multidisciplinary Practices and Partnerships: Prospects, Problems and Policy Options*, 79 CANADIAN B. REV. 1, 5 (2000) (arguing that consumers will benefit from a liberal regime of MDP governance, but striking a cautionary note: "Whatever regulatory response is taken must be justified in the public interest as necessary to protect the consumers of legal services and the ethical canons of the legal profession. There is a significant danger, however, that regulators will be pressured to act in a protectionist manner."); see also Julius Melnitzer, *Here Come the Bean-Counters . . . A Primer on Multidisciplinary Practice, Part One*, CANADIAN L., Nov.-Dec. 1999, at 34. For perspectives in an American context see, for example, Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217 (2000) [hereinafter Daly, *Choosing*] (describing the activities of the ABA Commission on Multidisciplinary Practice); Mary C. Daly, *What the MDP Debate Can Teach Us About Law Practice in the New Millennium and the Need for Curricular Reform*, 50 J. LEGAL EDUC. 521 (2000) [hereinafter Daly, *New Millennium*] (drawing on Daly's experience as a reporter for the ABA Commission on Multidisciplinary Practice); Dzienkowski and Peroni, *supra* note 26; Phoebe A. Haddon, *The MDP Controversy: What Legal Educators Should Know*, 50 J. LEGAL EDUC. 504 (2000); Carol A. Needham, *Permitting Lawyers To Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as We Know It?*, 84 MINN. L. REV. 1315 (2000); Michael W. Price, *A New Millennium's Resolution: The ABA Continues Its Regrettable Ban on Multidisciplinary Practice*, 37 HOUS. L. REV. 1495 (2000); Stuart S. Prince, *The Bar Strikes Back: The ABA's Misguided Quash of the MDP Rebellion*, 50 AM. U. L. REV. 245 (2000); George Steven Swan, *The Political Economy of Interprofessional Imperialism: The Bar and Multidisciplinary Practice, 1999-2001*, 24 J. LEGAL PROF. 151 (2000); Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869 (1999); Edith Y. Wu, *Why Say No to Multidisciplinary Practice?*, 32 LOY. U. CHI. L.J. 545 (2001). For discussions after the ABA House of Delegates July 2000 vote, see also Julia J. Hall, *Resolving the MDP Issue: Deciding If the Status Quo Is What's Best for the Client*, 52 MERCER L. REV. 1191 (2001); Burnele V. Powell, *Looking Ahead to the Alpha Jurisdiction: Some Considerations That the First MDP Jurisdiction Will Want To Think About*, 36 WAKE FOREST L. REV. 101 (2001).

and CBA debates ended meant that the fundamental questions about MDPs in North America were never resolved. The challenge of how best to respond to client demand for a more integrated approach to the delivery of professional services thus remains open. Both demand-side and supply-side perspectives are important.

From a demand-side perspective, Professor Michael Trebilcock's comprehensive 1999 empirical study substantiated claims that international client demand for MDPs existed and that consumers were willing to experiment with using an MDP option for legal services needs.⁴⁶ Trebilcock's economic analysis of MDPs showed that an integrated approach to providing professional services might reduce costs and enhance service quality and accessibility for clients, especially those doing business across borders. Clients surveyed for purposes of the study identified freedom of choice in professional services providers as extremely important. Trebilcock analyzed key objections to MDPs raised by the bar and legal regulators, anchored in concerns over privilege protection, independence, and conflicts of interest, and concluded that these had been overstated. The study further concluded that structures reflecting these overstated concerns—notably rules permitting MDPs only if they were controlled by lawyers and provided legal services as their primary function—were unresponsive to a consumer welfare perspective.

On the supply side, it was clear that law firms and others would continue with efforts to expand multidimensional professional services offerings, just as they had already done with ownership of affiliated lobbying and government relations firms. Mary Daly, who served as the reporter for the ABA Commission on Multidisciplinary Practice, argued that it would be a mistake to assume that resolutions rejecting MDPs would “derail the entrepreneurial engine that drives the U.S. legal profession. The growth of ancillary businesses is proof positive that lawyers who want to join forces with nonlawyers will find ways to do so.”⁴⁷ Indeed, as the reviving of the MDP debate itself now proves, banning MDP structures outright only sidestepped for the time being the substantive question of how professionals might deliver the best and most complete advice to their clients while maintaining professional identity and integrity. In that respect, regulators and bar associations in North America had missed the point: “The real

46. MICHAEL J. TREBILCOCK & LILLA CSORGO, *MULTI-DISCIPLINARY PROFESSIONAL PRACTICES: A CONSUMER WELFARE PERSPECTIVE* (1999). I was involved in the commissioning of this study, its editing and release, and I adopt its analysis. See also Michael Trebilcock & Lilla Csorgo, *Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective*, 24 *DALHOUSIE L.J.* 1 (2001).

47. Mary C. Daly, *Monopolist, Aristocrat, or Entrepreneur?: A Comparative Perspective on the Future of Multidisciplinary Partnerships in the United States, France, Germany, and the United Kingdom After the Disintegration of Andersen Legal*, 80 *WASH. U. L.Q.* 589, 645–46 (2002).

issue isn't as much the structure of the firm(s) that are giving advice[,] but the nature of the advice itself."⁴⁸

That lesson became especially clear in the assessments of the failure of Enron Corporation in late 2001. Fears of large-scale takeovers of major law firms by Big Five accounting firms had been lurking in the shadows of the MDP debates of the late 1990s; the collapse of Enron and the subsequent implosion of Arthur Andersen in its aftermath eliminated any realistic prospect that such takeovers or mergers would be viable.⁴⁹ A simplistic view of the Enron story might have been used to vindicate the positions of both the CBA and the ABA, as proof that combining legal services with others offered by an accounting firm would only serve to compromise the independence of the legal advice.⁵⁰ Liberalized conflict of interest rules used by accounting firms were cited as undermining the integrity of the audit process at Enron, which led to a loss of integrity in the financial statements provided to the market and a collapse of investor confidence. Fundamental reform of auditor independence rules followed.⁵¹ If accounting firms were willing to sacrifice audit integrity in order to secure more lucrative consulting arrangements, the argument went, then certainly lawyers working for MDPs controlled by accountants would be pressured to compromise their integrity and independence for financial gain.

Such a position, however, fails to acknowledge one hard truth: Enron resulted from the improper behavior of many professionals, including lawyers, acting in *separate* accounting or law firms rather than from an inherent flaw in multidisciplinary practice arrangements.⁵² Rather than

48. Nancy B. Rapoport, *Multidisciplinary Practice After In Re Enron: Should the Debate on MDP Change at All?*, 65 TEX. B.J. 446, 447 (2002).

49. The term "Big Five" accounting firms includes the firms of PricewaterhouseCoopers, KPMG, Deloitte & Touche, Ernst & Young, and Arthur Andersen. Arthur Andersen remained in existence after the collapse of Enron, but only as a shell of its former self. The firm imploded in early 2002, even prior to its June 2002 conviction on criminal charges brought by the U.S. Department of Justice against it for obstructing justice in the Securities and Exchange Commission's investigation of Enron. See *United States v. Arthur Andersen LLP*, No. H-02-121, 2002 U.S. Dist. LEXIS 26870 (S.D. Tex. May 24, 2002). During the period under discussion, however, all five accounting firms were actively engaged in or were pursuing the development of legal services and regulatory discussions and the use of "Big Five" remains historically accurate. For the period after mid-June 2002, the term "Big Four" is used herein to refer to the activities of the major accounting firms. See also George C. Nnona, *Situating Multidisciplinary Practice Within Social History: A Systematic Analysis of Inter-professional Competition*, 80 ST. JOHN'S L. REV. 849 (2006).

50. See Ward Bower, *MDP Isn't the Problem*, NAT'L L.J., Mar. 11, 2002, at A21.

51. See Paul D. Paton, *Rethinking the Role of the Auditor: Resolving the Audit/Tax Services Debate*, 32 QUEEN'S L.J. 135, 135 (2006); Strengthening the Commission's Requirements Regarding Auditor Independence, Securities Act Release No. 8183, Exchange Act Release No. 47,265, Public Utility Holding Company Act Release No. 27,642, Investment Company Act Release No. 25,915, Investment Advisers Act Release No. 2103, 68 Fed. Reg. 6006 (Feb. 5, 2003).

52. See Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9 (2002) (discussing lawyer roles in the Enron failure and the need for structural reform of lawyer regulation to address the problems exposed); see also Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143, 162-67 (2002); Kurt Eichenwald, *The Findings Against Enron: Many Avenues Are Seen for*

pointing to Enron as justification for banning MDPs, regulators and others should instead consider how best to structure incentives for the ethical behavior of lawyers and others within all professional services firms, whatever the configuration of the firm. Simply banning outright a business model for delivering legal and other professional services fails to address the more complex questions of how best to reward independent, ethical, and candid advice, regardless of the conduit through which that advice is delivered.

A. *The American Bar Association*

The history of the ABA's consideration of the MDP issue has been canvassed extensively.⁵³ However, a review and synopsis is appropriate and helpful in understanding the process/substance dichotomy in evidence in that debate in order to prepare for the MDP debate that I have suggested the Ethics 20/20 Commission ought to engage in, in view of both changed economic circumstances and developments in the global legal marketplace.

In 1998, ABA President Philip Anderson appointed a twelve-person Commission on Multidisciplinary Practice to "determine what changes, if any, should be made to the ABA Model Rules of Professional Conduct with respect to the delivery of legal services by professional services firms."⁵⁴ The Commission adopted an "open and deliberative process" and established an interactive website in which it posted its own reports, requests for comments, submissions from third parties, and submissions and presentations made at the town-hall style meetings it held between 1998 and early 2000.⁵⁵ The website was cited as providing "immeasurable" value, and "contributed enormously to the public's and the bar's perception of the

Criminal Investigators, N.Y. TIMES, Sept. 23, 2002, at C1; Mike France, *What About the Lawyers?*, BUS. WK., Dec. 23, 2002, at 58; Susan P. Koniak, *Who Gave Lawyers a Pass?*, FORBES, Aug. 12, 2002, at 58; Otis Bilodeau, *In a Harsh Light: Report on Enron Puts Spotlight on Lawyers Who Put Together Sales Deals That Seem Really To Be Loans*, BROWARD DAILY BUS. REV., Oct. 1, 2002, 2002 WLNR 15016322 (Westlaw) (highlighting that later revelations brought lawyer conduct increasing attention). Civil lawsuits in Texas with respect to the liability of Vinson & Elkins LLP alleged civil conspiracy and fraudulent conduct by the law firm. See, e.g., First Amended Complaint at 31–36, *In re Enron Corp. Sec. Derivative & "ERISA" Litig.*, 529 F. Supp. 2d 644 (S.D. Tex. 2006) (No. H-01-3624).

53. In addition to authorities noted *supra* notes 2, 24, 29, and 31, see also Daly, *New Millennium*, *supra* note 45. For a law and economics analysis of consumer welfare issues in the MDP debate in the U.S., see Dzienkowski & Peroni, *supra* note 26; Daniel R. Fischel, *Multidisciplinary Practice*, 55 BUS. LAW. 951 (2000); George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm*, 70 FORDHAM L. REV. 775 (2001). *Contra* David Luban, *Asking the Right Questions*, 72 TEMP. L. REV. 839, 839 (1999) (suggesting that the law and economics analysis is misguided, and arguing instead that in considering the MDP issue, "[t]he right question is not whether new roles with no rules are good for lawyers and clients, but rather whether they are good for the rest of us").

54. Am. Bar Ass'n Comm'n on Multidisciplinary Practice, *Report of the Commission on Multidisciplinary Practice to the ABA House of Delegates*, PROF. LAW., Spring 1999, at 1, 1.

55. Harris & Foran, *supra* note 53, at 785 (quoting Dzienkowski and Peroni, *supra* note 26, at 129).

transparency of the commission's process."⁵⁶ As one observer noted, "Without this transparency, it is likely that the commission's recommendations would have been criticized as 'hidden agendas,' 'tradeoffs,' and 'sellouts.' The open hearings and the Web site enabled interested parties to better understand the raw, unfiltered process of the commission's thoughts as they unfolded."⁵⁷ The Commission heard over sixty hours of testimony from fifty-six witnesses from a variety of groups around the world through public hearings in 1998 and 1999. Further hearings took place in February 2000. Witnesses included consumer advocates, partners in accounting firms, law professors, chairs of ABA sections and committees, domestic and foreign lawyers, and others.

In mid-1999, the ABA Commission made revolutionary recommendations that the Model Rules be amended to permit multidisciplinary practice, with safeguards to protect the "core values" of the legal profession.⁵⁸ The recommendations would have permitted lawyers to partner with nonlawyers to provide legal services, to share legal fees with nonlawyers, and to share ownership interests in the MDP structure, subject to certain conditions, including an annual certification and the requirement of an undertaking to a court in each jurisdiction from the MDP that it would not allow interference "with a lawyer's exercise of independent professional judgment" and would "respect the unique role of the lawyer in society as an officer of the legal system, a representative of clients and a public citizen."⁵⁹

After considerable debate in August 1999, the ABA House of Delegates deferred the issue for "additional study" via the following resolution:

Resolved, that the American Bar Association make no change . . . to the Model Rules of Professional Conduct [that] permit[s] 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 . . . compromising lawyer independence and . . . loyalty to clients.⁶⁰

In December 1999, the Commission released its *Updated Background and Informational Report and Request for Comments*.⁶¹ The Report

56. Daly, *New Millennium*, *supra* note 45, at 529.

57. *Id.*

58. David Segal, *Rules May Shake Law Industry: ABA To Break Accounting Barrier*, WASH. POST, June 4, 1999, at E1.

59. Am. Bar Ass'n Comm'n on Multidisciplinary Practice, *supra* note 54, at 7 (Draft Resolution, paras. 14(A), (E)).

60. AM. BAR ASS'N, THE FLORIDA BAR REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES 2 (2000) (internal quotation marks omitted); *see also* Daly, *Choosing*, *supra* note 45, at 280 & n.263 (cautioning that "interpret[ing] the 1999 vote as a setback for MDPs . . . would be too cavalier," particularly given that it paralleled developments then underway outside the United States). *Contra* Harris & Foran, *supra* note 53, at 786 (considering the vote to be ominous).

61. AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, COMM'N ON MULTIDISCIPLINARY PRACTICE, UPDATED BACKGROUND AND INFORMATIONAL REPORT AND REQUEST FOR COMMENTS (1999), <http://www.abanet.org/cpr/mdp/febmdp.html>.

rejected the claim that there was no empirical evidence of demand for multidisciplinary services. This accorded with the testimony before the Commission from consumer groups, business clients, and others, whose “support for change created an unusual alliance among disparate groups.”⁶² They “uniformly contended that the entry of a new, alternative provider of legal services was in the best interest of the public.”⁶³ Support for change from solo practitioners and small firms was great, with the Council of the ABA General Practice, Solo, and Small Firm Section urging that the rules barring MDPs be relaxed.⁶⁴ All of the consumers of legal services who voiced their opinions to the Commission—from Fortune 500 companies to consumer representatives—urged the ABA Commission to change the rules to permit MDPs. Thus, if discussion about “core values” of the legal profession is intended to protect client interests, it is curious that no user of legal services stepped forward to oppose MDPs.

Notwithstanding this overwhelmingly positive response from clients and the public, in July 2000, the ABA House of Delegates rejected a watered-down version of the July 1999 recommendation presented by the Commission on Multidisciplinary Practice. This 2000 proposal made it clear that passive investment in MDPs was not authorized and permitted fee-sharing only if “lawyers [had] the control and authority necessary to assure lawyer independence in the rendering of legal services.”⁶⁵

The proposal never made it to the floor of the House of Delegates. The Colorado and Denver bars filed a deferral motion that would have seen the ABA postpone a decision until more state and local bars had completed their investigations into the issue. This proposal was backed by Sherwin Simmons, chair of the ABA Commission on MDPs, who was reported as noting that “25 states—representing more than 50% of the US Bar—had yet to respond formally on the MDP question” before the vote on MDPs.⁶⁶

Instead, the ABA House of Delegates voted 314 to 106 in favor of a proposal sponsored by Robert MacCrate, former ABA President and chair of the New York State Bar’s Committee on the Law Governing Firm Structure and Operation, and backed by the Illinois State Bar, the New York State Bar, and the New Jersey State Bar as a “comprehensive response to the issue of multidisciplinary practice”⁶⁷ that effectively rejected MDPs.

62. Daly, *Choosing*, *supra* note 45, at 275.

63. *Id.*

64. *Id.* Daly notes in her review that this support from small firms was consistent with the survey information provided by the Law Society of Upper Canada, noted above, though she does not go on to note that the Law Society of Upper Canada ignored its own evidence in this regard. *Id.* at 276.

65. AM. BAR ASS’N, REPORT OF THE COMMISSION ON MULTIDISCIPLINARY PRACTICE 183 (2000).

66. Sue Allen, *ABA Votes To Retain Ban on MDPs*, GAZETTE (U.K.), July 13, 2000, at 8; see also Robert R. Keatinge, *Colorado and Denver in the House: MDP Declared Heresy by the ABA House of Delegates*, COLO. LAW., Sept. 2000, at 48; John Gibeaut, *It’s A Done Deal: House of Delegates Vote Crushes Chances for MDP*, A.B.A. J., Sept. 2000, at 92.

67. Am. Bar Ass’n Ctr. for Prof’l Responsibility, Comm’n on Multidisciplinary Practice, Transcript of House of Delegates Annual Meeting (July 11, 2000),

The recommendation was anchored in the language of “preserv[ing] the core values of the legal profession” and encouraged state bar associations and other agencies to prohibit lawyers from sharing fees with nonlawyers and to retain and enforce laws that generally bar the practice of law by “entities other than law firms.”⁶⁸ It called upon the ABA to recommend amendments to the Model Rules of Professional Conduct to “assure that there are safeguards” relating to “contractual relationships with nonlegal professional services providers” consistent with the principles adopted.⁶⁹ Remarkably, especially given that the ABA supported further study by the ABA Ethics Committee of an earlier recommendation from New York that would permit side-by-side arrangements, the House of Delegates voted to disband the Commission on MDPs. The text of the note attached to Recommendation 10F stated that “[t]he Commission [on MDPs] deserves our heartfelt thanks, but with the adoption of a comprehensive response to multidisciplinary practice contained in the Recommendation, the work of the Commission will be completed.”⁷⁰ The entire debate and vote took less than an hour.⁷¹

Responses were swift. One delegate described the ABA House of Delegates as “acting more like a lynch mob than a deliberative body of professionals.”⁷² The end result of the ABA’s deliberations reflected the profession’s self-interest rather than the public interest. As one delegate described it:

In the discussion in the ABA meeting in New York, . . . the focus was almost entirely on how MDP will affect lawyers, their practice, their integrity, and their grip on the provision of legal services. There was almost no consideration [of] how limitations of the provision of legal services would affect clients and their needs. . . . [T]he House has chosen to [turn] the legal profession into a protected guild. . . .⁷³

This view of the final outcome accorded with an earlier outside assessment of the anticompetitive nature of the ABA’s MDP initiative. In February 2000, the American Antitrust Institute (AAI) released a monograph entitled *Converging Professional Services: Lawyers Against the Multidisciplinary Tide*.⁷⁴ The monograph called the earlier ABA recommendation (which would have permitted MDPs, but only those

http://www.abanet.org/cpr/mdp/mdp_hod_transc.html; AM. BAR ASS’N CTR. FOR PROF’L RESPONSIBILITY, REPORT 10F (2000), <http://www.abanet.org/cpr/mdp/mdp-report10f.html> [hereinafter ABA, REPORT 10F].

68. Recommendation 10F, *supra* note 1.

69. *Id.*; see also Allen, *supra* note 66; Wendy Davis, *ABA Emphatically Rejects MDPs*, NAT’L L.J., Jul. 24, 2000, at A5; Jean Eaglesham, *Courting Conflict*, FIN. TIMES (London), July 13, 2000, at 22.

70. ABA, REPORT 10F, *supra* note 67.

71. Gibeau, *supra* note 66, at 93.

72. Keatinge, *supra* note 66, at 48.

73. *Id.*

74. Press Release, Am. Antitrust Inst., AAI Says Legal Profession’s Recommendation on Multidisciplinary Practices May Violate Antitrust Laws (Feb. 8, 2000), <http://www.antitrustinstitute.org/archives/52.ashx>.

controlled by lawyers) “nothing more than an effort to protect lawyers and law firms from competition” and asserted that the proposal in its form at the time “should not survive antitrust scrutiny.”⁷⁵ The president of the AAI urged the MDP Commission to “produce a final proposal that better meets the needs of consumers.”⁷⁶ As will be described below, it was pressure from England’s government antitrust office that propelled legislative reform that both effectively ended self-regulation of the legal profession and coincidentally opened the legal services market in that country to “alternative business structures,” including the MDP.

B. *The Canadian Bar Association*

The Canadian Bar Association is a professional, largely voluntary organization that represents roughly two-thirds of all practicing lawyers in Canada. The CBA’s primary purpose is to promote the interests of its members. It also seeks to “improve the administration of justice”; “improve and promote the knowledge, skills, ethical standards and well-being of members of the legal profession”; “promote equality in the legal profession”; and represent the legal profession in Canada.⁷⁷ However, it is viewed as an “important and objective voice on issues of significance to both the legal profession and the public”⁷⁸ and is generally respected by government for its input, although its resolutions are not binding on government or any legal regulator.⁷⁹

Accordingly, the CBA’s examination of the MDP issue is relevant as a counterpoint to the views and actions of the legal regulators charged with the responsibility of acting in the public interest. It is also a way to discern the opinion of the body representative of the profession as a whole in Canada on the MDP issue. The process by which it arrived at its final position on the MDP question, involving political intrigue and overt manipulation by representatives of the provincial regulator in the province of Ontario, the Law Society of Upper Canada (LSUC), is also instructive. In short, when it became clear that the Ontario regulator would be embarrassed by having the Canadian Bar Association sanction a far more liberal regime for MDPs than the one that LSUC had already imposed while purportedly acting “in the public interest,” LSUC representatives embarked on an ultimately successful campaign through the legal press and at the CBA itself to have the will of the CBA national council reversed and a narrower MDP regime with a lawyer-control requirement adopted.

75. *Id.*; see also Dzienkowski & Peroni, *supra* note 26, at 94.

76. Press Release, Am. Antitrust Inst., *supra* note 74.

77. Canadian Bar Ass’n, About the Canadian Bar Association, <http://www.cba.org/CBA/Info/Main> (last visited Mar. 18, 2010).

78. *Id.*

79. Full disclosure: I am a member of the CBA and in 2009–2010 Chair of the CBA Ethics and Professional Responsibility Committee. The views expressed herein are, however, my own.

The Canadian Bar Association established its International Practice of Law (IPL) Committee in 1997 with a mandate to monitor the “activities, negotiations and developments regarding the globalization of legal practice and the trend towards multi-disciplinary practices through NAFTA, the World Trade Organization (WTO), and the International Bar Association (IBA).”⁸⁰ The CBA directed the IPL Committee to report to the CBA’s senior officers regularly on such developments. The IPL Committee released an interim report to the CBA Council in 1998 that recommended to the provincial bars that “MDPs should not be permitted to provide legal services to clients” unless the MDP organization were controlled by lawyers.⁸¹ The report expressed concern that the “core values of solicitor/client privilege and the avoidance of conflict of interest [could not] be adequately addressed unless MDPs [were] controlled by lawyers and primarily offer[ed] legal services.”⁸² The report also recommended that “to avoid any confusion in the public mind as to the kinds of services offered by an entity, the rules [of practice] should be changed to prohibit any MDP or law firm from offering legal services under a name substantially similar to the name of an entity not authorized to provide legal services.”⁸³

The report also expressed the view that any regulatory approach to MDPs that rendered legal services must reflect “a commitment to: (i) the independence of lawyers and the legal profession; (ii) the preservation of solicitor/client privilege and client confidences; (iii) the prohibition against conflicts of interest in the practise of law; and (iv) adherence to the Code of Professional Ethics of the legal profession”⁸⁴ It suggested that “[o]nly if a regulatory regime relating to MDPs [could] demonstrably satisfy these criteria should MDPs be permitted to render legal services.”⁸⁵ Similarly, “[n]o regime relating to MDPs should be permitted if it could reasonably jeopardize” privilege or client confidentiality.⁸⁶ Finally, the report said that MDPs should be permitted so long as the MDP always had a majority of owners who were lawyers and the MDP was lawyer-controlled; “the primary activity of the MDP [was] the provision of legal services”; “all owners of the MDP offering legal services [were made] subject to the disciplinary jurisdiction of the Law Society of the Province in which they practi[ced];” and “all owners of MDPs [were] required to protect the privilege and confidentiality of the MDP’s clients.”⁸⁷

After further study and consultations, the IPL Committee in August 1999 released its astonishing reversal of views in a report entitled *Striking a*

80. CANADIAN BAR ASS’N, SPECIAL COMM. ON THE INT’L PRACTICE OF LAW, MULTI-DISCIPLINARY PRACTICES: AN INTERIM REPORT, at i (1998).

81. *Id.* at 5.

82. *Id.*

83. *Id.*

84. *Id.* at 6.

85. *Id.*

86. *Id.*

87. *Id.* at 5–6.

Balance.⁸⁸ That report recommended that lawyers be allowed to participate in MDPs even if such MDPs were not controlled by lawyers. The IPL Committee also recommended that law societies not limit the services that MDPs provide to those of a legal nature. It also favored a regime that focused regulation on individual lawyers rather than on the MDPs themselves and took the position that “[l]awyers in MDPs must be subject to the rules of professional conduct of law societies and remain responsible for ensuring that the services [that] they deliver comply with all such requirements.”⁸⁹ Both key elements of the new recommendation were embarrassing to the Law Society of Upper Canada, which in May 1999 had already imposed a regime for the province of Ontario that regulated the MDP structure and restricted lawyer participation to those MDPs in which legal services were the primary service offering.

The ramifications of the CBA position on the Ontario approach went deeper. The report suggested that the adoption of a more restrictive regime contradicted what the IPL Committee saw as more important public interests and values. The “balance” referred to in the report’s title should be struck between “two sets of public interests” in determining the appropriate approach to regulating MDPs:

MDPs . . . may threaten . . . core values of the legal profession: self-governance . . . , independence . . . , avoidance of conflicts of interest, preservation of client confidentiality, preservation of solicitor-client privilege and avoidance of the unauthorized practice of law. To preserve these values, there are three main approaches to regulation: first, regulate individual lawyers only and not the MDP as a business entity; second, regulate the business entity, specifying who can control it and the types of services [that] it can provide; third, permit MDPs generally but address specific issues that may be of particular concern.

The choice of approach is informed by two sets of conflicting public interests. The first is the preservation of lawyers’ role in the administration of justice. This tends to favour the separation of the delivery of legal services from the delivery of other professional services and is consistent with the second approach above. The second set of public interests is based on freedom of choice, freedom of association, competition and efficiency. This argues for substantial departures from current business structures in which legal services are delivered and is consistent with the first approach above. The third approach above attempts to strike a balance between the two sets of public interests, but it is difficult to determine how that balance should be struck.

The Committee prefers the third approach. Choice, competition and freedom of association are aspects of the public interest that should be given more weight. At the same time, the Committee is not persuaded that the core values of the legal profession can be protected only by lawyers controlling MDPs or by MDPs only delivering legal services.

88. STRIKING A BALANCE, *supra* note 30.

89. Press Release, Canadian Bar Ass’n, CBA Releases Report on Lawyers’ Involvement in Multi-Disciplinary Practices (Aug. 21, 1999).

The focus should be on regulation of individual lawyers and not the MDPs themselves.⁹⁰

The vote on the *Striking a Balance* recommendations came in August 2000 at the CBA Annual General Meeting in Halifax. The new CBA president, Eugene Meehan, had vowed in September 1999 to guard lawyers against ““know-nothing document-preparers”” and invoked democracy as a fundamental reason to oppose MDPs.⁹¹ Questioning how a law firm owned by an accounting firm could remain independent, Meehan said, ““Without an independent bar, and without an independent judiciary, you do not have a democracy. It’s that simple, and it’s that important too.””⁹²

After a two-day debate at the August 2000 CBA Annual General Meeting, and despite Meehan’s resistance, the CBA passed a landmark resolution on MDPs that was a stark contrast to Resolution 10F passed by the ABA the previous month. The CBA resolution recommended that provincial regulators adopt rules to permit lawyers to join MDPs and share fees with nonlawyers, but it did so without any requirement that lawyers have financial or voting control of the MDPs themselves. The resolution maintained, however, that lawyers would have to control the delivery of legal services by the MDP. Lawyers would not be able to practice in an MDP with other service providers that had conflicting ethical responsibilities (preventing, for example, the MDP from providing audit and legal services to the same client). MDPs would have to obtain a license from the appropriate law society, a condition of which would be the MDP’s pledge to adhere to the “core values, ethical obligations, standards and rules of professional conduct of the legal profession.”⁹³

The Council passed the resolution over strenuous objections from its Ontario branch. The Ontario delegates attempted to amend the CBA resolution to require lawyer control of the entire MDP—something upon which LSUC adamantly insisted, despite the fact that this would effectively gut the *Striking a Balance* report. The debate ended with a process fight by Ontario delegates about when the vote was supposed to have been taken.⁹⁴ A motion to reopen debate was defeated, forty-four to thirty-six.⁹⁵ This outcome prompted an effort by the head of LSUC to undercut and discredit the CBA entirely. The legal press reported it this way:

“It [the CBA resolution] certainly won’t persuade the Law Society of Upper Canada to change its view, I can tell you that,” LSUC Treasurer Robert Armstrong angrily told *The Lawyers Weekly*, minutes after the

90. STRIKING A BALANCE, *supra* note 30, at 5.

91. Monique Conrad, *Canadian Bar Association*, CANADIAN LAW., Sept. 1999, at 10 (quoting Eugene Meehan).

92. *Id.* (quoting Eugene Meehan).

93. Canadian Bar Ass’n, Council Res. 00-03-A, § 3 (2000).

94. Cristin Schmitz, *CBA Wants Law Societies To Let Lawyers Join MDPs*, LAW. WKLY. (Can.), Sept. 1, 2000, available at TLWN (Lexis); see also Michael Fitz-James, *Lawyers Don’t Have To Control MDPs*, LAW TIMES (Can.), Aug. 28, 2000, at 1.

95. Schmitz, *supra* note 94.

vote. "At the end of the day law societies have the final say. [The CBA's resolution] is just a statement of policy."⁹⁶

Armstrong increased the stakes by resigning from the CBA in protest. Some suggested that Armstrong's resignation would "undermine[] the CBA's claims to speak for the Canadian legal profession"⁹⁷ and that the tactic of a very public resignation had to be seen as a political move to discredit an outcome that undercut the authority of the Law Society of Upper Canada's position. The debate was not yet over.

In February 2001, CBA Council passed a resolution that "clarified" and amended the August 2000 resolution to require lawyers to have "effective control" over the entire MDP.⁹⁸ "Effective control" would ensure that the business and practice of the MDP would be in "continuing compliance with the core values, ethical and statutory obligations, standards and rules of professional conduct of the legal profession."⁹⁹ Every client of the MDP would be considered to be the client of every lawyer in the MDP, thereby imposing the lawyers' conflict rules on the entire MDP as though it were no different from any one law firm. The resolution required that such control must be via "a partnership agreement or other contractual arrangement [that] govern[ed] the relationship of the lawyer(s) and the non-lawyer(s) within the MDP."¹⁰⁰ Further, the MDP contract would have to stipulate that no service provider with conflicting ethical responsibilities could offer services to the firm's clients incompatible with lawyers' obligations to clients.¹⁰¹ The alteration on lawyer control brought the CBA much closer to the restrictive approach of the Law Society of Upper Canada,¹⁰² and constituted vindication for Armstrong, LSUC's head. How the CBA's new approach reflected the public interest concerns laid out in the *Striking a Balance* report was never addressed.

Given the mandate of the CBA to serve in the best interests of its lawyer members, it would have been plausible for the CBA to have arrived at its original position and stayed there. The force of the *Striking a Balance* report had been similar to the strong recommendations of the ABA Commission on MDPs. For a short period, the profession determined that the public interest was more broadly defined than the self-interest of the profession, and for a time adopted a position that the appropriate approach to the MDP question was to have a regulatory model that did not require either lawyer control or a singular focus on the delivery of legal services. The tale of the reversals, however, speaks to the overt politicization of the

96. *Id.* (second alteration in original) (quoting Robert Armstrong).

97. Eric Atkins, *LSUC Treasurer Robert Armstrong Quits CBA over Voting Procedure*, LAW. WKLY. (Can.), Sept. 8, 2000, available at TLWN (Lexis).

98. Canadian Bar Ass'n, Council Res. 00-01-M, para. 1.a (2000).

99. *Id.*

100. *Id.*

101. *Id.*; see also Press Release, Canadian Bar Ass'n, CBA Resolution Says Business of MDPs Should Be Controlled by Lawyers (Feb. 19, 2001).

102. See *Mid-Winter 2001, CBA Council: MDPs: A New Approach*, NATIONAL (Can.), Mar./Apr. 2001, at 54, 54.

CBA process, particularly by the Ontario lawyers and the Law Society of Upper Canada, which led to mixing the role of the legal regulator acting under statutory authority "in the public interest" with the machinations of the professional association for all lawyers in Canada.

Before returning to briefly consider state bar action following the ABA's MDP vote, a review of the Law Society of Upper Canada and Law Society of British Columbia MDP debates will provide a more complete picture of how the process unfolded in Canada. In so doing, it becomes clearer how the self-serving interest of the profession was in evidence during the period, cloaked in "core values" and "public interest" rhetoric.

IV. THE LAW SOCIETY OF UPPER CANADA: LAWYER INTEREST AS PUBLIC INTEREST

Under amendments made to the Law Society Act in 1998, the Ontario provincial government granted the Law Society of Upper Canada power to make bylaws to govern MDPs involving lawyers and other professionals.¹⁰³ Specifically, the Law Society was given authority to pass rules that governed

the practice of law by any person, partnership, corporation or other organization that also practises another profession, including requiring the licensing of those persons partnerships, corporations and other organizations, governing the issuance, renewal, suspension and revocation of licences and governing the terms and conditions that may be imposed on licences.¹⁰⁴

No similar language appears in statutes that govern other professions in any form of professional association with lawyers. The legislative scheme thus clearly privileged the Law Society's ability to regulate MDPs.

The work of the Law Society of Upper Canada on MDPs had in fact begun on April 4, 1997, when its governing body, Convocation, approved the creation of the "Futures Task Force" in response to deliberations within two separate Law Society committees on the need to assess the regulation of its members. As such, the Task Force was born of a broad set of interests in the future of the legal profession, in how the Law Society regulated legal-services marketplace issues, and curiously in the economic circumstances of lawyers.¹⁰⁵ With this focus on the profession and the well-being of its members, then, it is not surprising that a singular focus on protecting lawyers' interests (equating that with the interests of the public) would emerge. The ultimate scheme for regulating MDPs in Ontario is comprised of two Law Society bylaws, one on integrated partnership

103. An Act to Amend the Law Society Act, 1998 S.O., ch. 21 (Can.).

104. *Id.* ch. 21, art. 29(1) (amending Law Society Act, R.S.O., ch. L. 8, § 62(0.1)32 (1990)).

105. THE LAW SOC'Y OF UPPER CAN., WORKING GROUP ON MULTI-DISCIPLINE PARTNERSHIPS, REPORT TO CONVOCATION, THE "FUTURES" TASK FORCE—FINAL REPORT OF THE WORKING GROUP ON MULTI-DISCIPLINE PARTNERSHIPS, at Mandate, para. 1 (1998) [hereinafter FUTURES TASK FORCE FINAL REPORT].

arrangements and the other on affiliation arrangements between law firms and other services providers.

A. *By-Law 25: "Multi-Discipline Practices"*

By-Law 25, entitled *Multi-Discipline Practices*, was adopted on April 30, 1999.¹⁰⁶ It enshrined a doubly restrictive approach, combining elements of regulatory models previously adopted in Washington D.C. and New South Wales, Australia. Of the five practice models that Convocation considered for adoption—fully integrated MDPs; maintenance of the “status quo” with the practice of law in partnerships only; MDP services provided lawyers maintain effective control of the partnership—the New South Wales model;¹⁰⁷ MDPs offering primarily legal services with no specific provisions for control—the D.C. model;¹⁰⁸ and MDPs offering legal services only, provided that the partnership is in the effective control of lawyers—only the last option was considered to be in the public interest.¹⁰⁹

At numerous points, the Task Force recommending this model took pains to point towards the accounting profession as the principal protagonists for MDPs, yet the Task Force did not directly suggest that such firms’ arrangements in continental Europe or elsewhere violated professional ethical rules or the rules that govern the legal profession.¹¹⁰ The specter used to justify a doubly restrictive regime in no way took into account the public interest in broader access to legal services or even the supply-side pressures from its own membership. Yet the rhetoric of the public interest and a normative justification of special barriers were invoked to justify the ultimate recommendations and insular approach that the Task Force adopted:

An analysis of these unique features of the profession make it clear that as lawyers we are not simply at one with other professionals and service

106. BY-LAW No. 25 (Law Soc’y of Upper Can.1999) [hereinafter LAW SOC’Y BY-LAW 25], was later amended three times in 1999 (May 28, June 25, and December 10), twice in 2001 (April 26 and May 24), and once in 2002 (October 31), but the changes are not substantial for the purposes of this discussion. The By-Law was revoked on May 1, 2007, as part of housekeeping amendments necessitated by the October 2006 amendments to the Law Society Act. See THE LAW SOC’Y OF UPPER CAN., BY-LAW REVIEW COMM., REPORT TO CONVOCATION APR. 26, 2007 (2007), available at http://www.lsuc.on.ca/media/convapr07_bylaw_review.pdf; see also LAW SOC’Y BY-LAW 7, *supra* note 14, pt. III. The prior numbering was in place during the period until 2003 and is therefore retained for this discussion.

107. See LAW SOC’Y OF NEW S. WALES PROF’L CONDUCT AND PRACTICE RULE R. 40.1 (repealed 2008), <http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ruleslegislation/SolicitorsRules/027157>.

108. D.C. RULES OF PROF’L CONDUCT R. 5.4(b) (2006).

109. FUTURES TASK FORCE FINAL REPORT, *supra* note 105, Executive Summary.

110. *Id.* Executive Summary (“The early (and current) protagonists for the development of MDPs are the large chartered accounting or professional services firms who see the partnering of lawyers and accountants as the next logical step in the continued globalization and consolidation of professional services.”). Yet, not two paragraphs later the Task Force notes that such developments could flow to “main street,” involving lawyers and other professionals, and service providers in small centers and smaller firms or sole practices. *Id.*

providers being guided by a need to serve with due care and skill. The law has imposed special societal responsibilities upon us [that] we must discharge in the public interest. If we fail, we not only do ourselves discredit but, more important[ly], we undermine the values themselves and place important societal interests at risk. This is the responsibility [that] must be weighed in assessing our compatibility with MDPs.¹¹¹

For the first time in Ontario, By-Law 25 regulated the conduct of law *firms* rather than just that of a firm's individual lawyers. It allowed lawyer members of the Law Society to enter into association with a nonlawyer only if that person was "of good character"; was qualified to practice a "profession, trade or occupation that supports or supplements the practice of law"; agreed that the lawyer partner would have "effective control" over that person's activities insofar as they were providing services to clients of the partnership or association; and would comply with the Law Society's rules, regulations, and policies.¹¹² Unlike other bylaws that governed its members, By-Law 25 required an application by a lawyer member of the Society to be filed with the Law Society and approved before entering into the MDP. The rules reinforced the second-class status of any nonlawyer professional in a multidisciplinary partnership or association and imposed a primacy on Law Society rules over those of any other profession or trade similarly regulated by government in the public interest.

The outcome was not surprising, given the work of the Task Force and its bias against radical change. The Task Force's discussion in its final report under the heading "MDPs, the Role of the Lawyer, and the Public Interest" begins as follows:

The Law Society's study was premised on the belief that the legal profession should *not* embrace MDPs, whatever the commercial attractions, until a demonstrable and legitimate demand outweighs the risks to the profession in the public interest. The focus must be on the preservation of a strong and independent legal profession.¹¹³

Several features of this admission merit attention. It makes abundantly clear that the study had a transparently self-interested bias, despite evidence from its own 1998 survey data that 2775 members of 7134 responding, or approximately thirty-nine percent of those surveyed, maintained "regular referral arrangements with other non-legal professionals."¹¹⁴ Even more striking, a full eleven percent (767 of 7066 responding) acknowledged providing legal services to clients regularly "jointly with other professions and/or non-legal disciplines [through which] those services are also available."¹¹⁵ In effect, this latter group was already operating in a form of

111. *Id.* para. 97.

112. *See* LAW SOC'Y BY-LAW 25, *supra* note 106, §§ 4(1)–(4) (defining "effective control" and "good character").

113. FUTURES TASK FORCE FINAL REPORT, *supra* note 105, Executive Summary (emphasis added).

114. *Id.* app. 10 (MDP Form and Data).

115. *Id.*

multidisciplinary practice arrangement, even though the Law Society was not regulating it and was taking steps to prevent it.¹¹⁶ Further, the definition of the public interest was equated with a strong and independent legal profession. Finally, the conception of appropriate regulation utilized is that the Law Society would not permit something (that by its own data was already occurring) until such time that a “demonstrable and legitimate demand” was proven.¹¹⁷ No criteria were offered anywhere in the report for what threshold should be adopted for “demonstrable” demand, and “legitimate” demand appeared to be whatever the Law Society determined it to be. The statement was also undercut by the evidence laid out in the report’s appendices from business lawyers and in-house counsel about the utility of multidisciplinary services in particular business contexts.¹¹⁸ Given the premise of the study acknowledged by the Task Force in its report, the outcome of its investigation was inevitable.

For all of the purported concern that the Law Society expressed in its report about the public interest, at no time did the Task Force or its academic experts consult with the public. In stark contrast to the American Bar Association MDP Commission’s approach, there were no open hearings, no posting of testimony or submissions, no soliciting of views or invitations to groups such as the Canadian Federation of Independent Business (the most significant lobby group for small business in Canada), local chambers of commerce, Members of Provincial Parliament, or the public at large.

The sessions that the Task Force held with lawyers in business and practice highlighted that client demand for “one-stop shopping” developing internationally was in part responsible for the drive for MDPs; that a “team” approach was valuable and should result in reduced costs; and that if ethical questions were adequately addressed, MDPs would enhance the availability and delivery of legal services. The ethical concerns around whether and how a client received legal advice and indeed defining what constitutes the practice of law were important, both for maintaining privilege (particularly in a criminal law context) and, astoundingly, for the rationale for affording the Law Society the privilege of self-regulation. As the summary put it,

The argument is that if there is no clear vision of what the solicitor/client relationship is and what the legal services are that the Law Society can regulate to the exclusion of others, then lawyers cannot *sell* the

116. *Id.* (The Law Society’s analysis of the survey notes, “A significantly smaller number of respondents (about 760) indicated that business arrangements with others were entered into to provide multi-discipline services to clients. What is not known is whether this is a result of the current restrictions within the regulatory regime, a desire on the part of lawyers to remain in control and independent, or a combination of both.”).

117. *Id.* Executive Summary.

118. *Id.* app. 9 (Discussion Sessions with Practising Members, Employed Members, Accountants, and In-House Counsel).

proposition that there is a public interest in having lawyers maintain independence.¹¹⁹

B. *By-Law 32: Affiliated Law Firm Rules*

By-Law 25 was not the end of the MDP story in Ontario. The Futures Task Force report had noted the presence of law firms “captive” to Big Five accounting firms in continental Europe and the presence in Ontario of Donahue & Partners, a law firm established by the accounting giant Ernst & Young. The report noted that the Donahue law firm was a separate partnership, but had linkages to the accounting firm, “including a physical presence within the premises of the accounting firm’s offices.”¹²⁰ It further remarked that “there are regulatory issues [that] require independent study with respect to this model” and recommended that “an appropriate vehicle be struck to undertake [such a] study.”¹²¹

Accordingly, first in September 1998 and again in June 1999, Convocation mandated the Multi-Disciplinary Practice Task Force to “deal with the issue” of what it labeled a “captive law firm model,” the provision of legal services to the public through law practices affiliated with professional-service or accounting firms.¹²² The Task Force was to examine questions of “control, trading style, management, conflicts of interest and related matters.”¹²³ The Task Force reported that “in examining issues that the affiliated law firm structure may create for the practice of law, [it was] aiming in particular to isolate the key regulatory issues and, if necessary, design an appropriate regulatory scheme within which the affiliated firm may operate.”¹²⁴

The end result was By-Law 32, entitled *Affiliations with Non-Members*, passed on May 24, 2001. By-Law 32 imposed a notification requirement on a lawyer member or firm that “affiliates with an affiliated entity.”¹²⁵ It

119. *Id.* (emphasis added).

120. *Id.* Executive Summary.

121. *Id.*

122. See THE LAW SOC’Y OF UPPER CAN., STATUS REPORT OF THE MULTI-DISCIPLINARY PRACTICE TASK FORCE: REPORT TO CONVOCATION NOV. 26, 1999, at 1 & n.2 (1999) [hereinafter THE LAW SOC’Y OF UPPER CAN., STATUS REPORT], available at <http://www.lsuc.on.ca/media/MDPreportnov99.PDF> (referencing a mandate from June 1999); MULTI-DISCIPLINARY PRACTICE TASK FORCE, CONSULTATION SESSION INFORMATION ON THE AFFILIATED OR “CAPTIVE” LAW FIRM (1999), reprinted in THE LAW SOC’Y OF UPPER CAN., STATUS REPORT, *supra*, app. 2 (noting that the issue first arose at the September 1998 Convocation).

123. THE LAW SOC’Y OF UPPER CAN., MULTI-DISCIPLINARY PRACTICE TASK FORCE, IMPLEMENTATION PHASE: REPORT TO CONVOCATION APR. 26, 2001, at 1 n.1 (2001) [hereinafter IMPLEMENTATION REPORT], available at <http://www.lsuc.on.ca/media/mdptaskforcereport.pdf> (quoting The Law Soc’y of Upper Can. Transcript of Convocation 218 (Sept. 25, 1998)).

124. THE LAW SOC’Y OF UPPER CAN., STATUS REPORT, *supra* note 122, at 1.

125. BY-LAW No. 32, § 1(2) (Law Soc’y of Upper Can. 2001) (repealed 2007) [hereinafter LAW SOC’Y BY-LAW 32], available at <http://www.lsuc.on.ca/media/revokedbylaw32.pdf>. Note that this By-Law was also revoked on May 1, 2007, as part of the consequential changes required by the October 2006 amendments to the Law Society Act but

provided a form¹²⁶ that is to be filed annually that details the financial arrangements that exist between the two firms; sets out “the ownership, control and management of the practice through which the member or group delivers legal services”; informs the Society of the compliance by the lawyer members with the Law Society’s rules on conflicts of interest and confidentiality with respect to clients who are also clients of the affiliated entity; and provides other information required to satisfy the Society as to the arrangements between the lawyer or law firm and the affiliated entity.¹²⁷

Continuing the control requirements imposed in By-Law 25, By-Law 32 required that lawyers own and maintain control of the practice through which the legal services are delivered.¹²⁸ It stipulated a physical segregation of the premises from which the legal services are delivered from those used by the affiliated entity for the delivery of its nonlegal services, “other than those that are delivered by the affiliated entity jointly with the legal services of the member or group.”¹²⁹ The definition of “affiliation” was broad and was considered problematic even by the Task Force itself. By-Law 32 provided that “a member or group of members affiliates with an affiliated entity when the member or group on a regular basis joins with the affiliated entity in the delivery or promotion and delivery of the legal services of the member or group and the non-legal services of the affiliated entity.”¹³⁰

The Task Force acknowledged that “the definition of affiliation captures more than law firms and non-law firms who by design operate under comprehensive arrangements for the joint delivery of legal and non-legal services. Convocation, however, agreed that the definition proposed by the Task Force was appropriate.”¹³¹

Other elements of the scheme are noteworthy. No profit-sharing or fee-splitting was to be allowed. Most importantly, the clearance of conflicts would act as an impediment to any association on any meaningful scale nationally or internationally: a system would have to be established to search for conflicts in both the law firm and the affiliated firm. The Task Force stated that “the conflicts search regime should . . . extend to searches for conflicts in firms affiliated with the law firm that practice outside Canada in [which] separate national firms or offices of the non-lawyer firm are treated economically as if they were one firm.”¹³²

In the end, Ontario was left with and retains a restrictive regime for both MDPs and affiliated law firms. Initiatives were voted upon before the

that its provisions remain in force, with different numeration in the new By-Law 7. LAW SOC’Y BY-LAW 7, *supra* note 14.

126. The Law Soc’y of Upper Can., Notice of Affiliation, By-Law 32, Form 32A (2001), available at <http://www.lsuc.on.ca/media/form32aEN.pdf>.

127. LAW SOC’Y BY-LAW 32, *supra* note 125, §§ 3–4.

128. *Id.* § 2(a)–(b).

129. *Id.* § 2(c).

130. *Id.* § 1(2).

131. IMPLEMENTATION REPORT, *supra* note 123, at 14.

132. *Id.* at 3.

debates at the Canadian Bar Association or elsewhere had been completed. Aggressive moves to insulate the Ontario position from contradiction by the Canadian Bar Association, as detailed above, beg the question as to whether the regulator was acting in the public interest or in the profession's self-interest.

It was this perception of the mixing of self-interest and public interest that led to the effective end of self-regulation for the legal profession in England, coincident with legislation mandating the facilitation of alternative business structures, including the MDP, in 2007.¹³³ As the Ethics 20/20 Commission considers the impact of international developments on the practice of law in the United States and by American firms, English developments in particular will play a critical role in that competitive assessment. Further, the fact that English authorities have reconciled "core values" considerations with liberalization of service delivery options should challenge the ABA to reconsider the language of Resolution 10F and adopt a new way forward. Before considering those reforms, however, the history of the MDP debate in British Columbia, California, and New York round out the North American picture and further demonstrate that self-interest and core values rhetoric, left unchecked, are a recipe for retrenchment and calcification.

V. THE LAW SOCIETY OF BRITISH COLUMBIA

In British Columbia, the Legal Profession Act¹³⁴ grants to the Law Society of British Columbia the authority to regulate the legal profession and to make rules "for the governing of the society, lawyers, articulated students and applicants."¹³⁵ Section 3 of the Act requires that the public interest be paramount by making it

the object and duty of the [Law S]ociety

(a) to uphold and protect the public interest in the administration of justice by

- (i) preserving and protecting the rights and freedoms of all persons,
- (ii) ensuring the independence, integrity and [honor] of its members, and
- (iii) establishing standards for the education, professional responsibility and competence of its members¹³⁶

Curiously, subject to the responsibilities just enumerated, the object of the Law Society is *also* to "uphold and protect the interests of its members."¹³⁷

133. Paton, *supra* note 13, at 116–18; see also Anthony E. Davis, *Regulation of the Legal Profession in the United States and the Future of Global Law Practice*, PROF. LAW., 2009, at 1, 8.

134. 1998 S.B.C., ch. 9 (B.C.).

135. *Id.* § 11(1).

136. *Id.* § 3(a)(i)–(iii).

137. *Id.* § 3(b)(ii).

Until a December 2001 vote on a pro-MDP resolution failed to garner a sufficient majority to result in the adoption of a liberal MDP rule,¹³⁸ it appeared as though the Law Society of British Columbia would take an approach to MDPs that would be radically different from the restrictive regulatory framework adopted in Ontario. This followed over two years of steps towards an open regime. In October 1999, Law Society benchers (governors) agreed in principle to relax the prohibition on fee splitting to permit multidisciplinary practice, “subject to the adoption of a regulatory scheme that protect[ed] the core values of the legal profession, such as privilege, confidentiality and professional independence.”¹³⁹ Throughout the first half of 2000, an MDP Task Force presented further options on a regulatory scheme for MDPs in the province. Through a series of nonbinding “straw votes,” benchers made provisional decisions on the principles to protect core values that should underpin the regulatory scheme.

The Task Force drafted rules based on the straw votes. These were first introduced at the Law Society’s December 2000 meeting. Benchers had concluded that the Law Society should regulate the MDP through the lawyers participating in it rather than by regulating the firm itself (in contrast to the Ontario MDP rules), just as it did for law firms. With respect to control of the MDP, two options were considered. One would require lawyers to be a majority of the MDP’s partners. The other, which benchers favored, would place no restrictions on control of the MDP and would allow lawyers to comprise a minority of the MDP’s partners, provided that the delivery of legal services remained under lawyer control. On the question of who could participate in an MDP, benchers did not favor restricting membership to other self-regulating professionals, but thought that nonlawyers in other businesses should be allowed to participate. Their rationale was public spirited, as well as economically attuned to lawyers’ needs: “A restrictive approach may preclude sensible and economic arrangements between lawyers and members of other occupations that may serve the public well.”¹⁴⁰ Benchers were not comfortable, however, with an “open ownership” model.

Benchers directly rejected the approach adopted by Ontario (and built on the District of Columbia model) that restricted the scope of services to those directly related to the practice of law. Again, the rationale considered the ability of consumers and the public to access services, as well as the lawyers’ economic interests: “A client’s problems can cut across professional boundaries, and it is the potential convenience, lower cost and

138. The proposal, discussed below, attracted a majority of votes, but more than a simple majority was required to amend the Law Society Rules.

139. *Consultation on Multi-Disciplinary Practice*, BENCHERS’ BULL. SUPPLEMENT (The Law Soc’y of B.C., Vancouver, B.C.), July–Aug. 2001, http://www.lawsociety.bc.ca/publications_forms/bulletin/2000-01/01-08supp_MDP.html.

140. *Id.*

better and more comprehensive advice that may attract consumers to a multi-disciplinary practice.”¹⁴¹

On the issue of client confidentiality, the benchers took a similarly pragmatic approach, rejecting proposals that would prohibit lawyers from participating in MDPs or from acting for clients when there is a high probability that conflicting confidentiality standards would arise. The consultation paper noted that “[a]lthough such prohibitions would minimize the potential for conflict, they may prohibit some of the most useful forms of MDP for consumers.”¹⁴² The provision of audit and legal services to the same client was not banned outright, but was prevented “unless[in all cases] the client gives informed consent to the disclosure.”¹⁴³ The answers lay not in protecting the “guild,” but in figuring out pragmatic solutions that afforded minimum regulatory intrusion.¹⁴⁴

The Law Society’s 2001 president, Richard Margetts, Q.C., continued this focus on consumer needs, as well as on lawyers’ seeing new challenges as opportunities, not threats. In two separate articles to the legal profession in British Columbia, Margetts expressed his disappointment in what he saw as the profession’s tendency to regard any change as a threat.¹⁴⁵ He identified a need for increasing integration of legal practice and other disciplines. In dealing with MDPs, as well as other forces of change, the challenge was “to grasp the inevitability of change and use it as a creative force In the face of new competition, we cannot simply “circle the wagons” . . . to protect our turf.”¹⁴⁶

Margetts rejected the reliance on a “core values” defense and openly challenged the assumption that “lawyers [in an MDP] will be prepared to abandon their professional obligations at the whim of their non-lawyer partners.”¹⁴⁷ He did not share the “pessimistic view” of those who would question the fitness or character of “those members of our profession who

141. *Id.*

142. *Id.*

143. *Id.*

144. See Richard Margetts, “You Don’t Need a Weatherman”: Another Word in the Multi-Disciplinary Practice Debate, 59 *ADVOCATE* 543 (2001) [hereinafter Margetts, *You Don’t Need a Weatherman*]; Richard S. Margetts, *President’s View: Lawyers at the Crossroads*, *BENCHERS’ BULL.* (The Law Soc’y of B.C., Vancouver, B.C.), Jan.–Feb. 2001, http://www.lawsociety.bc.ca/publications_forms/bulletin/2000-01/01-02.html [hereinafter Margetts, *President’s View*]; see also Brad Daisley, *Profile: Karl Warner, the New President of the Law Society of British Columbia, Wants To Loosen the Reins of Regulation and Open the Profession to Competition*, *LAW. WKLY.* (Can.), Mar. 10, 2000, available at TLWN (Lexis).

145. Margetts, *President’s View*, *supra* note 144; Richard Margetts, *The Changing Nature of the Practice of Law: A Reply to Mr. Giles on the Issue of Multi-Disciplinary Practice*, 59 *ADVOCATE* 31 (2001) [hereinafter Margetts, *The Changing Nature of the Practice of Law*]; see also Jack Giles, *Response to the President on Multi-Disciplinary Practice*, 59 *ADVOCATE* 233 (2001).

146. Gary Oakes, *Profile: Richard Margetts, the New President of the Law Society of B.C., Sees a Need To Maximize Opportunities Posed by the Changing Landscape*, *LAW. WKLY.* (Can.), Mar. 16, 2001, available at TLWN (Lexis) (quoting Richard Margetts).

147. Margetts, *The Changing Nature of the Practice of Law*, *supra* note 145, at 32.

might wish to practise in a multi-disciplinary setting,”¹⁴⁸ and he noted that it was arguable that restrictions on MDPs were unconstitutional. Finally, directly rejecting the Law Society of Upper Canada’s conclusion that the entire MDP debate was prompted only by the expansionist desires of the “Big Five accounting firms,” Margetts’ argument was firmly anchored in a sense of the public interest:

It is a mistake to focus on the ambitions of the Big Five as a determinant of the relationship between the partners of a prospective business association. Ultimately, the consumer will determine successful arrangements. . . .

Requiring lawyers to be in control will be perceived by the public as simply protecting a monopoly.¹⁴⁹

This vision, as well as the principles articulated by the Law Society of British Columbia in its evaluation of the MDP issue and the rules proposed by its Multi-Disciplinary Practice Working Group, relied upon a fundamentally different conception of the regulators’ role and the importance of the public interest in a regime that afforded the flexibility for lawyers to choose the form of delivery through which they wished to deliver legal services, rather than having it dictated to them. Even though the relationship between the regulator and the provincial government was the same in the two jurisdictions, the results of the consultations were strikingly different.

In December 2001, however, benchers rejected the proposed rule changes that would have enshrined the principles approved in the earlier “straw votes” and allowed lawyers to engage in MDPs with nonlawyers. The proposed rule changes that implemented MDPs in British Columbia received a majority of votes of the benchers present and voting, fourteen to thirteen, but required a two-thirds majority to be implemented. The reasons offered for the rejection were based in the “core values” vocabulary and in the unsatisfactory explanations of the sort offered in Ontario about consumer interest. The Law Society of B.C.’s newsletter reported the outcome:

While praising the high quality and comprehensive material presented by the Working Group in December, many of the Benchers lacked comfort that the proposed rules could sufficiently protect the core values of the profession.

It was also flagged by several Benchers that there is currently a lack of demand within the profession for such a regulatory scheme¹⁵⁰

The explanations are extraordinary for several reasons. First, there was no evidence in any of the British Columbia reports of the level of demand

148. *Id.*

149. *Id.*

150. The Law Soc’y of B.C., *Benchers Say No to Multi-Disciplinary Practice*, BENCHERS’ BULL. (The Law Soc’y of B.C., Vancouver, B.C.), Nov.–Dec. 2001, http://www.lawsociety.bc.ca/publications_forms/bulletin/2000-01/01-12-14_MDP.html.

for MDPs, either from within the profession or from the public. The argument was consistently anecdotal. The view of the President of the Law Society had been a market-liberalizing approach for at least two years. Margetts had advocated allowing consumers to decide how they wanted to access their legal services and lawyers to decide how they wanted to offer them. Questions of demand, then, were arguably irrelevant to the regulatory scheme; if they were relevant, there was no evidence to support any conclusion about them. The language of “core values” again became a crutch upon which recalcitrant benchers could comfortably rest without having to articulate how they thought the “core values” would be compromised by the proposed rules.

As a result, today there are no specific rules in British Columbia to govern MDPs apart from the existing restrictions on marketing, fee sharing, and lawyers’ activities provided for in the Legal Profession Act, Law Society Rules, or *Professional Conduct Handbook*. Whether what lawyers are already doing in their business arrangements is acceptable was left unclear, and all of the talk regarding international competitiveness and the consumer interest was simply rhetoric.

VI. THE CALIFORNIA BAR

Like British Columbia, by 2003 California lacked a single governing rule or regime for multidisciplinary practices, although there were “existing practice models through which a form of indirect MDP currently [existed] in California, and . . . potentially viable models for permitting a ‘pure form’ of MDP to exist” there.¹⁵¹ Rule 1-310, operative since September 1992, provides that a member “shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law.”¹⁵² Just as in British Columbia, in California the regulatory body responsible for MDP rules signaled a more direct interest in responding to consumer accessibility and indeed situated the MDP issue as “just one aspect of [a] much larger delivery system issue,” one that requires leadership from within the legal profession to serve client needs in light of a “revolution” in the delivery of information, including legal information.¹⁵³ Building on the work of the ABA Commission on Multi-Disciplinary Practice, a California State Bar Task Force on Multi-Disciplinary Practice proposed various rule changes that would permit MDPs in various forms. The Task Force report was first discussed at a California Bar Board of Governors meeting on July 28, 2001. It was released for comment in August 2001; comments were to have been discussed at Board meetings scheduled for August 2002.¹⁵⁴ However, that discussion never took place

151. THE STATE BAR OF CAL., TASK FORCE ON MDP, *supra* note 18, at iii.

152. CAL. RULES OF PROF'L CONDUCT R. 1-310 (2010).

153. THE STATE BAR OF CAL., TASK FORCE ON MDP, *supra* note 18, at 3.

154. Am. Bar Ass'n Ctr. for Prof'l Responsibility, MDP Information (Jan. 18, 2005), http://www.abanet.org/cpr/mdp/mdp_state_summ.html.

and the item was tabled.¹⁵⁵ Instead, the California State Bar's Long-Range Strategic Plan, dated August 23, 2002, recommended continuing assessment of the feasibility "of permitting lawyers to join with non-lawyer professionals in a practice [in which] both legal and non-legal professional services are offered."¹⁵⁶

The State Bar task force viewed the five MDP models identified by the ABA Commission on MDPs as insufficiently comprehensive. It also conceded that associations through which lawyers practice law and offer legal services continue to evolve and that the five models at least offered a basis for its findings. Three of the models—the cooperative model, the ancillary business model, and the contract (strategic alliance) model—were determined to be within existing standards, fully viable without the need to change existing California rules or regulations. With respect to the District of Columbia "command and control" model on which the Ontario By-Law 25 governing MDPs was based, the report found that it "allows for a form of multidisciplinary practice within the confines of lawyer-controlled legal services" but is not a "pure form' MDP."¹⁵⁷ It would require changes to California's existing prohibitions on fee-sharing (CRPC 1-320) and partnering with nonlawyer professionals (CRPC 1-310) to implement this model, but the report recommended that such changes could be made "consistent with 'core values' to allow this model to be viable in California."¹⁵⁸

Consistent with the ABA and CBA reports and the B.C.-approved principles, the California State Bar Task Force report found that a fully integrated professional services firm, the fifth of the ABA models, would permit the "'core values' of the legal profession not only [to] be maintained, but [also to] be reaffirmed."¹⁵⁹ The report's recommendations in this regard, however, were far from an open regime. Passive investment would be prohibited in this and all other legal practices. Allowing such a "pure form' MDP" to exist would require cross-imputation of all professionals to each other when integrated services are provided to consumers and a presumption that when a consumer seeks assistance from the MDP, the

155. Telephone Interview with Randall Difuntorum, Prof'l Competence Unit, The State Bar of Cal. (Mar. 17, 2003). Difuntorum suggested the matter might come back before the Board in August 2003, but there is no accessible record of it ever having done so.

156. THE STATE BAR OF CAL., LONG-RANGE STRATEGIC PLAN, *supra* note 17, at 11. There is no reference in the 2004 Strategic Plan to MDPs.

157. THE STATE BAR OF CAL., TASK FORCE ON MDP, *supra* note 18, at v.

158. *Id.* at v, 20, 22–23, 38–42. Various other rules would require modification, including CAL. RULES OF PROF'L CONDUCT R. 1-300 (aiding the unauthorized practice of law); CAL. RULES OF PROF'L CONDUCT R. 1-400; CAL. BUS. & PROF. CODE §§ 6150–6159.2 (West 2003) (advertising and solicitation); CAL. BUS. & PROF. CODE § 6068(e) (West 2003) (protection of client confidential information); CAL. RULES OF PROF'L CONDUCT R. 3-300, 3-310, 3-320 (avoidance of conflicts of interest); CAL. RULES OF PROF'L CONDUCT R. 1-600 (professional independent judgment); CAL. RULES OF PROF'L CONDUCT R. 1-100(D) (geographic scope of rules); CAL. RULES OF PROF'L CONDUCT R. 2-100 (communication with a represented party) and others.

159. THE STATE BAR OF CAL., TASK FORCE ON MDP, *supra* note 18, at vi.

consumer must affirmatively opt out of the legal services for the "lawyer values" to cease to apply.¹⁶⁰ The Task Force proposed exploring this model, subject to State Bar certification, although responsibility for adherence to the State Bar Rules of Professional Conduct would rest with individual lawyers. If a breach of Bar rules occurred, the MDP would be subject to decertification.¹⁶¹ The model was thus a combination of the British Columbia emphasis on individual lawyer accountability and the Ontario licensing and certification of firms in bylaws for MDPs.

The California Bar approach for the Fully Integrated Model reflected an emphasis on lawyers' maintaining relationships solely with other professionals. Under the Demonstration Program, lawyers would only be able to partner with licensed "'professionals' as defined in existing state wage and hour laws (*i.e.*, *licensed* professionals in law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, accounting or another traditionally recognized 'learned' profession)."¹⁶² Further, there would be a requirement that the licensed profession in question "maintain a code of professional ethics . . . compatible with the legal profession's 'core values.'"¹⁶³ These aspects of the proposal threw into question whether the form being proposed was indeed an open integrated multidisciplinary practice, as the report suggested, or a model more of the type adopted in Ontario, which is called an MDP but in reality is a law firm with other professional services serving as an inferior adjunct to the firm's primary focus.

While appearing to be a quantum leap beyond the model of "side-by-side" alliances, the proposal was tame, clearly tempered by the Task Force's focus on the "'special' role of lawyers" with "values and duties that have traditionally resulted in lawyers being segregated from other professionals and regulated by the judicial branch of government."¹⁶⁴ Relying on the language of Justice Joyce L. Kennard in *Howard v. Babcock*,¹⁶⁵ the Task Force Report was emphatic in its efforts to assert that lawyers need to aspire to goals higher than financial gain alone:

As professionals consider joining together with lawyers in an MDP environment, there will have to be an acceptance of the "core values" of the legal profession There will also have to be acceptance by

160. *Id.*

161. *Id.* at 25.

162. *Id.*

163. *Id.* The report uses the certified public accountant audit function (in conflict with the lawyer's duty of confidentiality) and the duty of certain health care and counseling professionals to disclose evidence of child abuse (in conflict with the lawyer's duty of confidentiality) to illustrate situations of "some professional services that so inherently conflict that they cannot be integrated in an MDP environment." *Id.* at 30.

164. *Id.* at 11-12.

165. 863 P.2d 150, 166 (Cal. 1993) (Kennard, J., dissenting) ("If the practice of law is to remain a profession and retain public confidence and respect, it must be guided by something better than the objective of accumulating wealth.").

lawyers of the “core values” of the other professionals within an MDP [that] do not conflict with the legal profession’s “core values.”¹⁶⁶

VII. THE NEW YORK STATE BAR

Just as Ontario was the first Canadian jurisdiction to adopt MDP rules, New York was the first of the U.S. states formally to entrench rules to govern MDPs. The four appellate divisions of the New York Supreme Court, by joint order, adopted rules to govern ancillary services and strategic alliances with nonlegal professional service providers on July 24, 2001, effective November 1, 2001. The changes to the New York Code of Professional Responsibility (in place until April 2009),¹⁶⁷ made New York the first state to adopt rules that specifically governed lawyer participation in MDPs.¹⁶⁸ The language adopted to “protect[] the core values of the legal profession,”¹⁶⁹ however, was far from an endorsement of integrated multidisciplinary practice and was even less progressive than the restrictive Ontario rules criticized above.

In sharp contrast to the recommendations of the ABA’s Commission on Multidisciplinary Practice and to the Ontario rules, the two 2001 New York rules at the heart of that state’s regulatory scheme prevented any meaningful integration of lawyers and nonlawyers in the same firm. The first of these, the former DR 1-106, specified the circumstances in which a lawyer in an ancillary business would be subject to lawyer discipline rules.¹⁷⁰ The second rule, the former DR 1-107, set out when and how “contractual relationships” would be permitted between lawyers and nonlawyers.¹⁷¹ The rules categorically prohibited nonlawyers from ownership or management interests in law firms; prevented nonlawyers from regulating the professional judgment of lawyers; banned fee sharing

166. THE STATE BAR OF CAL., TASK FORCE ON MDP, *supra* note 18, at 17.

167. In April 2009, the New York State Bar adopted changes to the state Rules of Professional Conduct that in essence made New York the next-to-last state (California being the only holdout) to base its lawyer discipline rules on the ABA Model Rules of Professional Conduct. N.Y. RULES OF PROF’L CONDUCT pt. 1200 (2009); *see also* Richard Acello, *New York Makes Itself a ‘Model’ State: California Now the Only Holdout on Adopting the ABA Model Rules*, A.B.A. J., Sept. 2009, at 22. This discussion refers to the prior scheme, though the restrictions on MDPs remain.

168. *See* News Release, N.Y. State Bar Ass’n, *New Rules Clarify Standards for N.Y. Lawyers’ Alliances with Nonlegal Professional Service Firms* (July 24, 2001), in W. VA. LAW., Sept. 2001, at 19; *New York Becomes First To Allow Multidisciplinary Business Affiliations*, DAILY TAX REPORT NO. 145, Jul. 30, 2001, at G4 [hereinafter *N.Y. Becomes First*], available at 145 DTR G-4, 2001 (Westlaw). It should be noted, however, that the District of Columbia has permitted nonlawyer partners in law firms since the early 1990s. District of Columbia Rule 5.4(b) permits such arrangements only if the “partnership or organization has as its sole purpose providing legal services to clients.” D.C. RULES OF PROF’L CONDUCT R. 5.4(b)(1) (2006). Accordingly, the D.C. rule is viewed as governing law firm arrangements rather than MDPs *per se*.

169. News Release, N.Y. State Bar Ass’n, *supra* note 168 (quoting Steven C. Krane, President of the N.Y. State Bar Association).

170. N.Y. RULES OF PROF’L CONDUCT R. 5.7 (2009).

171. *Id.* R. 5.8.

between lawyers and nonlawyers; prohibited referral fees; and enshrined a presumption that a client who receives nonlegal services from an ancillary business will believe that those services are subject to an attorney-client relationship.¹⁷² The scheme also imposed minimum educational standards on nonlawyer professionals who want to participate in strategic alliances with lawyers and required them to be licensed by a government entity and bound by an enforceable code of conduct.¹⁷³

DR 1-107 began with a long policy statement stressing the “core values” of the U.S. legal profession—*independence, maintenance of client confidences, and preservation of client funds*. It then went on to state that “[m]ulti-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values.”¹⁷⁴ Even more restrictive than the Ontario approach, nonlawyers under the former DR 1-107(a)(2) (now New York Rule 5.8(a)(2)) were prevented from having any ownership or investment interest in the practice of law by the lawyer or law firm.¹⁷⁵

In addition to the two new rules, amendments to existing rules on publicity and advertising (the former DR 2-101),¹⁷⁶ professional notices and letterheads (the former DR 2-102),¹⁷⁷ and solicitation and referrals (the former DR 2-103)¹⁷⁸ imposed special requirements on lawyers who form alliances with nonlawyers about how they present themselves to the public. For example, the name of the nonlawyer or nonlawyer professional service could not be incorporated into the law firm’s name.¹⁷⁹

In essence, far from opening the market to new forms of integrated service offerings, the New York Bar rules constituted a complicated impediment to new forms of services delivery. Indeed, the text of the new rules entrenched the philosophical bias of the New York State Bar Association’s four-hundred-page report, entitled *Preserving the Core Values of the American Legal Profession*, against professional integration and in favor of tight regulation of “side-by-side” business arrangements.¹⁸⁰

The New York State Bar Association, which represents approximately 70,000 members, is the official statewide organization of lawyers in New York and is the largest voluntary state bar association in the United

172. *Id.* R. 5.7, 5.8.

173. *Id.* R. 5.8.

174. *Id.*

175. *Id.*

176. *See id.* R. 7.1.

177. *See id.* R. 7.5.

178. *See id.* R. 7.3.

179. *See id.* R. 7.5(b).

180. N.Y. STATE BAR ASS’N SPECIAL COMM. ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS (2000) [hereinafter N.Y. STATE BAR ASS’N, PRESERVING THE CORE VALUES]. For background on the Chair of the Committee and a key figure in the ABA deliberations, see Victor Futter & E. Nobles Lowe, *A Profile of Robert MacCrate*, EXPERIENCE, Summer 2001, at 30.

States.¹⁸¹ Its president in 2001 at the time MDP rules were being adopted, Steven Krane, acknowledged that lawyers and nonlawyers had been informally coordinating client-service efforts for many years, but said that the new regulations would “give lawyers guidance on what they can and cannot do instead of leaving it to them to find the governing principles scattered throughout the Code of Professional Responsibility.”¹⁸² Krane did not suggest, however, that the rules were directed at better client service; instead, his comments on the adoption of the new regime suggest that the primary goal was protection of the lawyers’ ability to control the practice of law:

“Throughout the nationwide debate on MDP’s, we have been maintaining that lawyers can provide clients with the purported benefits of coordinated professional services without giving the nonlawyer professionals any say . . . in the way [that] lawyers practice law. The new rules announced today (July 24) accomplish that goal by establishing a regulatory framework . . . that reaffirms and protects the core values of the legal profession.”¹⁸³

This “core-values” emphasis would have been familiar to Krane from his work as vice-chair of the New York State Bar committee, whose report formed the basis of the Bar’s recommendations for the rule changes that the New York courts adopted and was cited as an instrumental influence in the ABA House of Delegates deliberations that led to Resolution 10F.¹⁸⁴ The committee’s report was replete with references to the unique place of the American Bar in the U.S. legal and governmental system, in contrast to the major accounting and professional-service firms whose interest in legal services was said to be “in acquiring ownership and control of the *undisciplined* practice of law for its own sake.”¹⁸⁵ It expressed fears that lawyers would lose “their professional culture if many of their daily colleagues and partners come from other professions” or that lawyers would “cut ethical corners, to reduce pro bono commitments, or to relax the profession’s rules, if colleagues from other professions . . . call on them to

181. See N.Y. State Bar Ass’n, A Brief History and Purpose, http://www.nysba.org/Content/NavigationMenu/AboutNYSBA/HistoryandStructureoftheAssociation/History_and_Structur.htm (last visited Mar. 19, 2010).

182. *N.Y. Becomes First*, *supra* note 168.

183. News Release, N.Y. State Bar Ass’n, *supra* note 168 (quoting Steven C. Krane, President of the N.Y. State Bar Association).

184. Cone, *supra* note 2, at 12–13; see also Sydney M. Cone, III, *The Future Debate on Multidisciplinary Practice in the United States*, 2 EUR. J. L. REFORM 611, 625 (2000).

185. See N.Y. STATE BAR ASS’N, PRESERVING THE CORE VALUES, *supra* note 180, at 117 (“Two features distinguish the regulation and professionalization of the American bar from those of most other professions.”); *id.* at 109 (“In contrast to the divided bar in other common law countries and the diffuse character of lawyering in various civil law countries, the American legal profession over the last 200 years has evolved as a single profession, set apart and unified by its organization, education and common body of learning, as well as by acquired skills and adopted values associated with the profession. Law and medicine have been distinguished in this manner from other professions in the United States, including that of accountancy, which has never achieved an identity but has been splintered and spread into diffuse components.” (footnote omitted)); see also Cone, *supra* note 2, at 13.

do so.”¹⁸⁶ These fears animated the report’s conclusion that the Bar would “enter into new forms of practice only at the cost of injury to its independence and to the rule of law,” “[i]f positive answers to these [fears] cannot be found.”¹⁸⁷ The answers proposed by the report—and ultimately adopted by the New York courts—rested on the proposition that strict separation of legal services is a prerequisite. The Report suggested that contracting legal and nonlegal professional-service firms should be given substantial flexibility to determine the form of their MDP relationship, so long as the three essential requirements (disclosure of the relationship to clients, lawyer ownership and control of the legal practice, and the nonlegal firm’s meeting recognized professional standards) were satisfied.¹⁸⁸

The New York Bar was ultimately successful, then, in having this view adopted by the New York courts, thereby making a “non-MDP” policy the answer to the MDP question in the State. The New York approach resonated with the Ontario MDP approach (particularly in respect of the second phase of the Ontario scheme that deals with “captive” law firm relationships with nonlawyer providers). In the end, in all four jurisdictions and at the national level in both Canada and the United States, “core values” rhetoric and anticompetitive undercurrents had served to prevent the integrated multidisciplinary practice from entering into being. Elsewhere, however, change was afoot that would lead to quite different results.

VIII. ENGLAND

Substantive developments in England in the last decade, and in particular in the last five years, have provided an astounding contrast to the North American approaches to the MDP issue to date. One crucial difference has been direct intervention in the legal services marketplace by government. The Office of Fair Trading, a government ministry, initially signaled in 2001 that if the Law Society of England and Wales, key regulator of the legal profession in England at the time, did not change rules to accommodate MDPs, then the government would do so for it. Even though the Law Society then made steps towards accommodating change, change did not come quickly enough on this or other issues. Fundamental transformation in the regulation of the legal profession in England and Wales—and the effective end of self-regulation—followed, culminating in the adoption of the Legal Services Act, 2007.¹⁸⁹ The legislation included a more open, competitive, and consumer-oriented approach to the delivery of legal services, with Parliament mandating “alternative business structures,” including the MDP.¹⁹⁰

186. N.Y. STATE BAR ASS’N, PRESERVING THE CORE VALUES, *supra* note 180, at 324.

187. *Id.*

188. *Id.* at 342–52 (discussing the necessary rule changes “With Respect to Interprofessional ‘Strategic Alliances’ and other Contractual Relationships Between Lawyers and Nonlawyers”).

189. Legal Services Act, 2007, c. 29 (U.K.).

190. *Id.* pt. 5.

The March 2001 release of a report by the Office of Fair Trading (OFT), the U.K.'s competition and antitrust authority, marked the critical point of government intervention in the English MDP story and set the stage for the 2007 legislative reforms.¹⁹¹ The OFT report recommended a relaxation of MDP restrictions (including the removal of a ban on fee sharing by solicitors with other professionals) and announced a one-year time limit within which the legal regulators (the Law Society and the Bar Council) had to act or face the threat of fines or other sanctions.¹⁹² The OFT concluded that restrictions that barred MDPs were unreasonable market restraints that gave rise to inflationary pricing and resulted in an anticompetitive practice in the United Kingdom's main commercial professions. The report concluded that legal-professional privilege was anticompetitive, as it gave lawyers an unfair advantage over other professional advisors.¹⁹³ The Director General of the OFT said that intervention by the authority would be avoided, "provided [that] real progress is made," and that the OFT would "take action after this grace period if necessary, or earlier if there is no evidence of willingness to make changes."¹⁹⁴

The OFT action came after reform by the Law Society itself had been proceeding at a glacial pace. In 1996, the Law Society had abandoned its traditional opposition to MDPs; an October 1998 consultation paper, "*MDPs: Why? . . . Why Not?*" considered different ways to facilitate MDPs while maintaining adequate regulatory supervision. The Law Society obliquely acknowledged political pressure to open the field to MDPs, with a representative noting that part of the "Law Society's intention in continuing to consult on the subject of multi-disciplinary practice is to be in a position to avoid the imposition of what might be an unsatisfactory regime should any part of Government decide to take action."¹⁹⁵ The Law Society finally agreed to support MDPs in 1999. Its Council overwhelmingly approved a statement from its MDP Working Party that "[t]he ultimate goal should be to allow solicitors who wish to do so to provide any legal service through any medium to anyone."¹⁹⁶ In October 1999, the Law Society's Council considered a Law Society Working Party report that proposed developing

191. U.K. OFFICE OF FAIR TRADING, COMPETITION IN PROFESSIONS (2001).

192. See Claire Smith, *The OFT Report: The Legal*, LAWYER (London), Mar. 12, 2001, <http://www.thelawyer.com/the-oft-report-the-legal/77471.article>; see also Jean Eaglesham, *Lawyers To Be Subject to Full Force of Competition Law*, FIN. TIMES (London), Mar. 9, 2001, at 3; Jeremy Fleming, *Society Primed To Launch Fresh Battle over MDPs*, GAZETTE (U.K.), Mar. 15, 2001, at 4.

193. U.K. OFFICE OF FAIR TRADING, *supra* note 191, at 7, 11; see also Margetts, *You Don't Need a Weatherman*, *supra* note 144, at 545-46.

194. Smith, *supra* note 192.

195. Alison Crawley, The Law Soc'y of Eng. & Wales, *Solicitors, Accountants and Multi-Disciplinary Practice: The English Perspective*, <http://www.abanet.org/cpr/mdp/crawley.html> (last visited Mar. 19, 2010).

196. Neil Rose, *Multi-Disciplinary Partnerships on Horizon After 'Seismic' Vote*, GAZETTE (U.K.), Oct. 20, 1999, at 3.

two “interim models” to allow for MDPs without the need for legislation.¹⁹⁷ The first of these was called “legal practice plus” and would allow nonsolicitor partners in a solicitors’ firm, the main business of which must be the provision of legal and ancillary services.¹⁹⁸ The Working Party, however, stated that it did not “believe [that] this model is a complete answer as it does not permit a one-stop-shop.”¹⁹⁹ The other option, labeled “linked partnerships,” built on the model in which an independent firm of solicitors allied itself with another professional practice, such as a partnership of accountants.²⁰⁰ The Working Party was “willing to explore” whether the ban on fee sharing between such linked partnerships was necessary, and to explore passive investments in law firms, the extent of conflicting duties between lawyers and others, and whether achieving the long-term goals set out in its report would require a change in the legislative framework by which the Law Society was governed.²⁰¹

A change in rules via “interim solution[s]” was approved in a November 2000 vote.²⁰² Nonsolicitors would become partners in a law firm, so long as the firm’s business remained the provision of legal and ancillary services.²⁰³ The Law Society Working Party proposed that services be restricted to those “only of a kind [that] are normally provided by solicitors practising as solicitors.”²⁰⁴ While it was acknowledged that this might seem to be unduly restrictive, the scope of solicitors’ services was already broad, encompassing property selling, financial services, and general consultancy.²⁰⁵ The nonsolicitors would agree by contract to submit to the Law Society’s regulatory powers.²⁰⁶ Ultimate control would remain with solicitors.²⁰⁷ Under the “linked partnership” model, law firms were permitted to have fee-sharing agreements with other businesses. The relationship with the linked business would have to be disclosed to clients.²⁰⁸ A December 2000 Law Society Working Group report favored

197. ALISON CRAWLEY, BRONWEN STILL & NICOLA TAYLOR, *MULTI-DISCIPLINARY PRACTICES: PROPOSALS FOR THE WAY FORWARD: A PRELIMINARY REPORT FOR DEBATE* (1999).

198. *Id.* para. 22.

199. *Id.* para. 22(1).

200. *Id.* para. 22(2).

201. *Id.* paras. 22–24.

202. *See Law Society To Push MDPs Through Early*, *LAWYER* (London), Nov. 13, 2000, <http://www.thelawyer.com/law-society-to-push-mdps-through-early/102942.article>.

203. *Id.*

204. NICOLA TAYLOR, *LAW SOC’Y OF ENG. & WALES, MULTI-DISCIPLINARY PRACTICE WORKING PARTY THIRD INTERIM REPORT: LEGAL PRACTICE PLUS—A FIRST STEP TOWARDS MDPs 7* (2000).

205. *Id.*

206. *Id.* at 4.

207. *Id.* at 5.

208. Neil Rose, *Law Society Lays the Groundwork for MDPs*, *GAZETTE* (U.K.), July 13, 2000, at 4.

allowing solicitors in this “linked partnership” model to share fees with any other business, with the proviso that solicitors retain control.²⁰⁹

The Law Society viewed these two models only as “interim steps.” A report in the July 20, 2000, issue of the *Law Society Gazette* quoted the chairman of the regulation review working party as saying that the committee was looking beyond MDPs to what he called “‘Virgin.com solicitors.’ . . . with commercial organisations, such as Virgin, owning their law firms.”²¹⁰ The Law Society’s steps were particularly timely. A *Financial Times* survey in September 1999 indicated that more than half of British and American corporate purchasers of legal services were willing to make use of firms that had both accountants and lawyers.²¹¹ A survey conducted somewhat later for the British publication *Commercial Lawyer* concluded that a significant majority of corporate counsel and finance directors preferred traditional, single-source providers.²¹²

The U.K. was moving accordingly in a very different direction than that taken by the ABA House of Delegates during the same period. The adoption of a restrictive MDP model, however, would not satisfy government regulators, particularly those in the Office of Fair Trading who were pressing for far more substantial reforms. Divisions between barristers and solicitors would in this case delay implementation. On July 30, 2002, the Lord Chancellor’s Department issued a consultation document on multidisciplinary partnerships that asked for views on MDPs.²¹³ The Bar Council, representing barristers, had campaigned strenuously to forestall permissive rules; the Law Society of England and Wales, representing solicitors, continued to be “actively seeking the parliamentary time” needed to implement a mixed-partnership model.²¹⁴ Consumer interest, legal ethics, and government regulation animated a push in a permissive direction, which presented a stark contrast to the Canadian and

209. TAYLOR, *supra* note 204, at 3. For a more detailed analysis of the two models and the ethical ramifications of their operation, see Aubrey Meachum Connatser, *Multidisciplinary Partnerships in the United States and the United Kingdom and Their Effect on International Business Litigation*, 36 TEX. INT’L. L.J. 365, 380–90 (2001).

210. Neil Rose, *Multi-Disciplinary Practices: Should the UK Follow the US’s Lead?*, GAZETTE (U.K.), July 20, 2000, at 9.

211. See Chris Arnheim, *Why Most Clients Want a One-Stop Shop*, TIMES (London), July 18, 2000, at 16.

212. See Jean Eaglesham & John Mason, *Independent Spirit*, FIN. TIMES (London), Nov. 6, 2000, at 26 (reporting on the *Commercial Lawyer* magazine survey, noting that thirty-seven percent of FTSE 100 companies said they would consider using an MDP as their main law firm, compared with sixty-six percent of businesses quoted on the smaller Alternative Investment Market and fifty-six percent of businesses within the top 300 private companies).

213. U.K. LORD CHANCELLOR’S DEP’T, IN THE PUBLIC INTEREST? A CONSULTATION BY THE LORD CHANCELLOR’S DEPARTMENT FOLLOWING THE OFT REPORT ON COMPETITION IN PROFESSIONS (2002), available at <http://www.dca.gov.uk/consult/general/oftrept.htm>.

214. Jean Eaglesham, *Accountants Face Setback over Plans To Sell Legal Services*, FIN. TIMES (London), July 30, 2002, at 2.

American approaches even though England shares the same common-law tradition and concerns about “core values.”²¹⁵

That push culminated in legislation: the Legal Services Act, 2007, implements a set of “radical reforms which will see services in the £20 billion legal sector undergo major changes to bring them in line with other professional services in the 21st century.”²¹⁶ Proclaimed into law on October 30, 2007, the Act removed the authority of the traditional self-regulatory bodies for lawyers in England and implemented a regulatory model and structures more closely tied to government.²¹⁷

There are four main components. First, the Act establishes a new Legal Services Board (LSB) to serve as a “single, independent and publicly accountable regulator with the power to enforce high standards in the legal sector, replacing the maze of regulators with overlapping powers.”²¹⁸ Second, the Act simplifies a previously complex web of conduits for consumer complaints and lawyer discipline, establishing a single and fully independent Office for Legal Complaints (OLC) “to remove complaints handling from the legal professions and restore consumer confidence.”²¹⁹ Third, the Act provides specific authorization for the establishment of alternative business structures (ABS) for the delivery of legal services by lawyers and nonlawyers together, a radical shift and to a great degree an amended version of the multidisciplinary practice model rejected.²²⁰ Fourth, the Act articulates a set of “regulatory objectives” for the regulation of legal services designed to guide all parts of the system.²²¹ These last two components are key to understanding the future of the MDP in England.

The “regulatory objectives” place consumer welfare and the public interest as preeminent concerns in the first section of the Act, as follows:

(1) In this Act a reference to “the regulatory objectives” is a reference to the objectives of —

a) protecting and promoting the public interest;

215. As in North America, the most strident opposition to MDPs in England came from litigators. Since the English system is bifurcated into barristers and solicitors, the response of the Bar Council to the Office of Fair Trading demand was significant both in respect of MDP matters generally and because of intraprofessional concerns: prior to the 2007 reforms, the Law Society feared that the English barristers would hold themselves out as the only independent Bar in England should MDPs proceed. The Bar Council strenuously opposed partnerships among barristers and nonlawyers as posing insurmountable conflict of interest problems and limiting consumer choice in advocacy. *See* Connatser, *supra* note 209, at 384.

216. Press Release, Ministry of Justice, Legal Services Act Given Royal Assent (Oct. 30, 2007), <http://www.justice.gov.uk/news/newsrelease301007a.htm>; *see also* Legal Services Act, 2007, c. 29 (U.K.); Ministry of Justice, Legal Services Act 2007, <http://www.justice.gov.uk/publications/legalservicesbill.htm> (last visited Mar. 19, 2010) (assessing the regulatory impact of the law).

217. For a detailed history of the events leading up to the adoption of the 2007 legislation, *see* Paton, *supra* note 13, at 96–104.

218. Press Release, Ministry of Justice, *supra* note 216.

219. *Id.*

220. *See* Maute, *Revolutionary Changes*, *supra* note 15, at 11–12.

221. Legal Services Act, c. 29, pt. 1.

- b) supporting the constitutional principle of the rule of law;
- c) improving access to justice;
- d) protecting and promoting the interests of consumers;
- e) promoting competition in the provision of services . . . ;
- f) encouraging an independent, strong, diverse and effective legal profession;
- g) increasing public understanding of the citizen's legal rights and duties;
- h) promoting and maintaining adherence to the professional principles [defined in section 1(3) of the Act].²²²

The direction of the legislation came directly from a process begun in July 2003, with Secretary of State Lord Falconer appointing Sir David Clementi to conduct an independent review of the regulatory framework of the legal profession in the U.K. The Terms of Reference required Clementi to report by December 31, 2004, and

[t]o consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector.

To recommend a framework which will be independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified.²²³

As John Flood has noted, “[t]hese innocuous terms of reference gave rise to one of the most far-reaching analyses and set of proposals for reforming the legal profession that the UK, or indeed, the world, has seen.”²²⁴ In announcing the Clementi review, Lord Falconer also announced that the government favored “allowing new types of businesses such as multi-disciplinary practices giving “one stop” services and corporations wider access to the market but will leave it to the review to recommend how best to regulate them to safeguard the independence of the professions and consumers’ interests.”²²⁵ Accordingly, Clementi had the task of assessing the implementation of alternative business structures through which legal services could be delivered: the question was no longer “whether,” but “how.”²²⁶

Clementi’s March 2004 consultation paper confirmed this shift towards viewing reforms from a consumer welfare perspective and the need for significant change in regulatory direction to prioritize those interests. While

222. *Id.*

223. See SIR DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES: FINAL REPORT 1 (2004) (internal quotation marks omitted).

224. Flood, *supra* note 15, at 4.

225. See Paton, *supra* note 13, at 100 (quoting Press Release, Dep’t of Constitutional Affairs (U.K.), Wide-Ranging Review Aims To Open Up Competition (July 24, 2003)).

226. See the discussion of the Clementi Review in LEGAL SERVICES BOARD, *supra* note 12, at 7; Flood, *supra* note 15, at 6–8; and Paton, *supra* note 13, at 100–04.

indicating that he was sensitive to arguments by the legal profession that the “core values” of the profession were unique and that legal services provision should not be treated simply as a service offering like those of any other industry,²²⁷ the paper nevertheless focused on five key issues that all had an underlying consumer or public interest focus: complaints handling and discipline, unregulated legal service providers, new business structures for legal services provision, and professionalism and self-regulation.²²⁸

Clementi asked for responses on a variety of questions that dealt with the combination or separation of representative from regulatory functions; delegation of powers from government to a new regulator; the constitution of and appointments process for the Board of a new regulator; and other accountability mechanisms.²²⁹

The impact of globalization was a particular concern, both in respect of marketplace competition and in ensuring that domestic regulatory regimes were in harmony with international obligations, including General Agreement on Trade in Services (GATS) requirements. The Report noted,

The regulatory framework for legal services in England and Wales should, amongst other benefits, enable providers to compete effectively in the modern domestic and rapidly expanding global marketplace. To that end, any changes to the regulatory framework must not be counterproductive in terms of inhibiting the competitiveness of legal service providers in England and Wales. The revised framework must also take full account of the impact of the UK’s international obligations.²³⁰

GATS requirements included direction that “domestic regulation should be based on objective and transparent criteria, not more burdensome than necessary and, in relation to licensing procedures, not in themselves a restriction on the supply of the service.”²³¹

Two hundred and sixty-five responses broadly supported in principle some sort of regulatory reform.²³²

Clementi’s Final Report, published in December 2004, concluded that the current system gave insufficient regard to the needs of the consumer, that the structures of the main professional bodies were inappropriate for their regulatory tasks, that oversight regulatory arrangements for professional bodies were overly complex and inconsistent, and that while no clear objectives or principles could be discerned as underlying the existing regulatory system, such objectives did indeed exist and needed to be more

227. SIR DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES: A CONSULTATION PAPER 2, 14–23 (2004).

228. *Id.* at 1. See also the helpful summary in Maute, *Revolutionary Changes*, *supra* note 15, at 9–10.

229. CLEMENTI, *supra* note 227, at 32, 34–35, 51–53 (Questions B1–B6, D2–D4).

230. *See id.* at 34.

231. *See id.* at 34–35; see also Paul D. Paton, *Legal Services and the GATS: Norms as Barriers to Trade*, 9 *NEW ENG. J. INT’L & COMP. L.* 361 (2003); Terry, *supra* note 3.

232. CLEMENTI, *supra* note 223, at 12, app. 1.

clearly articulated.²³³ Clementi also found that the complaints system was inefficient and had failed to secure consumer confidence.²³⁴ He recommended the creation of a Legal Services Board into which government would vest all regulatory powers.²³⁵ The LSB would then delegate front-line regulatory functions to recognized professional bodies as long as they handled their responsibilities appropriately and separated their regulatory from their representative functions.²³⁶ He also recommended the establishment of an Office for Legal Complaints to serve as a single source body for handling all consumer complaints against legal services providers.²³⁷ The OLC would be under the authority and general supervision of the LSB, but would handle complaints independently.²³⁸

The sixth and final chapter of the Final Report, entitled “Alternative Business Structures” offered extensive commentary about and recommendations for implementing forms of legal services delivery beyond the traditional law firm model.²³⁹ Clementi provided a scheme for immediate implementation of Legal Disciplinary Practices (LDPs), which would bring together barristers, solicitors, conveyancers, and other legal professionals to offer legal services to third parties. Accountants, human resources professionals, and others could support the delivery of legal services but not provide services directly to clients. Nonlawyers could be managers but not partners in LDPs.²⁴⁰ This commingling of legal services providers constituted a shift in approach in England and a major breaking down of traditional barriers to consumer access to legal services. The more difficult question, about Multi-Disciplinary Practices, or fully integrated professional services offerings, was left open: Clementi wrote that MDPs could be potentially viable “if at some subsequent juncture the regulatory authorities considered that sufficient safeguards could be put in place.”²⁴¹

From the December 2004 tabling of his report, it was another year and a half until legislation was introduced in the House of Commons as a draft Legal Services Bill in May 2006. The final version did not receive Royal Assent until the end of October 2007, after a tortuous path through both the House of Commons and the House of Lords.²⁴² This was despite the fact that the government broadly accepted Clementi’s recommendations and incorporated a number of amendments into a prior version of a draft bill

233. *Id.* at 2, 14–23.

234. *Id.*

235. *Id.* at 8.

236. *Id.* at 49–50.

237. *Id.* at 66–67.

238. *Id.* at 51–80.

239. *Id.* at 9, 105–39.

240. *Id.* at 108–32.

241. *Id.* at 139.

242. The history of the debate and all amendments is set out on the UK Parliament website at http://www.publications.parliament.uk/pa/pabills/200607/legal_services.htm (last visited Mar. 19, 2010). A prior version was introduced in the House of Lords in November 2006.

prior to first introducing it in the House of Lords.²⁴³ The Act established the Legal Services Board as the front-line regulator, generally following the path laid out in the original Office of Fair Trading and Clementi Review recommendations.

On MDPs, however, the Act did not require the two-stage process of LDP before MDP that Clementi had recommended; as long as a new structure for the delivery of legal services obtained a license from the new regulator, it could operate.²⁴⁴ The manner in which the new regulator will grant such licenses is under deliberation, and the Legal Services Board is committed to granting the first “alternative business structures” licenses by 2011.²⁴⁵ The LSB has noted that a “shift in focus is required, from regulating the conduct of individual lawyers, towards regulation of the entity providing legal services.”²⁴⁶ A discussion paper seeking input on how best to implement the new regulatory scheme made clear that the debate about whether to open up the market was settled; the task is to sort out when and how the market will be opened, and to analyze how new types of legal services providers should be regulated.²⁴⁷ The discussion paper makes specific reference to changes already implemented in Australia, and the possibility that English approaches may be guided by the answers to “core values” questions addressed by Australia in permitting law firm incorporations, multidisciplinary practices, and nonlawyer investor ownership of law firms.²⁴⁸ By 2011, the MDP will be in place in England, and American law firms competing in the global financial services marketplace, in particular, will have to assess a new threat: a regulatory landscape that will give law firms in London “individually, and the English legal profession collectively, a hitherto unimaginable competitive advantage.”²⁴⁹

IX. AUSTRALIA

The English Legal Services Board is looking to Australia for directions on how to implement a regulatory framework for “alternative business structures” for good reason. Over the last decade, Australia has aggressively opened its domestic legal market to incorporated legal

243. See the detailed discussion in Maute, *Revolutionary Changes*, *supra* note 15, at 12–13.

244. LEGAL SERVS. BD., *supra* note 12, at 9–10.

245. *Id.* at 4, 12–15.

246. *Id.* at 5.

247. *Id.* at 4.

248. *Id.* at 30; *see also* Office of the Legal Services Commissioner, New South Wales, http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_index (last visited Mar. 19, 2010).

249. Davis, *supra* note 133, at 9. In their 2009 articles, both Anthony Davis and John Flood have used transaction-focused MDPs as illustrations of a serious competitive threat to U.S. law firms. *See id.* at 8–9; Flood, *supra* note 15, at 10 (considering the potential impact of an investment firm buying a large international law firm to offer a “total M&A package at rates that would not depend on variable professional fees but straightforward value billing instead”).

practices, multidisciplinary practices, and nonlawyer investment in law firm entities, including the first initial public offering of shares in a law firm.²⁵⁰ This has coincided with the effective end of self-regulation by the legal profession, replaced by a coregulatory system that separates regulatory from representative functions, and legislation that places increased responsibility in the hands of government or government agencies. While regulations vary from state to state, incorporated legal practices are permitted under national model laws, as well as in New South Wales, the Northern Territory, Queensland, and Western Australia.²⁵¹ National Model Laws developed in 2002 permitted alternative business structures, amongst other matters; the Model Laws were not intended to replace existing state regulatory structures but instead to set standards that existing state structures could aspire to meet.²⁵² Three Australian states released legislation aimed at implementing the Model Laws soon thereafter.²⁵³

Pressure for increased liberalization now comes from the profession itself. In a September 2009 speech, the President of the Law Council of Australia noted that the Council had welcomed the Australian Government's announcement earlier in 2009 that the Council of Australian Governments would add legal profession reform to Australia's microeconomic reform agenda. Uniform legislation and an integrated regulatory framework are being sought to "move towards a more functional and efficient Australian legal services market."²⁵⁴ But domestic growth

250. See the discussion of Australian regulatory changes in SLATER & GORDON LIMITED, PROSPECTUS (2000); Grech & Morrison, *supra* note 13; Parker, *Law Firms Incorporated*, *supra* note 13 (discussing MDPs and ILPs in Australia); Paton, *supra* note 13, at 104–07; and Parker, *Peering Over the Ethical Precipice*, *supra* note 13, at 3 (analyzing the implications of the incorporation and listing on the Australian Securities Exchange of Slater & Gordon, the "first law firm in the world to list").

251. Parker, *Law Firms Incorporated*, *supra* note 13, at 1 & n.1; Reid Mortensen & Linda Haller, *Legal Profession Reform in Queensland*, 23 U. QUEENSL. L.J. 280 (2004).

252. The Law Council of Australia notes that

[t]he Model Laws project was largely undertaken under the auspices and in conjunction with the Standing Committee of Attorneys-General (SCAG) culminating in the public release of the second edition *Legal Profession Model Bill* late in 2006. Between 2004 and 2008 the States and territories (apart from South Australia) enacted a *Legal Profession Act* based on the template of the model legislation.

The Law Council of Australia, The Model Legal Profession Bill, Status of Implementation, http://www.lawcouncil.asn.au/programs/national_profession/model-bill.cfm (last visited Mar. 19, 2010); see Council of Australian Governments (COAG) National Legal Profession Reform, <http://www.ag.gov.au/legalprofession> (last visited Mar. 19, 2010); see also STANDING COMM. OF ATTORNEYS-GEN., LEGAL PROFESSION—MODEL LAWS PROJECT: MODEL BILL (MODEL PROVISIONS) (2d ed. 2007); STANDING COMM. OF ATTORNEYS-GEN., LEGAL PROFESSION—MODEL LAWS PROJECT: MODEL REGULATIONS (2d ed. 2007); Linda Haller, *Imperfect Practice Under the Legal Profession Act 2004 (Qld)*, 23 U. QUEENSL. L.J. 411 (2004).

253. Paton, *supra* note 13, at 105.

254. John Corcoran, President, Law Council of Austl., The State of the Profession, Speech Given at the 36th Australian Legal Convention 3 (Sept. 19, 2009), available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=CABF097B-1E4F-17FA-D276-46725B8903E0&siteName=lca.

itself is not the end goal, as legal services are seen as making an enormous contribution to Australia's economy "in both a national and international sense."²⁵⁵ Internationalization of legal services is seen as driving growth for the Australian legal profession, particularly in Asian markets, China, and Hong Kong. The Law Council's "International Strategy" is focused on "developing mutual understanding and trust with overseas counterparts and working with counterpart bodies to foster hospitable reciprocal conditions for the practice of foreign law."²⁵⁶ Just as U.S. firms will need to be concerned about competitive threats posed by U.K. firms, Australia is aggressively investigating how regulatory frameworks can further be adjusted to ensure that Australian lawyers are poised to compete both from domestic bases and abroad. The fact that the profession is working with government to ensure that ethical considerations are addressed within these new regulatory frameworks is evidence that the simple adoption of an alternative approach to the delivery mode for legal services does not alone mean the abandonment of "core values," as the MDP debate in North America ten years ago suggested.

X. LESSONS FROM THE MDP DEBATE, AND THE WAY FORWARD

As the Ethics 20/20 Commission deeply engages the challenges emerging from globalization of the profession, it will have to squarely address not whether, but how, alternative business structures like the multidisciplinary practice will be part of the American regulatory landscape in the future. The English and Australian experiences, in particular, demonstrate that thinking about the profession as a business does not have to mean the abandonment of "core values" as the profession evolves. Rather, the challenge is to ensure that the dialogue and debate is broad ranging, not beholden to a politically powerful segment or segments of the bar, and that consumer interests are kept front and center.

This will require a different sort of debate than what went on in North America roughly a decade ago. Yet at both the ABA and at the CBA, Commissions charged with deep study recommended fundamental change; the failure to act came when the issue came to a vote and "core values" rhetoric was invoked to sustain the status quo. Even regulators in Canada and those responsible for regulating the profession in the United States in the public interest demonstrated greater fealty to guild protection. In that respect, "core values" was used as a "veto over change."²⁵⁷ This time, however, the opportunities presented by alternative business structures such as the MDP, and the economic threats coming not from accounting firms but from globalization of legal services and law firms in England and Australia means that the subtext—and likely the outcome—will be different. Further, from an access to justice perspective, permitting

255. *Id.*

256. *Id.* at 9.

257. See Crystal, *supra* note 24, at 774.

alternative delivery structures such as MDPs will have a far broader impact on ordinary citizens' ability to purchase legal services than the Big Five accounting firm initiatives about which the ABA, CBA, and regulators were so concerned a decade ago.²⁵⁸ There is also a greater risk if the bar fails to appropriately and credibly consider the public interest in assessing the merits of MDPs and to act accordingly: attracting a legislative response that not only implements rules with which the profession itself is not satisfied, but using that to justify further encroachments on lawyer self-regulation. In the aftermath of Enron, Congress demonstrated that it was prepared to legislate rules for lawyers appearing before the Securities and Exchange Commission, despite fierce resistance from the ABA.²⁵⁹ The fundamental transformation of regulation in England resulted when the profession was moving towards action, just not quickly or dramatically enough.

Getting across the threshold of accepting change, not just "peering over the ethical precipice"²⁶⁰ can then lead to a deeper engagement of how to reconcile traditional "core values" questions with new models of service delivery. Thinking about how to regulate the firm rather than just the individual lawyers practicing within it, for example, will require a paradigm shift, but the foundation for that was laid in the United States nearly twenty years ago.²⁶¹ Current economic challenges and the changed global legal

258. See, e.g., Charles W. Wolfram, *Comparative Multi-Disciplinary Practice of Law: Paths Taken and Not Taken*, 52 CASE W. RES. L. REV. 961, 963–66 (2002); see also BOYD, *supra* note 32; N.Y. STATE BAR ASS'N, PRESERVING THE CORE VALUES, *supra* note 180, at 141–53.

259. See the discussion in Rhode & Paton, *supra* note 52, at 26–27 (discussing the ABA's rejection, twice, of the recommendation of its Ethics 2000 Commission to amend the Model Rules of Professional Conduct to require lawyers to reveal information when necessary to prevent or rectify substantial economic harm). For analysis of section 307 of the Sarbanes-Oxley Act of 2002, see Paul D. Paton, *Corporate Counsel as Corporate Conscience: Ethics and Integrity in the Post-Enron Era*, 84 CANADIAN B. REV. 533 (2006). The SEC adopted final rules implementing section 307 on January 23, 2003, and released the text of the rules the following week. See Press Release, SEC, SEC Adopts Attorney Conduct Rules Under Sarbanes-Oxley Act (Jan. 23, 2003), <http://www.sec.gov/news/press/2003-13.htm>. For final rule text, see Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8185, Exchange Act Release No. 47,276, Investment Company Act Release No. 25,919, 68 Fed. Reg. 6296 (Feb. 6, 2003); see also Stephen M. Bainbridge & Christina J. Johnson, *Managerialism, Legal Ethics, and Sarbanes-Oxley Section 307*, 2004 MICH. ST. L. REV. 299; Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725 (2004); Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983 (2005); William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 FORDHAM L. REV. 947 (2005).

260. Parker, *Peering Over the Ethical Precipice*, *supra* note 13.

261. Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335 (2003); Elizabeth Chambliss, *MDPs: Toward an Institutional Strategy for Entity Regulation*, 4 LEGAL ETHICS 45 (2001); Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms*, 39 S. TEX. L. REV. 245 (1998); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991); see also Parker, *Law Firms Incorporated*, *supra* note 13, at 368–79 (arguing that as new forms of business models become entrenched, it affords

environment present the opportunity for the profession in North America to once again consider the MDP, economic self-interests of the profession, a consumer welfare perspective, and how these forces might align. Reviewing the lessons from the previous MDP debate is a place to start. Reaffirming that lawyers' ethical identities and professional values transcend models of business delivery, and ensuring that both the profession and the public recognize that in an era of increased globalization, is a daunting task but one that will be fundamental to both this next MDP debate, and the future of the profession as a whole.

the opportunity to develop new models for ethical practice and internalization of responsibility for ethical conduct).