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BEND, BUT DON'T BREAK: MDP PROPOSAL BENDS IN THE RIGHT DIRECTION, BUT—CRACK!!— GOES TOO FAR

*Jeffrey M. Jones**

MULTI-DISCIPLINARY Practice, the partnering of lawyers and nonlawyers in multi-task service firms, is the next evolutionary step of modern business. The only question that remains is exactly what shape such practices will take. Multidisciplinary practice groups (MDPs) combine the practice of law with non-legal services, enabling MDPs to offer a “one-stop shopping” approach to help meet all of their client’s professional service needs under one roof. Merging financial planning and business consulting with traditional legal services, MDPs will allow professionals from various industries to combine forces and offer their clients the most complete, seamless web of services possible. But despite the business efficiencies of MDPs, such a combination of services is wrought with ethical difficulty. The Big Five accounting firms have heretofore determined the battlegrounds for MDP formation, but efforts by the American Bar Association may pave the road for their arrival on terms the legal profession can withstand.

In 1998, Philip S. Anderson, then President of the ABA, appointed a special committee to explore and examine the opportunities presented and ramifications anticipated by the diversification of the legal profession. The ABA Commission on Multidisciplinary Practice (the “MDP Commission” or “Commission”) thus set out to study the operation of MDPs abroad, examine their myriad ethical hitches, and survey attorneys and businessmen alike from around the globe. In June 1999, the Commission presented its Report¹ and Recommendation² (the “MDP Proposal” or “Proposal”) that would become the ABA’s platform in the ensuing MDP debate.

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1. ABA Commission on Multidisciplinary Practice Report, at <http://www.abanet.org/cpr/mdreport.html> (last visited Jan. 11, 2001) [hereinafter MDP Report].

2. ABA Commission on Multidisciplinary Practice, Report to the House of Delegates, Recommendation, at <http://www.abanet.org/cpr/mdprecommendation.html> (last visited Jan. 11, 2001) [hereinafter MDP Proposal].

The MDP Proposal was bold and far-reaching, essentially recommending that MDPs be welcomed with open arms. According to the Proposal, MDPs in all forms shall be allowed. Lawyer-controlled MDPs shall be self-regulated³ and nonlawyer-controlled MDPs shall be subjected to a professional audit.⁴ In addition, the Proposal eliminates the ban on fee-sharing,⁵ stresses that nonlawyers shall not be allowed to practice law⁶, and dictates that “[a]ll rules of professional conduct that apply to a law firm should also apply to an MDP.”⁷ The Proposal first and foremost recognizes the inevitability of MDPs, and then lays out an ethical framework that allows for their formation in a manner bearable to the core values of the legal profession.

Unfortunately for the MDP Commission and the ABA, the Proposal has suffered two staggering blows. First, in Atlanta in August 1999 (barely two months after its release), the Proposal was tabled for further consideration at the annual meeting of the ABA’s House of Delegates.⁸ The Delegates, by their vote, felt it more prudent to wait “unless and until” greater evidence surfaced to compel the need and desire for MDPs on American soil. The Commission worked diligently to prepare a revised Proposal for the 2000 annual meeting in New York, but after a year of salesmanship, presented a Proposal that was only slightly altered from the Atlanta draft. The revised Proposal maintained the same basic framework as the original offering and met with a similar fate. At the 2000 meeting in New York, the ABA House of Delegates soundly defeated the Commission’s Proposal 314-106.⁹

The Proposal remains the ABA platform in ongoing debates, but has the Proposal gone too far? Is the ABA biting off too much too soon in its approach to MDPs? This paper suggests so. The problem lies not in the Proposal’s overall message (i.e., MDPs should be allowed and subject to legal rules of ethics), but in its approach - specifically its handling of MDPs to be controlled by professionals outside of the legal profession. Generally speaking, there are two forms of MDPs: those controlled by lawyers and those controlled by nonlawyers. The Proposal allows for both, but requires that nonlawyer-controlled MDPs be subject to a professional audit to ensure that their practices are in accord with legal tenets of ethical conduct. On a yearly basis, nonlawyer-controlled MDPs would be required to submit “a written undertaking” to the “highest court” in the jurisdiction, most likely the state’s Supreme Court.¹⁰ This audit process, as is suggested by the Proposal, is the legal profession’s

3. *See id.* at Recommendation No. 12.

4. *See id.* at Recommendation No. 14.

5. *See id.* at Recommendation No. 2.

6. *See id.* at Recommendation No. 4.

7. *Id.* at Recommendation No. 7.

8. The proposal was tabled by a vote of 304-98. *See ABA Delegates Vote Not to Approve MDPs “Unless and Until” More Study Dispels Risks*, 77 *Antitrust & Trade Reg. Rep. (BNA)* No. 1922, at 197 (Aug. 12, 1999).

9. *See ABA Says No to MDPs*, *TEX. LAW.* at 15 (July 17, 2000).

10. MDP Proposal, *supra* note 1, at Recommendation No. 14.

defense against ethical compromise, and purports to solve the problem of maintaining proper legal ethics in an entity controlled by nonlawyers.

But this approach suffers from five fatal flaws, encompassing ethical, practical and political problems. First, nonlawyer-controlled MDPs fail to protect the core ethical values of the legal profession. Chinese walls may protect limited business interests, but are insufficient to protect the unconflicted client service that proper legal tenets dictate. Second, the enforcement regime suggested by the ABA proposal to regulate nonlawyer-controlled MDPs is unworkable. It is unlikely that the system could be properly enforced and its administrative requirements place too difficult a burden on already strained court system resources. Third, the Proposal ignores international trends in its approach to nonlawyer-controlled MDPs. MDPs have taken root in many foreign jurisdictions, but only under exclusive lawyer control. Fourth, the ABA Proposal is politically infeasible. A proposal allowing nonlawyer-controlled MDPs will always risk passage at the hands of the ABA's House of Delegates, regardless of built-in protections. At a time when the ABA needs to act quickly, the Proposal in its present form threatens to reduce the American MDP debate to a standstill. Finally, the MDP Commission, authors of the MDP Proposal, are already predisposed against nonlawyer MDPs. Their Proposal is a thinly veiled ban on nonlawyer-controlled MDPs and should best be amended to reflect their true sentiment.

This paper will tackle the MDP question in several phases, laying out the ethical challenges presented by MDPs, examining the ABA's Proposal, and suggesting a more tempered approach toward welcoming MDP arrival in the United States. First, a brief synopsis of the advance of MDPs—both abroad and in the U.S.—will be laid out. The second section will address the ethical challenges presented by MDPs, discussing the present state of legal ethics and the pertinent provisions of the Model Rules of Professional Conduct. The third section will dissect the ABA Proposal, analyzing the changes it suggests and their possible ramifications. Finally, the last section will challenge the inclusion of nonlawyer-controlled MDPs in the Proposal and suggest a more conservative approach—the elimination of this provision altogether. The Proposal is a step in the right direction, but may prove too aggressive for both passage and implementation. In the words of Philip Anderson, “Market forces cannot be stopped. But they can be channeled.”¹¹ The ABA must ensure that the channel chosen is both appropriate and feasible.

I. BACKGROUND ON MDP DEVELOPMENT

Multi-Disciplinary Practices, in various forms, currently operate in numerous jurisdictions around the globe. Ranging from loosely tied referral

11. *ABA Multidisciplinary Practice Commission Recommends Amending Rules to Allow MDPs*, 31 *Sec. Reg. & L. Rep. (BNA)* No. 23, at 790 (June 11, 1999) (former ABA President at a Washington news conference announcing the original release of the ABA Commission on Multidisciplinary Practice's Report and Recommendations).

networks to fully integrated service firms, MDPs find their origin in the growth and expansion of professional service firms throughout the late 1980s and early 1990s. As these firms, particularly the then-called "Big Eight" accounting firms, widened their service umbrellas beyond traditional accounting practices, legal services became a natural target for growth.¹² Venturing into legal services in foreign countries was limited only by the ethical constructs of the target jurisdiction, and has resulted in various forms of associations - the beginnings of MDPs.

Generally speaking, MDPs in foreign jurisdictions are tolerated rather than officially sanctioned. But with every passing month, legal professions around the globe are coming to terms with MDPs and designing ethical frameworks to allow for their official existence and development. New South Wales, Australia, regarded as the most MDP-advanced international jurisdiction, has explicitly permitted MDP formation since provincial legislation passed in 1994.¹³ The Law Society of Upper Canada (the legal regulatory body of Ontario) has also officially tackled MDPs, passing rules during its 1999 meetings to allow lawyer-controlled MDPs.¹⁴ Recent legislation in Spain permits limited forms of MDPs, although not with accountants.¹⁵ In addition, the Council of the Law Society of England and Wales, Denmark, and the International Bar Association are presently reviewing reports on MDPs submitted by specially appointed steering committees and expect to make decisions by early 2001.¹⁶

But although various jurisdictions are gradually laying down rules and regulatory directives, in many cases mere toleration is all that is necessary for MDPs to flourish. In France, MDPs take the form of independent captive law firms with tightly connected referral networks. French lawyers will typically own the law firm, "but they also share the same client base as the accounting firm, work very closely with it, and benefit from volume cost savings . . . that result from leasing space in the same office building as the accounting firm. . . ."¹⁷ According to the partner in charge of Archibald Andersen Association d'Avocats' Paris office (a French law firm associated with Arthur Andersen), "We provide all the typical ser-

12. It should be noted that MDPs, as a concept, are not limited to the accounting firm paradigm. In fact, MDPs may find their greatest operational success in far smaller settings combining rural attorneys with psychologists, social workers, lobbyists, or architects, depending on client demand. But for purposes of this paper, the focus will primarily be on the advance of the Big Five accounting firms, whose rapid expansion in professional services has brought MDPs to the forefront of legal debate around the globe.

13. See S. Stuart Clark & Larissa Cook, *Multidisciplinary Practice: Is It the Wave of the Future, or Only a Ripple: The View from Australia*, 66 DEF. COUNS. J. 460, 472 (1999).

14. See *The Legal Profession: The Quest to Go Multidisciplinary*, THE GLOBE AND MAIL, Aug. 20, 1999, at B22.

15. See John C. Evans & Eleanor Boddington, *Multidisciplinary Practice: Is It the Wave of the Future, or Only a Ripple: The View from England*, 66 DEF. COUNS. J. 460, 466 (1999).

16. See *id.*

17. ABA Commission on Multidisciplinary Practice, Background Paper on Multidisciplinary Practice: Issues and Developments, at <http://www.abanet.org/cpr/multicomreport0199.html>, (Jan. 1999) [hereinafter MDP Background Paper].

vices of a business law firm.”¹⁸ Similar “associations,” operating in the absence of regulation, exist and are developing in Ireland, Scotland, and South Africa, to name a few - seemingly anywhere the Big Five can justify acquiring legal services around the world.¹⁹ Through these and other forms of associations, licensed attorneys are presently employed by nonlawyers throughout the world in staggering numbers.²⁰

MDPs in any form, of course, are presently forbidden in the United States. Fee sharing with nonlawyers and loosely held protections for client confidences, common practices within MDPs, are explicitly prohibited by the Model Rules of Professional Conduct (the “Model Rules”), the ethical guidelines promulgated by the ABA.²¹ But despite their explicit ban in U.S. jurisdictions, MDP inroads have begun. Most alarmingly to MDP opponents, Ernst & Young has recently established an association with former King & Spalding attorneys in Washington, D.C. Using D.C.’s relaxed rules on the use of trade names (intended for lobbying firms and trade associations), Ernst & Young announced the formation of McKee Nelson Ernst & Young on November 2, 1999.²² While the firm will formally be a separate entity, Ernst & Young financed the new firm’s launch and “they plan to market their services side by side.”²³ According to founding partner William McKee, “The reason we’re doing this is we think this is the future.”²⁴ The deal appears to be in direct defiance of the Model Rules, but William Lipton, Ernst & Young’s Vice Chairman, maintains that the firm’s independence insulates them from violations. “Ernst & Young won’t own any part of the law firm, and there won’t be any sharing of fees or profits.”²⁵

Big Five encroachment on the U.S. legal profession has not been limited to Ernst & Young. PricewaterhouseCoopers (“PwC”) was first

18. Chris Klein, *Gold Rush, Thin Stakes: U.S. Branches Face Fierce Competition From U.K. Solicitors, Accountants*, NAT’L L.J., Aug. 12, 1996, at A1, quoted in MDP Background Paper, *supra* note 17.

19. See Charles Hogan, *Law Society’s Protection Ban Under Pressure*, SUNDAY BUS. POST, Feb. 21, 1999, available at 1999 WL 7280235 (regarding MDP association in Ireland and Scotland); David Jackson, *Survey—Corporate Legal Services: Long Engagement Rather Than a Hasty Marriage*, BUS. DAY May 8, 1999, at 24 (regarding MDP association in South Africa).

20. As of October, 1999, the Big Five employment numbers: PricewaterhouseCoopers (Landwell): 1,735 lawyers; Arthur Andersen (Andersen Legal): 1,718; KPMG (Klegal): 1,264; Ernst & Young: 954; and Deloitte Touche: 691. These figures do not include lawyers practicing tax law exclusively within the firms’ accounting or tax divisions. See *Clifford Chance World’s Largest Law Firm, Big Five Close Behind*, at <http://www.lawmoney.com/public/search/PreviewStory.asp?StoryNum=3165> (Oct. 14, 1999); *IFLR 1000 50 Largest Law Firms in the World*, at [http://lawmoney.com/homepage/news/date/tope50.asp\(1999\)](http://lawmoney.com/homepage/news/date/tope50.asp(1999)).

21. See MODEL RULES OF PROF’L CONDUCT R.1.7-1.10 (conflict of interest), R.1.6 (client confidentiality), R.5.4 (professional independence of a lawyer) (1998) [hereinafter MODEL RULES].

22. See Siobhan Roth, *Inside the Ernst & Young Deal*, LEGAL TIMES.COM at <http://www.legaltimes.com/expcfm/display.cfm?id=2099>, (Nov. 5, 1999).

23. *Id.*

24. *Id.*

25. Tom Herman, *Ernst & Young Will Finance Launch of Law Firm in Special Arrangement*, WALL ST. J., Nov. 3, 1999 at B10.

among the Big Five to venture into associations with law firms, aligning with Washington, D.C.'s Miller & Chevalier in February 1997.²⁶ Publicized as a "strategic alliance," the arrangement was designed to focus on federal tax law²⁷ and to offer companies "tax representation that fully integrate[d] negotiation and litigation strategies. . . ."²⁸ According to Philip Neal, chairman of Miller & Chevalier, the alliance would offer a "new and all-inclusive service to corporate tax executives."²⁹

In August 1999, KPMG Peat Marwick ("KPMG") entered the fray, announcing an alliance with several firms within a nationwide network of state and local tax lawyers.³⁰ The network of law firms, operating as SALTNET since 1997, includes San Francisco's Morrison & Foerster, Chicago's Horwood Marcus & Berk, and Tampa's Holland & Knight, all of whom have negotiated agreements with KPMG.³¹ Through the alliance, KPMG and its associated law firms will offer joint consulting services and refer clients to one another. According to Donald Griswold, KPMG's national partner in charge of state and local tax services, their strengths—KPMG's in tax planning and the law firms' in litigation - will "mesh neatly."³² Says Griswold, it is "that much more valuable to the client if we can bring those disciplines together at the start of the [consulting] process."³³

Arthur Andersen and Deloitte & Touche, the remaining Big Five firms, have yet to announce U.S. associations, but remain active in aligning with law firms abroad. Andersen Legal, Arthur Andersen's legal arm, presently has acquired over 1700 attorneys worldwide.³⁴ Deloitte & Touche remains the least active among the Big Five in this area, amassing less than 700 attorneys around the globe.³⁵ But judged by number of attorneys, Andersen Legal and Deloitte & Touche rank 4th and 30th, respectively, as the largest law firms in the world.³⁶

In addition to establishing law firm alliances, the Big Five's foray into the U.S. legal profession includes raiding top lawyers and recruiting from the nation's top law schools with increasing regularity. In addition to the King & Spalding partners, prominent tax partners from such firms as Baker & McKenzie, Wilson Sonsini, and Pillsbury Madison & Sutro have

26. See Tom Herman, *Tax Report: A Special Summary and Forecast of Federal and State Tax Developments*, WALL ST. J., Feb. 5, 1997, at A1 (PwC was simply Price Waterhouse at the time of the alliance announcement).

27. See Arian Campo-Flores, *Dream Tax Team*, AM. LAW., Sept. 1999, at 19.

28. Herman, *supra* note 26 (quoting Bob Shapiro of Price Waterhouse (now PwC) in Washington).

29. *Id.*

30. See Campo-Flores, *supra* note 27, at 18.

31. See *id.*

32. *Id.*

33. *Id.* at 18-19 (alterations in original).

34. See *IFLR1000 50 Largest Law Firms in the World*, (Oct. 14, 1999), at <http://www.lawmoney.com/homepage/news/data/top50.asp>.

35. See *id.*

36. See *id.*

recently left their firms to join the Big Five.³⁷ Reportedly, they have been offered "seven-figure salaries and little or no billable-hour requirements to join."³⁸ Ernst & Young has taken to the law school recruiting circuit as well, visiting 14 schools in 1999 and reporting 200 expected hires from their efforts.³⁹

But the diversification of professional services has not been an entirely one-sided affair. Paralleling the alliances established by the Big Five, many entrepreneurial law firms have developed wide-ranging associations of their own. McGuire, Woods, Battle & Boothe L.L.P. (Richmond, VA) has forged a consulting group headed by former Virginia Governor George Allen with offices in both Richmond, VA, and Washington, D.C.⁴⁰ Bingham Dana (Boston) has established a similar consulting arm, headed by former New Hampshire Governor Stephen Merrill, to take advantage of "the growing intersection between law, business and government."⁴¹ In addition, the firms of Howrey & Simon (Washington, D.C.) and Womble Carlyle Sandridge & Rice (Winston Salem, NC) employ consulting teams of 20 or greater, and Littler Mendelson (San Francisco, CA) has formed Employment Law Training Inc., a stand-alone human resources firm.⁴²

The advance of the Big Five and the diversification of the legal profession has, until recently, caught the ABA flat-footed. In 1998, in response to mounting concern, then-ABA President Philip Anderson appointed a commission to study and examine MDPs and to prepare a report for review at their August 1999 annual meeting in Atlanta, Georgia. The MDP Commission assembled law professors, federal and state judges, and practicing attorneys from around the country to appraise the MDP advance on the U.S. legal profession. Their mission was not only to study and discuss MDPs, but to recommend a course of action for the ABA to follow.

After ten months of interviews, debate, and discussion, the MDP Commission produced a report in June 1999 recommending the full embrace of MDPs along with several substantial amendments to the Model Rules of Professional Conduct to facilitate their arrival.⁴³ The proposal was then presented to the ABA's policy-making House of Delegates in Atlanta, with hopes of passage and adoption. Once adopted by the ABA, the recommended changes to the Model Rules could then be studied, debated, and possibly adopted by state bar associations. But the Proposal met with strong opposition from several state bar associations. Ultimately, the Commission's recommendations were not subjected to a vote.

37. See Kelly A. Fox, *Firms are Forging Ahead with Alliances, Despite ABA Rejection of MDPs*, 10 *Law Firm Partnership & Ben. Rep.* 5 (Nov. 1999).

38. *Id.*

39. Ernst & Young N.A.L.P. forms (1999).

40. See Fox, *supra* note 37.

41. *Id.* (quoting Jay Zimmerman, Bingham Dana's managing partner).

42. See *id.*

43. See MDP Report, *supra* note 1.

Instead, the House of Delegates passed a motion proposed by the Florida Bar not to change any provisions of the Model Rules "unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients."⁴⁴ The Proposal was thus tabled for further study before an official vote was taken.⁴⁵

The August meeting in Atlanta was the ABA's first official attempt to grapple with MDPs and spawned heated debates throughout the country. Many state bar associations formed exploratory committees to analyze the issue and the MDP Commission took to revising their Proposal and collecting further evidence to "demonstrate" both the need for and the advantages of MDPs. After nearly a year of quasi-roadshows and slight changes to their Proposal, the Commission presented its findings and recommendations to the House of Delegates in New York in July 2000. But after several hours of debate, the MDP Proposal was once again turned down, this time by a recorded vote of 314-106.

The U.S. legal profession remains in flux about MDPs. The ABA Proposal was an admirable first step, but will need to undergo fundamental changes before it will be given future consideration by the House of Delegates. The next section will take a more exacting approach to the ethical challenges presented by MDPs, analyzing the major areas of ethical concern and the corresponding provisions of the Model Rules.

II. THE ETHICAL CHALLENGES OF MDPS

In its recommendation to the House of Delegates, the ABA's Commission on Multidisciplinary Practice defines an MDP as follows:

[A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing non-legal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, including legal services, and there is a direct or indirect sharing of profits as part of the arrangement.⁴⁶

MDPs will facilitate the combination of legal services with myriad other professional services, allowing clients the benefits of complete professional business consultation. But merging a traditional law practice with another professional services enterprise is an endeavor quite different from any typical business combination. Attorneys and consultants are playing similar games, but with very different sets of rules. In today's world of high speed and high power mergers and acquisitions, rarely a

44. *ABA Delegates Vote Not to Approve MDPS "Unless and Until" More Study Dispels Risks*, 77 *Antitrust & Trade Reg. Rep. (BNA)* No. 1922, at 197 (Aug. 12, 1999) (quoting a motion by the Florida Bar to postpone changes to the Model Rules until further study has been assessed).

45. The proposal was tabled by a vote of 304-98. *See id.*

46. MDP Proposal, *supra* note 2, at Recommendation No. 3.

second thought (if even a first) is given to ethical consequences. But in the case of MDPs, questions of ethics transcend all others. In broad terms, the ethical challenges presented by MDPs fall into three categories: 1) conflict of interest rules, 2) the protection of client confidences, and 3) the independence of an attorney's professional judgment. This section will examine these primary areas and touch on several secondary issues. Once the ethical boundaries have been considered, the next section will analyze the MDP Commission's attempt to reconcile them and allow for MDP formation in U.S. jurisdictions.

A. CONFLICT OF INTEREST

MDPs encounter perhaps their greatest ethical challenge in the area of conflicts of interest. MDPs, by definition, will bring many different professions under one roof. These professions not only bring together a varied assortment of skill and expertise, but a varied assortment of ethical rules. Different professions have different standards of conduct, and an MDP will find its greatest ethical harmony in those areas where the gap between standards is small. The less professions have to alter their rules, the easier it will be for MDPs to gain acceptance within those professions. With respect to conflicts of interests, unfortunately, the gap remains very wide.

An attorney's advice to a client must be unencumbered and untainted by any other interest. The attorney must at all times be guided and directed with only the best interests of the client in mind. This ethical tenet is the bedrock of legal services. To that end, several of the Model Rules create a framework in which conflict of interest questions must be determined.

Rule 1.7 lays out the guiding principles of the conflict of interest rules, establishing client loyalty as paramount in the lawyer/client relationship.⁴⁷ A decision to represent clients with "directly adverse" interests (even in different matters) is not one for the attorney to make alone, but must accompany client approval.⁴⁸ In addition, an attorney must have client consent in order to proceed with any representation if such representation "may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own [personal] interests."⁴⁹

Rule 1.8 governs transactions between an attorney and their client, prohibiting or limiting such actions as entering a business deal with a client, designing wills that personally and directly benefit the attorney, and giving certain forms of financial assistance to a client.⁵⁰ In essence, an

47. See MODEL RULES, *supra* note 21, Rule 1.7. "Loyalty is an essential element in the lawyer's relationship to a client." *Id.* at cmt. 1.

48. MODEL RULES, *supra* note 21, Rule 1.7(a).

49. *Id.* at Rule 1.7(b).

50. See *id.* at Rule 1.8(a), (c), and (e).

attorney may not enter into a transaction that places an attorney in a position to financially take advantage of his or her client.

Rule 1.9 extends the conflict rules, although in a somewhat tempered fashion, to former clients.⁵¹ This rule reflects the ongoing nature of the attorney/client relationship, prohibiting an attorney from representing any other client “in the same or a substantially related matter” if that client’s interests are “materially adverse to the interests of the former client,” without first having the former client’s consent.⁵² According to the official comments, “[t]he underlying question is whether the lawyer was so involved in the matter [with the former client] that the subsequent representation can be justly regarded as a changing of sides in the matter in question.”⁵³

Finally, Rule 1.10 recognizes the fluid nature of business within a law firm, imputing a single attorney’s conflicts to all lawyers within the firm. “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so. . . .”⁵⁴ This rule extends from the premise that “a firm of lawyers is essentially one lawyer for the purposes of the rules governing loyalty to the client.”⁵⁵ In sum, the Model Rules require attorneys to have only their client’s best interests in mind throughout and following representation, untainted by conflicting interests from any other source. If conflicting interests exist or emerge, and the client feels threatened, the attorney must decline or withdraw from representation.

MDPs pose their greatest ethical threat in the area of conflicts. Similarities and common ground can be found between the professional ethics of lawyers and other professions in many other potential trouble areas, but in the case of conflicts, the legal profession is unique and unforgiving. As detailed above, conflicts—even potential conflicts—can preclude representation in any fashion. The adversarial underpinnings of the practice of law dictate representation unfettered by conflicting interests and lie at the core of the profession’s demanding rules. Other professional services, on the other hand, are not characterized by explicit confrontation and have developed rules more accommodating to developing profits than to protecting a client’s exclusive interests.

Conflict problems exist in other professions, but are simply handled differently. While lawyers must restrict and even prohibit representation, other professions allow “screens” and “Chinese walls.” These barriers allow consulting or accounting firms to artificially separate conflicting clients and handle both accounts simultaneously. If a conflict is identified at the outset of representation, or arises throughout, non-legal service firms

51. *See id.* at Rule 1.9.

52. *Id.* at Rule 1.9(a).

53. *Id.* at Rule 1.9 cmt. 2.

54. MODEL RULES, *supra* note 21, Rule 1.10(a).

55. *Id.* at Rule 1.10 cmt. 6.

simply erect a Chinese wall, cordon off the affected staff, and move forward with both clients.

Chinese walls are handled much more delicately in the practice of law, and are far less common. The differences in approach to Chinese walls (accommodating in the business model and antagonistic in the legal model) lie in the inherent differences between the relationships of the clients being served. In the business model, client cooperation is the standard. Terms are fought over and voices may rise throughout the process, but the parties have assembled to enter into business together. Their interests are much more commonly aligned than in a legal setting and the parties are thus more flexible and more willing to tolerate Chinese walls. There is very little incentive to “rock the boat,” and Chinese walls are viewed as a simple solution to maintain the stability of negotiations and close the deal. In this accommodating atmosphere, little thought or worry is given to a consultant with a conflicting interest, so Chinese walls are the accepted norm.

Clients opposite one another in a legal matter have a different outlook. The party on the other side of the table is no longer a potential business partner, but is an adversary with opposite interests. The practice of law, thus, often pits parties against one another in a zero sum game. Gains for Party A are losses for Party B, and vice versa. In such a situation, simply throwing up a Chinese wall becomes far more suspect. An affected legal client has much more to lose and greater reason to question the strength and integrity of the screen. As such, Chinese walls are strictly forbidden among current clients.

As Model Rule 1.7 dictates, client consent is required to overcome directly adverse and materially limiting conflicts.⁵⁶ Because of the reasons discussed above, client consent is rare. In addition, Model Rule 1.10 prevents a firm from merely blocking off a tainted lawyer by surrounding him with a Chinese wall. “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so. . . .”⁵⁷ The threat of undue influence far outweighs any ease in case administration gained by using Chinese walls. Put more bluntly, promoting unconflicted client service is paramount to facilitating profits.

The only situation in which Chinese walls are tolerated throughout the legal profession is with respect to former clients.⁵⁸ Attorneys frequently change firms and often times join a firm that represents adversaries of clients of the former firm. But if conflicts can be identified in advance of the new attorney’s arrival, a screen can be placed around him so as not to taint his new firm. But creation of a valid Chinese wall in the legal pro-

56. *See id.* at Rule 1.7.

57. *Id.* at Rule 1.10(a).

58. There are several provisions throughout the Model Rules that tolerate Chinese walls for paralegals and support staff. See MODEL RULES, *supra* note 21, Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants).

fession is more difficult than it may first appear and has only recently (even in this strict circumstance) gained acceptance.

Former client conflicts is an issue that has been handled in various ways throughout the evolution of legal ethics. Model Rule 1.9 squarely explains the concerns involved:

There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association.⁵⁹

Legal ethics have evolved from strict prohibition surrounding former client conflicts (similar to the method now employed with respect to concurrent conflicts) to a more relaxed rebuttable presumption standard. One approach has been to seek per se rules of disqualification.⁶⁰ Per se disqualification would make one grand assumption, namely, that "if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm."⁶¹ A slightly less drastic, but equally problematic, standard was adopted by Canon 9 of the ABA Model Code of Professional Responsibility: the "appearance of impropriety" standard.⁶² Under this standard, if a new relationship merely appears to be conflicting, it is in fact conflicting, and representation must be declined. This approach suffers from problems of ambiguity and application. Canon 9 did not define "impropriety," so finding its "appearance" was open to varying interpretation. Second, the standard used the former client's perspective, leaving the conflict rules at the subjective judgment of former client anxiety.⁶³

Abandoning both of these approaches, the Model Rules recognize a rebuttable presumption standard. Prior associations, under this standard, are presumed to be prohibitively conflicting unless proved otherwise. Accordingly, if an attorney is challenged for disqualification, he has the burden to show that he 1) had limited access to the former client files, and 2) has no actual knowledge of former client information.⁶⁴ Consider three different situations. First, an attorney in Law Firm ABC had X as a client and his new firm LMN sues X on behalf of Y. The attorney (and his new firm) would be conflicted out because X was his direct client at ABC, and he would clearly have actual knowledge of confidential client information. LMN cannot erect a Chinese wall to circumvent the conflict

59. MODEL RULES, *supra* note 21, Rule 1.9 cmt. 3.

60. *See id.* at Rule 1.9 cmt 4.

61. *Id.*

62. *Id.* at Rule 1.9 cmt. 5.

63. *See id.*

64. *See id.* at Rule 1.9 cmts. 7, 9.

and must refuse Y's business. Second, X was a client of ABC, but not a direct client of the transferring attorney. Instead, the attorney only learned about X in partner meetings where various clients and strategies were discussed. When he leaves for LMN and LMN sues X on behalf of Y, he and his new firm are conflicted out. Although he may have had limited access to X's files, he learned confidential information in the partner meetings. Again, LMN cannot erect a Chinese wall to circumvent the conflict; the connection remains too strong and LMN must refuse Y's business. Finally, X was a client of ABC, but the transferring attorney never became involved in X's case and never had access to any of X's confidential information. In this final case, the attorney's knowledge of X is negligible. Only in this final scenario may LMN erect a Chinese wall and proceed with the case against X.

The New York Court of Appeals, which operates under former client conflict rules that mirror Model Rule 1.9,⁶⁵ recently echoed this sentiment in *Kassis v. Teacher's Insurance & Annuity Association*.⁶⁶ "[E]ven where it is demonstrated that the disqualified attorney possesses no material confidential information, a firm must nonetheless erect adequate screening measures to separate the disqualified lawyer and eliminate any involvement by that lawyer in the representation."⁶⁷ In this case, a first-year associate, Charles Arnold, switched sides in the midst of litigation. Recognizing the ethical consequences of the move, Arnold's new firm immediately instituted a Chinese wall around him. The screen was outlined in a memo from the new firm's lead counsel on the case to opposing counsel:

1. The entire file which presently consists of 15 redwells will be kept in my office in lieu of our general filing area.
2. Mr. Arnold's office will be at a substantial distance from my office.
3. Mr. Arnold upon commencement of his employment . . . will be instructed not to touch the Kassis file nor to discuss the Kassis matter with any partner, associate or staff member of the firm.
4. There will be no meetings, conferences or discussions in the presence of Mr. Arnold concerning the Kassis litigation.
5. All future associates who may work on the Kassis matter with me in preparation for trial will be instructed not to discuss this file with Mr. Arnold.⁶⁸

The provisions taken by Arnold's new firm appear to be strongly worded and were instituted as a precondition to Arnold's employment. But despite its efforts, Arnold's new firm was disqualified. The court determined that Mr. Arnold's involvement in the case had been too great at his original firm, and the Chinese wall was insufficient to prevent firm-wide disqualification.

65. See 22 N.Y.C.R.R. §§ 1200.24, 1200.27 (2000).

66. 717 N.E.2d 674 (N.Y. 1999).

67. *Id.* at 678.

68. *Id.* at 676.

This exhaustive discussion of Chinese walls is designed simply to illustrate how far apart lawyers and nonlawyers are in their approach to conflicts of interest. In nonlawyer firms, Chinese walls are a necessary evil and an accepted reality of doing business. Chinese walls divide former clients, and Chinese walls divide concurrent clients. In law firms, on the other hand, Chinese walls are rarely used. Screens are not even *considered* as a way around concurrent client conflicts, and they are used in only the narrowest of circumstances to ease former client conflicts. Rather than screen tainted lawyers, a firm must simply turn business away - a difficult pill for a consultant to swallow.

The differences in approach to conflicts are also ingrained by procedure. If an opposing lawyer has a possible conflict, counsel need only file a single-page "Motion to Disqualify." The burden, as discussed above, then falls on the accused lawyer to defend himself. If the motion is successful, counsel has eliminated a potential problem and cost the opposing party a substantial sum, both in money and time. In the business setting, on the other hand, having the other party's consultant removed is a much more difficult process. Instead of filing a simple motion, a party must file a lawsuit. Such an action is not only expensive and time consuming, but it risks losing the business at hand. It is far simpler to have the other party erect a Chinese wall and move forward. Procedural constraints thus influence the formation of Chinese walls. In legal matters, there is little incentive: they are too difficult to erect and too easy to tear down. In pure business deals, to the contrary, there is too much incentive: they are easily erected and costly to attack.⁶⁹

Since the approaches to conflicts are so different, the formation of MDPs begs the question: whose rules govern? The Big Five stand to take a considerable loss if subjected to the strict conflict rules governing attorneys. But by the same token, legal clients will sacrifice one of their primary protections for fair, untainted legal representation if these rules are softened. Bridging the conflict of interest impasse may prove to be the greatest difficulty in MDP formation.

B. CLIENT CONFIDENCES

A question closely related to conflict of interest is that of client confidences. Many practicing attorneys are fearful that the rise of MDPs may weaken the protections that currently surround client information and ultimately dilute public perception of the attorney/client privilege, even for non-MDP attorneys. A more pointed worry concerns the apparent direct opposition of the attorney/client privilege and the public duty of auditors. If a client has legal troubles or worries, an attorney plays the role of con-

69. In addition, nonlawyer professions allow parties to contract out of consultant liability. Lawyers, on the other hand, are forbidden by the Model Rules from contracting around any form of liability. See MODEL RULES, *supra* note 21, Rule 1.8(h). The incentives are thus further skewed: a legal screen may be defeated and result in malpractice, but a business screen carries no such risk.

fidante and is bound by the attorney/client privilege to keep whatever information he learns confidential. Auditors, on the other hand, are required by law to publicly disclose audit irregularities. An audit's purpose is to serve the investing public, not the client.

The Model Rules address client confidentiality in several locations. Rule 1.6 lays out the general boundaries of confidentiality, prohibiting an attorney from revealing any "information relating to representation of a client unless the client consents."⁷⁰ Exceptions are made only when silence may compromise honesty to a court or when revealing client information is necessary to prevent a serious crime or allow the attorney to establish a defense in a client/attorney dispute.⁷¹ In all other circumstances, a lawyer's legal ethics require his silence and fortify the protections surrounding a client's information.⁷²

Auditing rules, the cornerstone business of the Big Five accounting firms, on the other hand, have an entirely different goal in mind. As an auditor proceeds through a client's documents, irregularities are not absorbed into an "auditor's privilege." Quite to the contrary, the very purpose of conducting an audit is to discover financial irregularities. If they exist, an auditor is required by law to reveal such irregularities to the public.

The conflict is obvious. If an MDP offers both litigation and auditing services to a client, what happens to harmful, incriminating information revealed to the litigators for purposes of a trial? The attorney can simply avoid the topic in trial, but prepare for the fallout if it is somehow discovered and attacked. His obligation and duty is one of protection and confidentiality and his knowledge of client misgivings helps prevent him and his client from being blindsided at trial. An auditor, on the other hand, has duties and obligations that pull in an entirely different direction. If an audit would reveal financial problems, those problems are (by law) bound to become public knowledge. The client's opponent in trial need only conduct the most circumspect research to find their smoking gun and defeat the client in trial. These duties are thus clearly in opposition to one another and a tremendous concern of MDP opponents.

C. INDEPENDENT PROFESSIONAL JUDGMENT

A final major ethical concern about the nature and make-up of MDPs is maintaining the independence of an attorney's professional judgment. Many worry that partnering lawyers with nonlawyers will force lawyers to

70. MODEL RULES, *supra* note 21, Rule 1.6(a).

71. *See id.* at Rule 3.3(b) (candor toward the tribunal); *Id.* at Rule 1.6(b)(1) ("to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm"); *Id.* at Rule 1.6(b)(2) ("to establish a claim or defense on behalf of the lawyer").

72. *See id.* at Rule 1.2, cmt. 7 (lawyer not permitted to reveal client's wrongdoing except where permitted by Rule 1.6); *Id.* at Rule 1.13 cmt. 3 (extending protection to in-house attorneys); *Id.* at Rule 4.1(b) (requiring disclosures to third parties unless such disclosures are in conflict with Rule 1.6).

subvert their professional judgment to the bottom-line as profit margins supplant ethics in regard to client service. Lawrence Fox, a partner of Philadelphia's Drinker Biddle & Reath and a staunch MDP opponent, underscores this concern with an analogy to HMOs. "Look what happened to the doctors when they sold out. They lost all their independence. Even though they've got all these oaths to do the best for their patients they still have to call up some high school clerk to get permission to prescribe medicine."⁷³ Fox testified during the MDP Commission's Washington, D.C. hearings in February 1999. Of the impending August vote on the Commission's report, Fox commented that "[t]he best thing that could happen would be to give [the MDP report] a swift and respectful burial in August."⁷⁴

The Model Rules address the independence of an attorney's professional judgment throughout its rules. Attorneys must maintain their conviction and independent devotion to their client, regardless of their employer or of who may be paying the client's bills. Rule 1.13 details the rules governing in-house lawyers, a common comparison to the situation many MDP lawyers may find themselves in. According to 1.13, an in-house lawyer "shall proceed as is reasonably necessary in the best interest of the organization," but the lawyer may resign if "representation will result in violation of the rules of professional conduct."⁷⁵ Another common situation that tests a lawyer's independence is when payment comes from a third party, not the client. In such a situation, the third party (the paying party) will often attempt to influence the actions of the attorney. But Model Rule 1.8(f) makes it clear that the client's interests, not those of the third party, will guide an attorney's judgment.⁷⁶

Unfortunately, the clarity of these rules is not enough to placate many existing fears. Harvard Law School Professor Bernard Wolfman also testified before the MDP Commission and echoed many of Fox's fears. "If you have people running the show who have no training or interest in the preservation of the values that underlie the legal system and its ethical rules, those values are going to go by the board."⁷⁷ According to Sydney Cone, of counsel to New York City's Cleary, Gottlieb, Steen & Hamilton, "[e]ven if lawyers do not receive specific instructions to subordinate the interests of a particular client to economic concerns of the nonlawyers who run the MDP, lawyers within the MDP would be keenly alert to management's expectations and their own career opportunities."⁷⁸

73. Lance J. Rogers, *Debate on Multidisciplinary Practice Report Continues as ABA Delegate Vote Nears*, 31 Sec. Reg. & L. Reg. (BNA), No. 28, at 940 (July 16, 1999) (quoting Lawrence J. Fox).

74. *Id.*

75. MODEL RULES, *supra* note 21, Rule 1.13(b) in conjunction with Rule 1.16(a)(1).

76. *See id.* at Rule 1.8(f)(2). "A lawyer shall not accept compensation for representing a client from one other than the client unless . . . there is no interference with the lawyer's independence of professional judgment." *Id.*

77. Rogers, *supra* note 73 (quoting Professor Wolfman).

78. *Id.*

D. OTHER ETHICAL WORRIES

While conflict of interest, client confidences, and independent professional judgment dominate the critique of and anxiety over MDPs, many more subtle ethical concerns exist as well. First of all, how will MDPs affect current rules governing lawyer advertising? Currently, lawyer advertising is strictly controlled by Article 7 of the Model Rules ensuring that lawyer advertising is truthful, factually substantiated, and does not unnecessarily take advantage of those clearly in need of legal services.⁷⁹ In addition, lawyers cannot accept any payment or other form of compensation for client referrals and all advertising must be kept on record for possible later review.⁸⁰ The Big Five, on the other hand, are free to advertise in whatever medium and under any circumstance they see fit. Consulting and accounting firms follow the capitalism ethics of "buyer beware" rather than any set code of business ethics to ensure that their efforts are not misleading or unduly burdensome on vulnerable prospective clients.

Second, consulting and accounting firms operate in a market where non-compete clauses for employees are commonplace. Before accepting employment in such a firm or business, prospective employees must promise (contractually) that if they ever leave the firm, they will not seek like employment in the immediate geographical area for a specified period of time. Lawyers, on the other hand, are specifically prohibited from limiting their practice in any way by Model Rule 5.6. According to the Model Rules, "[a] lawyer shall not participate in offering or making a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship."⁸¹ Such freedoms are guided by public policy that not only considers the attorney's professional autonomy, but also respects the client's freedom to choose an attorney.⁸² If a lawyer's practice is unduly restricted, the public loses a portion of their access to the justice system, a right protected by the U.S. Constitution.⁸³

Finally, as was mentioned briefly during the conflict of interest discussion, attorneys cannot limit their liability for malpractice as part of their retention agreement.⁸⁴ This rule protects the client from unprofessional service and offers recourse for poor or inadequate legal service. An attorney can refuse to take on a case or a client, but once representation has begun, he must serve the client with "reasonable diligence."⁸⁵ Consultants and accountants, on the other hand, are free to contract around whatever they deem necessary. Limiting liability may not foster much repeat business, but the option remains for lay businessmen to limit their

79. See MODEL RULES, *supra* note 21, Rule 7.1.

80. See *id.* at Rule 7.2.

81. See *id.* at Rule 5.6(a).

82. See *id.* at cmt. 1.

83. U.S. CONST. amend. V.

84. See MODEL RULES, *supra* note 21, at Rule 1.8(h).

85. *Id.* at Rule 1.3.

client's remedies if representation is inadequate or ineffective. Again, the lay businessman operates under a "buyer beware" code of professional ethics, a posture that stands in direct opposition to much of the legal code of ethics.

With these ethical questions in mind, the MDP Commission sought to develop an ethical framework that could harmonize much (if not all) of the differences between lawyers and other professional service providers. Their recommendations were the culmination of ten months of interviews, debate, and discussion, and will be examined in the next section.

III. THE MDP COMMISSION PROPOSAL

Unquestionably, MDPs pose very daunting challenges to the present make-up of legal ethics in the United States. The MDP question has been termed everything from "a potential 'watershed' that would mark a sea [of] change in the way lawyers do business"⁸⁶ to "the most important issue to ever face our profession."⁸⁷ As such, the ABA took a very determined and thoughtful approach to examining MDPs, and the MDP Commission produced a very well-reasoned and thorough report.

The MDP Commission itself brought practitioners from all corners of the profession, a conscious effort to balance any seeded biases and ensure an objective study. The Commission's twelve members included six practicing attorneys, two judges, three law professors, and an in-house lawyer—truly a multifaceted collection of legal minds.⁸⁸ The Commission was appointed by ABA President Philip S. Anderson in August of 1998, and during the next ten months heard over 60 hours of testimony from 56 witnesses. According to the Commission's report,

Testimony and/or written materials [were] presented by U.S. and foreign lawyers, consumer advocates, representatives of four of the five largest accounting firms in the world, law professors, chairs of ABA sections and standing committees, officers of foreign and domestic bar associations, ethics counsel of foreign and domestic bar associations, small business clients, the American Corporate Counsel Association and in-house counsel of international corporations.⁸⁹

86. Robert Pack, *Lawyers, Nonlawyers, and the Future of the Practice of Law*, THE WASH. LAW., Sept./Oct. 1999, at 25 (quoting Roger L. Page, Deloitte & Touche partner).

87. *Id.* (quoting the Pennsylvania Bar Association).

88. The MDP Commission included Chairman Sherwin P. Simmons of Steel, Hector & Davis LLP (Miami, FL); Honorable Carl O. Bradford, Maine Superior Court (Portland, ME); Honorable Paul L. Friedman, U.S. District Court for the District of Columbia (Washington, D.C.); Professor Phoebe A. Haddon, Temple University School of Law (Philadelphia, PA); Professor Geoffrey C. Hazard, Jr., University of Pennsylvania School of Law (Philadelphia, PA); Roberta Reiff Katz, Netscape Communications Corp. (Mountain View, CA); Carolyn B. Lamm, White & Case (Washington, D.C.); Robert H. Mundheim, Shearman & Sterling (New York, NY); Steven C. Nelson, Dorsey & Whitney (Minneapolis, MN); Dean Burnele V. Powell, School of Law of the University of Missouri at Kansas City (Kansas City, MO); Michael Traynor, Cooley Godward LLP (San Francisco, CA); and Herbert S. Wander, Katten Muchen & Zavis (Chicago, IL). See MDP Background Paper, *supra* note 16, at 12.

89. MDP Report, *supra* note 1.

The magnitude of input underscores the complexity and significance of the MDP debate. Members of the Commission may have entered their study with varying opinions, but they all agreed that MDPs were not going away and the American legal profession had to act quickly. Their study revealed “an interest by clients in the option to select and use lawyers who deliver legal services as part of a multidisciplinary practice.”⁹⁰ Conceding that empirical evidence of such support was as yet not available, the Commission further found that a “complementary interest exists among many U.S. lawyers in different practice settings in having the option to form relationships with nonlawyers that include the sharing of legal fees.”⁹¹

Regardless of market forces and comments received, the Commission’s stated goal was “to protect at all times the interests of clients and the public and the core values of the legal profession.”⁹² To that end, the Commission developed an ethical scheme markedly similar to the existing Model Rules. The Commission first dispensed with Model Rule 5.4’s fee sharing prohibition, designing an exception for MDPs.⁹³ Considering the history and reasoning employed in enacting the fee sharing ban in addition to the public interest received, the Commission noted that “[t]he existing bans found in Model Rule 5.4 were *not* contained in the original Canons of Professional Ethics adopted by the ABA in 1908.”⁹⁴ Moreover, when 5.4’s predecessor was introduced twenty years later, rules against fee-sharing were placed in admonitory language only. “Mandatory language appeared for the first time in 1969 when the ABA adopted the [existing Model Rules].”⁹⁵

But generally speaking, after designing the MDP fee-sharing exception and certain transparency rules,⁹⁶ the Commission holds an MDP (under the Proposal) to the same standards as existing law firms. Lawyers will be bound by the same ethical rules of professional conduct⁹⁷ and nonlawyers will still remain prohibited from delivering legal services.⁹⁸ In addition, “all clients of an MDP should be treated as the lawyer’s clients for purposes of conflicts of interest and imputation in the same manner as if the MDP were a law firm and all employees, partners, shareholders or the like were lawyers.”⁹⁹ Thus, to a large degree, the

90. *Id.*

91. *Id.*

92. *Id.*

93. See Commission on Multidisciplinary Practice, Appendix A, (June 8, 1999) <http://www.abanet.org/cpr/mdpappendixa.html> [hereinafter MDP Report Appendix A] (recommending subsection (e) be added to the Model Rule 5.4: “To the extent provided in Rule 5.8 [Responsibilities of a Lawyer in a Multidisciplinary Practice Firm], the provisions in subsections (a), (b), or (d) above [fee sharing provisions] do not apply to a lawyer in an MDP”).

94. MDP Report, *supra* note 1 (emphasis in original).

95. *Id.*

96. See MDP Proposal, *supra* note 2, at Recommendation No. 9.

97. See *id.* at Recommendation No. 5.

98. See *id.* at Recommendation No. 4.

99. *Id.* at Recommendation No. 8.

Commission created MDPs by simply overlaying existing legal ethics.

The true meat of the MDP Commission's recommendations was thus not in determining the ethical rules that applied to MDPs—they would parallel existing lawyer rules. Rather, the Commission channeled the bulk of its energy into the regulation of these rules, devising an enforcement framework to ensure that the core values of the legal profession were protected and maintained. In a lawyer-controlled MDP, enforcement was easily crafted: they would be self-regulated.¹⁰⁰ Since lawyers would remain bound by the rules of professional conduct, existing self-regulation procedures would suffice for enforcing and maintaining proper legal ethics. Lawyer-controlled MDPs would thus be a mere extension of the controlling lawyers' already existing ethical duties as attorneys.

Nonlawyer-controlled MDPs, on the other hand, were the Commission's (and are the profession's) greatest worry. If an MDP is controlled by nonlawyers, how can the profession ensure that proper legal ethical rules are established, maintained and enforced? The Commission's answer was to develop a professional auditing procedure by which nonlawyer-controlled MDPs must submit annual certificates to a regulatory body to ensure its compliance with legal standards. The "highest court with the authority to regulate the legal profession in each jurisdiction" would receive annual reports from nonlawyer-controlled MDPs, signed by both the CEO (or similar officer) and board of directors (or similar body) of the MDP.¹⁰¹ According to the Commission's Recommendations, a nonlawyer-controlled MDP must submit a "written undertaking" that:

- (A) it will not directly or indirectly interfere with the lawyer's exercise of independent professional judgment on behalf of a client;
- (B) it will establish, maintain and enforce procedures designed to protect a lawyer's exercise of independent professional judgment on behalf of a client from interference by the MDP, any member of the MDP, or any person or entity controlled by the MDP;
- (C) it will establish, maintain and enforce procedures to protect a lawyer's professional obligation to segregate client funds;
- (D) the members of the MDP delivering or assisting in the delivery of legal services will abide by the rules of professional conduct;
- (E) it will respect the unique role of the lawyer in society as an officer of the legal system, a representative of clients and a public citizen having special responsibility for the administration of justice. This undertaking should acknowledge that lawyers in an MDP have the same special obligation to render voluntary *pro bono publico* legal service as lawyers practicing solo or in law firms;
- (F) it will annually review the procedures established in subsection (B) and amend them as needed to ensure their effectiveness; and annually certify its compliance with subsections (A)-(F) and provide a copy of the certification to each lawyer in the MDP;

100. See MDP Report, *supra* note 1.

101. See MDP Proposal, *supra* note 2, at Recommendation No. 14.

(G) it will annually file a signed and verified copy of the certificate described in subsection (F) with the court, along with relevant information about each lawyer who is a member of the MDP;

(H) it will permit the court to review and conduct an administrative audit of the MDP, as each such authority deems appropriate, to determine and assure compliance with subsections (A)-(G); and

(I) it will bear the cost of the administrative audit of MDPs described in subparagraph (H) through the payment of an annual certification fee.¹⁰²

In addition, if a nonlawyer-controlled MDP were to fail its administrative audit, it would “be subject to withdrawal of its permission to deliver legal services or to other appropriate remedial measures ordered by the court.”¹⁰³

In essence, for nonlawyer-controlled MDPs, the Commission chose not to alter any of the profession’s core values in the slightest. Instead, it holds MDPs (in all forms) to existing legal rules surrounding conflicts of interest and imputation and creates a certification and audit process to “make senior officials of the MDP sensitive to these special obligations.”¹⁰⁴ In the words of one commentator, the Commission’s report and recommendations were “a resounding reaffirmation that the legal profession is not like other commercial endeavors When it comes to practicing law, a lawyer’s duties to his or her client, justice, and as an officer of the court are paramount to all other concerns”¹⁰⁵

Recommendations governing client confidentiality and independent professional judgment in MDPs also strongly mirror accepted legal standards. The Commission recommended that “no change be made to the lawyer’s obligation to protect confidential client information.”¹⁰⁶ But with respect to the confidentiality standards applicable to nonlawyers, attention by the Commission is curiously absent. Presumably, nonlawyers will not be extended an “MDP-client” privilege. In fact, the Recommendations require that MDPs take measures to inform their clients that lawyers and nonlawyers “may have different obligations with respect to disclosure of client information.”¹⁰⁷ But the Report fails to address the daunting challenge of an auditor’s presence in an MDP alongside attorneys. As discussed above, these professions are diametrically opposed in their obligations—the auditor acting to disclose and the attorney serving as advocate. Rather than confront this issue, the Commission punts. In Endnote 3 of its Report, the Commission notes that the SEC is currently investigating the question and that “this issue is correctly initially discussed in those fora.”¹⁰⁸ In sum, the Commission leaves client confiden-

102. *Id.*

103. *Id.* at Recommendation 15.

104. MDP Report, *supra* note 1.

105. James Wilber, *American Bar Association Stakes Out Its Position on MDPs*, *FED. LAW.*, Oct. 1999, at 21.

106. MDP Report, *supra* note 1.

107. MDP Proposal, *supra* note 2, at Recommendation 9.

108. MDP Report, *supra* note 1.

ality rules (Model Rules 1.6 and the attorney-client privilege) intact for attorneys and reserves judgment on possible additional rules for nonlawyers.

The maintenance of independent professional judgment remains at the forefront of the MDP debate and was not overlooked by the Commission. Recommendation No. 6 reiterates Model Rule 5.4(c)'s requirement of professional independence, dictating that "[a] lawyer acting in accordance with a nonlawyer supervisor's resolution of a question of professional duty should not thereby be excused from failing to observe the rules of professional conduct."¹⁰⁹ In fact, the Report makes specific reference to Model Rule 5.4(c), recommending that it remain unchanged in its application to MDPs.¹¹⁰ In defense of leaving this rule intact, the Commission makes reference to in-house and government attorneys, noting that it is common for lawyers to work under the supervision of nonlawyers.¹¹¹ "Independence has been maintained in those settings,"¹¹² and the Commission feels that proper independence will be just as easily maintained in MDPs. As added safeguards, the Commission suggests adding language to eliminate a nonlawyer supervised attorney's Nuremberg defense and makes reference to the aforementioned professional audit process.¹¹³

An additional requirement for MDPs is that of transparency. Since clients may be receiving a combination of legal and non-legal services, the Commission's Proposal obligates lawyers in an MDP "to make reasonable efforts to ensure that the client sufficiently understands that the lawyer and nonlawyer may have different obligations . . ." ¹¹⁴ In addition, an MDP client may exclusively receive non-legal services but must understand that receipt of those services may not carry the same protections as those extended with legal services.

A final step taken by the MDP Commission was to venture a definition of "the practice of law." Analysis of the debate surrounding what constitutes "the practice of law" is beyond the scope of this Comment but remains an important and contentious aspect of the overall MDP discussion. According to MDP Commission Chairman Sherwin Simmons, "It is a very elusive concept . . . It would take Solomon to come up with a definition that would accurately describe the practice of law."¹¹⁵ Despite acknowledged difficulties, the Commission suggested the definition employed by the Washington, D.C. Bar, a broad definition

109. MDP Proposal, *supra* note 2, at Recommendation 6.

110. MDP Report, *supra* note 1.

111. *See id.*

112. *Id.*

113. *See id.* The Commission recommends that the Model Rules "clearly state that a lawyer who is supervised by a nonlawyer may not use as a defense to a violation of the rules of professional conduct the fact that the lawyer acted in accordance with the nonlawyer's resolution of a question of professional duty." *Id.*

114. MDP Proposal, *supra* note 2, at Recommendation 9.

115. Lance J. Rogers, *Debate on Multidisciplinary Practice Report Continues as ABA Delegate Vote Nears*, 31 Sec. Reg. & L. Rep. (BNA) No. 28, (July 16, 1999).

that many believe throws far too wide a net.¹¹⁶ Defining the practice of law may be a key aspect of reigning in attorneys directly employed by accounting firms, insurance companies, and banks (currently operating under the business parlance of “consulting” and “advising”), but for the time being it remains a veritable black hole in the MDP debate. Of the definition proposed by the Commission, Simmons says, “I thought we made a decent stab at it and its out there for whatever use people want to make of it.”¹¹⁷

While the Commission addressed the essential items for laying the ethical groundwork for MDPs, several issues remain on the table. In addition to the difficult question of an auditor’s place in MDPs (if there is one at all), the Commission failed to address *who* an attorney can partner with and what constitutes “control” of an MDP. As the Recommendations stand, no effort has been made to restrict nonlawyer partner membership in MDPs—all nonlawyer partners are simply “nonlawyers.”¹¹⁸ Such a wide-open definition has given MDP opponents great rhetorical leverage throughout the debate. Critics point out, perhaps in hyperbole, the possible ramifications of an open definition:

Wal-Mart is committed to maximizing profits, . . . [b]ut they shouldn’t be able to own a law firm . . . Wal-Mart could form a subsidiary called “Wal-Mart Law and Estate Planning.” Or funeral parlors could offer embalming and estate administration. A service is a service. How about “Joe’s Wrecking and Towing Service and Personal Injury Representation.” Those are all services, right?¹¹⁹

A possible option could be to restrict “nonlawyers” to other professions that require some form of certification and adherence to ethical

116. Based on Rule 49 of the District of Columbia Court Rules, the Commission notes that the “‘Practice of Law’ means the provision of professional legal advice or services where there is a client relationship of trust or reliance. One is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

- a) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect interests in real or personal property, wills, codicils, instruments intended to affect the disposition of property of decedents’ estates, documents relating to business and corporate transactions, other instruments intended to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business;
- b) Preparing or expressing legal opinions;
- c) Appearing or acting as an attorney in any tribunal;
- d) Preparing any claims, demands, or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal;
- e) Providing advice or counsel as to how any of the activities described in subparagraph (a) through (d) might be done, or whether they were done, in accordance with applicable law;
- f) Furnishing an attorney or attorneys, or other persons, to render the services described in subparagraphs (a) through (e) above.”

MDP Report Appendix A, *supra* note 93.

117. Rogers, *supra* note 115.

118. See MDP Proposal, *supra* note 2, at Recommendation No. 3 (defining an MDP to include “lawyers and nonlawyers”).

119. Rogers, *supra* note 115.

professional standards. Defense for this position lies in the assumption that other “certified professionals” may be able to better appreciate a lawyer’s ethical standards and would pose less of a threat to their violation than lay partners with no formal ethical training. But critics are quick to point out the difference between, for example, a certified public accountant and a certified beautician—simply being “certified” means different things to different professions. In addition, many likely MDP nonlawyer partners may include social workers, economists and lobbyists, professions that require no official certification.

Secondly, despite basing its entire MDP ethical enforcement regime on a distinction between MDPs controlled by lawyers and those controlled by nonlawyers, the MDP Commission Report also fails to address what constitutes “control” of an MDP. Presumably, the distinction would lie in a simple majority control (more lawyers than nonlawyers, or vice versa), but a more stringent requirement is also feasible. If lawyer-controlled MDPs required a supermajority of 2/3 or 3/4 lawyer membership, the MDP debate would take on a decidedly different flavor. Also, if “lawyer-controlled” simply meant that the CEO or managing partner of an MDP were an attorney or that some smaller unit within MDP management (a board of directors, for example) were controlled by a simple majority of lawyers, then a “lawyer-controlled” MDP could in fact have less than a majority of overall lawyer-partners.¹²⁰

The MDP Commission’s Report and Recommendations officially touched off the American MDP debate. While great speculation and rhetoric was evident before the MDP Proposal, its publication has begun the MDP discussion in earnest. Ground rules have been laid, and a viable vision of U.S. MDPs has been set forth. But much work remains before any tangible resolution of the MDP question is found. The next section will critique the MDP Commission Proposal and is divided into two major portions. First, the underlying theme of the Proposal—the acceptance of MDPs—is sound, and will be defended. But the approach taken by the Commission—namely, the inclusion of nonlawyer-controlled MDPs—remains inherently flawed. The second portion will critique the Commission’s approach, suggesting that nonlawyer-controlled MDPs be avoided and thus should be removed from the Proposal’s consideration altogether.

IV. DEFENSE OF LAWYER-CONTROLLED MDPS

If one thing remains certain throughout the MDP debate, the likelihood of some form of multidisciplinary practice in the United States is real and will only grow with time. The longer the American legal profession chooses to ignore nonlawyer encroachment upon legal services, the

120. The Report also neglected questions of interstate and cross-border practice, but these issues, while important, are largely tangential to the core MDP debate. The Commission recognized the importance of these issues, but determined the MDP Report an inappropriate forum to discuss them in detail. See MDP Report, *supra* note 1.

weaker its ability becomes to influence the direction of its growth and development. MDPs have arrived, but are in their infancy. It is the profession's duty and moral obligation to grab the reins and prevent MDPs from evolving in a manner that challenges the core values of the profession and sacrifices client service to profit development. Nonlawyer-controlled MDPs, for reasons discussed below, are an unnecessary step to effectively influence the MDP debate. Lawyer-controlled MDPs, on the other hand, will help American attorneys better serve their clients and allow law firms to respond to nonlawyer encroachment into the legal market without sacrificing legal ethics in the process.

It should be recognized, first and foremost, that MDPs will help law firms better serve their clients. As business has become more complicated and interconnected, clients' needs have evolved as well. A client may initially come to an attorney with a legal problem, but have in their mind the necessity to later visit other professionals for related, but non-legal, problems. Allowing law firms to include non-legal professionals within their partnerships will prevent their clients from having to take this extra step (or steps, depending on the problem) and visit several different professionals in having their problems resolved.

Estate planning is a fantastic example. If an elderly client decides to make alterations in his will, a lawyer is clearly needed. But in order to fully satisfy his professional needs, the client may also require advice from a financial planner, an accountant and a philanthropist. An MDP would allow the firm to extend these services to its client without sending him elsewhere. The client thus only has to explain his situation to one group of professionals, pay one fee to professionals, and will likely have his needs addressed in a much more timely fashion. The MDP format would allow this firm to provide more complete and effectively delivered services to its client.¹²¹ Preventing lawyer-controlled MDPs thus "not only bars lawyers from fresh—and lucrative—new sources of revenue, it also victimizes consumers."¹²²

Bringing various professionals under one roof not only eliminates duplication of effort on the client's part, but allows the law firm to provide services in a more cost-effective manner. Many firms would presently offer the services described above to any client that required them, but would do so on a contract basis—Model Rule 5.4 requires it. With the abolition of fee-sharing rules for MDPs, firms can now pay non-legal professionals in a manner more directly tied to their service. Instead of receiving a flat rate, perhaps inadequately tied to the value of their service, non-legal professionals would be able to receive a portion of the profits garnered from clients, a much more accurate and cost-effective method of compensation. The money saved could then be passed along to the client in the form of lower overall fees. MDPs would thus allow law firms to

121. See James Lafferty, *Time to Change Rules To Allow for One-Stop Law Firms*, HOUSTON CHRON., Dec. 6, 1999, at 25 (outlining the estate planning scenario).

122. *Id.*

deliver services in a more cost-effective manner, helping to reduce the overall price of their services.

Lower fees and more complete service will not only help law firms better serve their clients, but will allow them greater flexibility in competing with other professional service firms for business. As law firms diversify their services, they can more effectively tap into previously unexplored markets. Real estate advice need not end with contracts for sale and lease agreements, but could extend to the planning, site-development, and building stages as well with a qualified environmentalist, surveyor, and architect on staff. Lawyer-controlled MDPs could also revolutionize corporate deals, reducing the number of players significantly and consolidating fees in one service provider. Service to corporate clients need not end with due diligence and negotiation, but could include the numerical analysis and valuation analysis previously performed by accounting firms and bankers. With regard to corporate deals especially, "[t]he law firm that can . . . play an integral role in as many facets of a transaction as possible without passing it on to a potential competitor, is at a distinct advantage."¹²³ The options are limited only by a firm's imagination.

Forming an MDP will not only help law firms compete for business, but will help them retain lawyers contemplating a leap out of the practice of law and improve recruiting for new talent. As professional service firms, particularly the Big Five, have encroached into legal services, they have enlisted the service of more and more attorneys. Lawyers are drawn by factors ranging from larger salaries, a more diversified slate of work, and (in the case of the Big Five) the opportunity to work for a firm with a worldwide reputation. By diversifying their services, law firms can raise overall revenues and widen their book of work and influence. All of these factors, precipitated by the development of lawyer-controlled MDPs, will help law firms begin to reverse the tide of lawyer defection and ensure continued success in the recruitment of law students.

The MDP format will also enable law firms to properly reward key nonlawyer professionals currently under contract or employed as non-partners. Under Model Rule 5.4, fee-sharing is prohibited between lawyers and nonlawyers, regardless of the nonlawyer's contributions to the firm's business.¹²⁴ But in many instances, law firms could better encourage, promote, and ultimately retain important nonlawyer staff if they could offer them not only a higher salary but a share in the profits. Lobbying is an excellent example. While the majority of lobbyists are also attorneys, many are not. Becoming a registered lobbyist does not require a law degree, and many lobbyists easily master their field without one. Lobbyists also, by definition, thrive on connections to politicians and business leaders and can be tremendous assets for a law firm, both for reputation and business. An MDP platform would allow law firms to open

123. E. Leigh Dance, *How To Compete with MDPs*, 13 No. 7 *MKT. FOR LAW.* 3 (Nov. 1999).

124. See MODEL RULES, *supra* note 21, Rule 5.4(a), (b), and (d).

their partnerships to valued nonlawyers such as lobbyists, properly compensating them for their contributions to the firm and ensuring their continued service.

All of the advantages mentioned above are true of any MDP form, but lawyer-controlled MDPs also ensure a seamless transition without threatening legal ethics. Governance and management by lawyers will properly safeguard MDPs from the ethical challenges presented by multi-faceted representation, overseeing client development and service. Conflict of interest rules, including imputation, will continue to be respected and an attorney's professional judgment will not require any subordination to nonlawyer input. In addition, with appropriate safeguards for transparency, clients can be serviced, certain that their business will be held in strict confidence.

In short, lawyer-controlled MDPs offer the benefits of one-stop shopping without endangering the legal profession's core values. Under this format, law firms can improve their services to clients and offer them in a more cost-effective and affordable manner. Law firms, through the MDP platform, can also increase their competitiveness for both business and talented lawyers as well as more properly reward key nonlawyer employees. Most importantly, with lawyers controlling, overseeing, and being held responsible for the operations of the firm, ethical worries are of no greater consequence than they are within any present day law firm.

The advantages of MDPs, both to clients and to the increased competitiveness of law firms, are undeniable. The MDP Commission recognized these benefits and boldly recommended the full acceptance of MDPs in the United States. But in its efforts to fully control MDP expansion, the Commission also recommended the integration of MDPs controlled by nonlawyers. The next section will examine the difficulties presented by nonlawyer-controlled MDPs and explain why the Commission's ambitious reach may cost the American public and legal profession acceptance of MDPs in any form whatsoever.

V. REJECTION OF NONLAWYER-CONTROLLED MDPS

As described above, MDPs are the next step in the evolution of modern business practices in the United States. Having already touched jurisdictions around the world in various forms, MDPs are a vehicle by which the American legal profession can better serve existing clients and reach out to new unexplored areas of client and business development. But in extending its report and recommendations to cover nonlawyer-controlled MDPs, as evidenced by the vote in New York, the ABA's MDP Commission may lose the MDP discussion entirely.

Nonlawyer-controlled MDPs are an unnecessary step for the ABA to take for five reasons. First, nonlawyer-controlled MDPs will sacrifice the core values of the legal profession. It has been shown how difficult Chinese walls are to maintain in a legal setting, and recent cases and inquiries have exposed the weaknesses of such supposed safeguards in the business

setting as well. Second, even if informational screens are accepted as a viable safeguard for legal ethics, the administrative program suggested by the MDP Commission is wholly unworkable. The present state of the UPL debate demonstrates the difficulty of enforcing ethical violations, and the professional audit format would simply place too great a burden on the high courts of American jurisdictions. Third, despite the widely touted prevalence of MDPs around the globe, nonlawyer-controlled MDPs, with or without safeguards, are surprisingly rare. Lawyer-controlled MDPs dominate the world MDP scene, and strong opposition has been expressed in every single jurisdiction that has thoughtfully examined the make-up and effects of nonlawyer-controlled MDPs. Fourth, an ABA Proposal that includes nonlawyer-controlled MDPs within its recommendations will continue to fail, time and time again, upon its submission to the House of Delegates. Including a nonlawyer-controlled MDP provision will thus not only result in the rejection of the nonlawyer-format, but will also prevent the American legal profession from capitalizing on the recognized benefits of MDPs controlled by lawyers. Finally, a rejection of nonlawyer-controlled MDPs is already in line with the general sentiment of the MDP Commission. The across-the-board application of uncompromised legal ethics to MDPs in the U.S. as well as the difficult professional audit requirements placed on nonlawyer-controlled MDPs show that the Commission appreciated the difficulties presented by nonlawyer-controlled MDPs and did everything in its power to prevent their existence.

A. ETHICAL PROBLEMS TOO DIFFICULT TO HARMONIZE

The primary ethical difficulty of nonlawyer-controlled MDPs lies not in protecting client confidences or maintaining the independence of an attorney's professional judgment, but in respecting and properly handling conflicts of interest. Alerting clients to the various duties or non-duties of professionals within an MDP team could adequately protect disclosure of confidential information. Through transparency, if clients are made aware that information revealed to a nonlawyer would not carry the same privileges as with attorneys, MDPs would not forfeit their client's rights to confidentiality and would not entice clients to unwittingly reveal information in an unprotected format. Confidentiality problems (assuming proper resolution of the auditor question) are thus reduced to difficulties of client understanding and transparency.

Independent professional judgment, within the MDP discussion, is also a paper tiger. Responsibility for professional judgment ultimately resides solely in the attorney providing counsel. MDPs may indeed present greater temptations for its attorneys than law firms, but these temptations are no greater than those presently borne by in-house and bank trust attorneys. If proper independence is viable in these circumstances, MDPs are simply an extension of existing forms of nonlawyer supervision and not a new creature of ethical crisis.

The truly difficult question resides in protecting clients from conflicting interests. The gap between the ethical approaches employed within the legal profession and those taken by nonlawyer professional firms remains, at present, unbridgeable. Attorneys protect client interests with utmost care, employing Chinese walls in only the most innocent of cases. When conflicts arise, attorneys are duty bound to decline representation. Nonlawyer professional service firms, on the other hand, erect Chinese walls to resolve even the most adverse of conflicts. A recent case from the United Kingdom, *Bolkiah v. KPMG*¹²⁵, demonstrates the lengths to which accounting firms will go to keep from turning business away.

KPMG has acted as auditors for the Brunei Investment Agency (BEI), an entity formed to hold and manage the General Reserve Fund of the government of Brunei, since its creation in 1983.¹²⁶ Prince Jefri Bolkiah served as BEI's chairman until he had a dispute with his brother, the Sultan of Brunei, in March 1998.¹²⁷ KPMG had also conducted a detailed investigation for Prince Jefri surrounding a litigation the Prince was involved in between 1996 and 1998.¹²⁸ After the Prince's departure from BEI, the Sultan asked KPMG to conduct an investigation of the Prince's holdings in an effort to remove his assets from BEI. KPMG, despite the recognized conflict of interest of investigating a former client (the Prince), threw up a Chinese wall and proceeded forward.¹²⁹ In sum, KPMG's forensic accounting department conducted a detailed investigation for the Prince in support of a two year litigation, and then turned around (within *one month* of completing that investigation) and launched an investigation against the Prince for BEI. Needless to say, Prince Jefri filed for an injunction to halt the investigation.

Prince Jefri's motion for injunction was ultimately granted in a unanimous decision by the House of Lords. Lord Millet, although recognizing the prevalence of Chinese walls within the financial services industry,¹³⁰ deemed the screen erected by KPMG ineffective. According to Lord Millet:

When the number of personnel involved is taken into account, together with the fact that the teams engaged on Project Lucy and Project Gemma [KPMG code names for the two investigations] each had a rotating membership, involving far more personnel than were working on the project at any one time, so that individuals may have joined from and returned to other projects, the difficulty of enforcing confidentiality or preventing the unwitting disclosure of information is very great.¹³¹

125. 2 App. Cas. 222 (1999).

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.* (noting that "Chinese walls are widely used by financial institutions in the City of London and elsewhere. They are the favoured technique for managing the conflicts of interest which arise when financial business is carried on by a conglomerate").

131. 2 App. Cas. 222 (1999).

Lord Millet also noted the difference between screens separating distinct departments and those erected within a single department "between members all of whom . . . have been accustomed to work with each other."¹³²

Chinese walls are common practice within nonlawyer professional service firms, a fact that KPMG acknowledged in *Bolkiah*. In fact, KPMG insisted that "the erection and operation of information barriers . . . [are] part of the professional culture in which staff work and becomes second nature to them."¹³³ For attorneys, on the other hand, the erection of Chinese walls is far from "second nature." Quite to the contrary, informational screens and Chinese walls are highly suspect and allowed in only the rarest of circumstances. In the words of Lord Millet (discussing the unique duties of the legal profession):

It is in any case difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in confidence in the course of a fiduciary relationship may come into the possession of a third party and be used to his disadvantage. . . . It is of the highest importance to the administration of justice that a solicitor . . . should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest.¹³⁴

If the American legal profession is to continue to protect client interests with its present level of integrity, Chinese walls cannot become "second nature." Unconflicted client service is, and should remain, paramount to business development. Unfortunately for nonlawyer-controlled MDPs, nonlawyer professionals do not appear prepared to adhere to the strict conflict of interest and imputation rules that presently govern the provision of legal services. To the contrary, as *Bolkiah* illustrates, they seem ready to risk client interests whenever the opportunity presents itself. Unless and until these variant approaches to conflicts of interest are fully harmonized, nonlawyer-controlled MDPs are ethically impossible.

B. ETHICAL AUDIT SYSTEM UNWORKABLE

Assuming nonlawyer-controlled MDPs can overcome these vast ethical differences, questions next turn to the MDP Commission's proposed enforcement regime. The Commission recognized the threat presented by nonlawyer-controlled MDPs and designed an administrative audit system to try to keep them ethically in check. In theory, this system will ensure that nonlawyer-controlled MDPs respect, maintain, and enforce the ethical tenets of the legal profession, but in practice, the system suffers from two fatal flaws. First, if the present state of the UPL debate is any indica-

132. *Id.*

133. *Id.*

134. *Id.*

tion, there is little evidence that this regime will in fact be enforced. Second, assuming the impetus is found to enforce this system, the judicial resources demanded may prove too burdensome to maintain.

The Commission's proposed enforcement regime requires nonlawyer-controlled MDPs to submit a "written undertaking" to the "highest court" in each jurisdiction in which they operate, pledging its support of and conformity with the legal rules of professional conduct.¹³⁵ Within this document, the MDP must promise to "establish, maintain and enforce" procedures to maintain proper legal ethics, review these procedures annually, and amend them "as needed to ensure their effectiveness."¹³⁶ In addition, it must annually certify compliance with these established procedures and provide a copy of the certification to each lawyer in the MDP.¹³⁷ A copy of this annual certificate must also be filed with the court "along with relevant information about each lawyer who is a member of the MDP."¹³⁸ Finally, the MDP must also allow the court to conduct an "administrative audit . . . to determine and assure compliance."¹³⁹

It is difficult to predict how vigorously these regulations may be enforced, but the present state of the UPL debate provides a functional comparison. Many practicing attorneys are distraught over the high numbers of attorneys that have joined the ranks of nonlawyer professional service firms, particularly the Big Five. In their estimation, the services provided by many of these attorneys, while guised in the business parlance of "consulting" and "advising," are in fact the practice of law. As such, a movement is afoot to rein these non-practicing attorneys back under the rules of professional conduct through unauthorized practice of law suits. According to Lawrence Fox, lawyers practicing in accounting firms "are engaged in civil disobedience" by violating the Model Rules against fee-sharing, conflict of interest, and confidentiality.¹⁴⁰

The ABA has a long history of opposition to such practice, but very little in the way of enforcement to show for it. In 1961, through ABA Formal Ruling 297, the ABA cautioned against the practice of law in accounting firms, ruling that a lawyer employed by an accounting firm may not advise the firm's clients about their legal problems or engage in any related activity.¹⁴¹ But despite this 39-year-old ruling and a recent resurgence of ethical motivation, very few UPL investigations have in fact been launched against the Big Five and none have gone to trial. In 1997, the UPL Committee of the Supreme Court of Texas filed a complaint against Arthur Andersen, but after an 11 month investigation, the case

135. MDP Proposal, *supra* note 2, at Recommendation 14.

136. *Id.* at Recommendation 14(B) and (F).

137. *See id.* at Recommendation 14(F).

138. *Id.* at Recommendation 14(G).

139. *Id.* at Recommendation 14(H).

140. *ABA Delegates Vote Not to Approve MDPs "Unless and Until" More Study Dispels Risks*, 77 *Antitrust & Trade Reg. Rep.* (BNA) No. 1922, at 197 (Aug. 12, 1999).

141. *See* ABA Comm. on Prof'l Ethics, Formal Op. 297 (1961).

was dismissed at the close of a one-day hearing.¹⁴² Similar investigations have recently begun in Virginia (against Ernst & Young) and North Carolina (against several Big Five firms), but “these are sporadic events.”¹⁴³ The Maryland Bar Association reported 41 UPL complaints filed in 1998, but none were related to the Big Five or involved allegations connected to multidisciplinary practice.¹⁴⁴

Aside from these scant cases, UPL statutes, while on the books in every U.S. jurisdiction, are simply not being enforced against the Big Five. The services provided by their attorneys have been questionable at best for nearly 40 years, yet have gone virtually unchallenged. And despite the renewed ethical awareness that has come with the MDP debate, there is no evidence that any greater motivation will be found to actively enforce the compliance regime suggested by the MDP Commission.

But even if the proper motivation were marshaled, where will reformers find the proper resources to fight these battles? In the Texas suit mentioned above, according to the attorney that drafted the complaint, the reason for dropping the case “wasn’t lack of evidence but lack of resources.”¹⁴⁵ Arthur Andersen “simply overwhelmed the bar with a phalanx of defense lawyers.”¹⁴⁶ The Texas UPL Committee operates on a yearly budget of \$40,000, and after a certain point, their litigation simply ran out of steam.¹⁴⁷ The Commission’s compliance regime includes a fee provision to help pay for enforcement efforts, but it is difficult to imagine a filing fee sufficient to fund and allay the costs of MDP enforcement. Lawyer-controlled MDPs, according to the Commission, will be self-regulated, but nonlawyer-controlled MDPs require a near herculean marshaling of motivation and resources to properly regulate.

The over burdensome nature of the enforcement regime is the primary complaint of MDP Commission critics. From consumer groups to accounting firms, the proposed regulations are viewed as both far-fetched and excessive.¹⁴⁸ The Commission’s Proposal is guided by precisely the right principle, but has fostered entirely the wrong approach. Nonlawyer-controlled MDPs require greater regulation because they pose a significantly greater threat to legal ethics. But rather than develop an elaborate professional auditing system to anchor them to the rules of legal profes-

142. See Krysten Crawford, *The Enemy Has Landed, and They Count Beans*, THE AM. LAW. DEC. 1998, at 4.

143. M. Peter Moser, *The Argument For Change*, 9 EXPERIENCE 4, 38 (1999).

144. See *id.*

145. Crawford, *supra* note 142.

146. *Id.*

147. See testimony of Brent Clifton, Chairman of the Texas Unauthorized Practice of Law Task Force, meeting of the Dallas Bar Association (Jan. 19, 2000).

148. See Margaret A. Jacobs, *ABA Puts Off Vote on Nonlawyer Partnerships*, WALL ST. J., Aug. 11, 1999, at B9 (noting that consumer groups have “criticized the ABA proposal for excessively regulating” MDPs); Randy Myers, *Lawyers and CPAs: How the Landscape is Changing*, J. OF ACC., Feb. 2000, at 75 (noting critique from the AICPA of “an ABA plan to require MDPs controlled by nonlawyers to submit to annual certification and audit requirements by the courts”).

sional conduct, the Commission should abandon nonlawyer-controlled MDPs altogether.

C. NONLAWYER-CONTROLLED MDPs REJECTED AROUND THE WORLD

The more one studies and reads about the MDP debate, the more one gets the impression that the United States is terribly behind the times. According to news reports, MDPs have spread around the world with lightning speed, and the ABA has simply been slow to react. But while it is true that Europe, Australia, Canada, and areas of Asia, Africa, and South America all have an MDP presence to some degree, the conventional news story or tantalizing front page article often fails to qualify the MDPs it describes. MDPs exist in varying forms the world over, but the resounding trend is to reject the nonlawyer-control format and allow MDP formation in only a limited, lawyer-controlled fashion. The MDP Commission is thus treading in truly uncharted waters.

With respect to the MDP debate, the nations of the world fall into one of three categories: 1) those that have addressed MDPs, 2) those that are studying MDPs, but have yet to formulate an official position (the United States, for example), and 3) those that have yet to face MDPs at all. Different jurisdictions, because of their varied judicial systems, have developed a wide range of answers to the MDP question, but very few have taken the bold step to uniformly allow their existence absent lawyer control.

New South Wales, the southeastern Australian province that includes Sydney and the majority of Australian business (legal and otherwise), is the setting for perhaps the most far-reaching MDP developments in the world.¹⁴⁹ A 1994 amendment to the Legal Profession Act of 1987 formally sanctioned and allowed for the formation of MDPs. But even in 1994, when the global expansion of the Big Five was in its relative infancy (particularly with regard to expansion into legal services), New South Wales recognized the dangers of allowing MDPs to be controlled by nonlawyers. The 1994 amendment permits MDP formation, but "still provides that the solicitor members of any MDP must have control of the legal practice and majority voting rights in the MDP's affairs."¹⁵⁰ As a practical consequence, encroachment by the Big Five has come in the form of establishing separate law firms or affiliating with existing firms rather than setting up fully-integrated MDPs.¹⁵¹ In fact, as of July 1998, there were only 11 Australian MDPs formed under the 1994 legislation,

149. See Clark & Cook, *supra* note 13, at 472.

150. *Id.*

151. Three of the Big Five have ventured into the Australian legal market with stand-alone law firms. Andersen Legal was established as a separate law firm at the end of 1994 and then "merged with a small- to medium-sized Sydney firm . . . in February 1995." *Id.* at 473. KPMG and Ernst & Young have also established Australian legal arms, but with a smaller presence. See *id.* at 474.

none of which included any of the Big Five accounting firms.¹⁵²

France is also cited as a legal foothold for the Big Five, but such far-reaching credit can be very misleading. The emerging MDP format in France is one of close association between the Big Five and law firms, but falls far short of complete integration. In fact, despite allowing a more direct association between lawyers and accounting firms in July 1998, the Paris Bar “stopped short of full partnership with nonlawyers—that is, lawyers must swear an oath that they are properly independent from their accounting arm.”¹⁵³ Such opposition to MDP formation has been echoed by the French Bar Association.¹⁵⁴

Debate is ongoing throughout the rest of the world, but many significant legal bodies have formally stated their opposition to MDPs. The Council of the Bars and Law Societies of the European Union (a coalition of seven European legal governing bodies) voted to ban MDPs entirely in early January of 2000.¹⁵⁵ The United Kingdom has endorsed fully integrated MDPs, but has taken great lengths to explain that such integration would be extended only to solicitors and require practicing barristers to remain independent. In Canada, the debate remains divided. The Canadian Bar Association has endorsed a position similar to that of the ABA’s MDP Commission, but the Law Society of Upper Canada (the legal governing body for Ontario) has encouraged its attorneys to associate only with MDPs that are lawyer-controlled.

In sum, foreign jurisdictions are far from embracing the nonlawyer-controlled format for MDPs and in many instances have specifically designed systems to prohibit their formation and development. The ABA, in endorsing such a position, would thus be the first major professional legal body to adopt and advance MDPs under nonlawyer supervision. The debate abroad is far more advanced than that in the United States and, despite the various idiosyncracies of foreign legal systems, it serves as a firm warning against nonlawyer-controlled MDPs in America as well.

D. NONLAWYER-CONTROLLED MDPs POLITICALLY INFEASIBLE

Regardless of the countervailing international trends against nonlawyer-controlled MDPs, the MDP Commission must first face the political realities of its Proposal here in America. MDPs will fundamentally alter the practice of law, and should not be welcomed *carte blanche* without thoughtful discussion and debate. The Commission has worked tirelessly to analyze this issue, but the depths of this study have yet to percolate into the mainstream of the profession. But while serious and lengthy debate is necessary, it is also well-recognized that time is of the essence and that the ABA is gradually losing its ability to shape and influence the MDP debate with every passing day. The further the Big Five encroach,

152. *See id.* at 475.

153. Evans & Boddington, *supra* note 15, at 464.

154. *See Michelin Man Joins Archibald Andersen*, *THE LAW.*, Feb. 21, 2000.

155. *See Abigail Townsend, Defiance or Alliance?*, *THE LAW.*, Jan. 10, 2000, at 16.

the greater the urgency for the American legal profession to respond. The political climate has yet to ripen in favor of nonlawyer-controlled MDPs, and a proposal promoting their formation will continue to fail. The MDP Commission should amend its proposal and renew the debate promoting only lawyer-controlled MDPs, a fundamental compromise that enjoys broad support and will help the profession counter the advancement of the Big Five.

The American MDP debate began in earnest with the release of the MDP Commission's Proposal in June 1999. Since that time, attorneys around the country have been forced to address this growing concern and have struggled to fashion a response. As has been discussed, this is a complicated debate that is wrought with ethical difficulty. It represents fundamental changes in the way in which American attorneys practice law and has met with strong resistance from many different sectors of the profession. But as the debate has grown, so has understanding—understanding of the advantages of some form of combined professional practice and understanding of the consequences for failing to respond to current market trends.

The ABA's first opportunity to collectively express its feelings about MDPs occurred with the August 1999 vote on the MDP Commission Proposal. The Proposal promoted MDP formation in all forms and was tabled by a vote of 304-98.¹⁵⁶ Rather than vote directly on the Proposal, the House of Delegates opted to postpone any such vote "unless and until" adequate empirical research demonstrated that public demand for MDPs actually exists. The Commission continued to work, criss-crossing the nation from town halls to weekend seminars, all the while stressing the advantages of MDPs and the insight of their Proposal. But while the opportunity existed to fundamentally amend and revise their Proposal, the Commission only altered its approach on the fringes. The Proposal presented in New York far too closely resembled the Atlanta version, and was soundly defeated 314-106.

The next question to be asked, is to what degree has the debate advanced since the July 2000 vote? If sufficient debate has placated all existing fears, then the profession is ready for MDPs in any form. But if sufficient doubt remains, the Proposal in its existing form risks continued defeat.

This paper suggests the latter. Debate has been ongoing throughout many U.S. jurisdictions since the August 1999 vote and several bar associations have reached decisions and promoted various proposals. The resounding message, which should be heeded by the MDP Commission, is that nonlawyer-controlled MDPs remain too difficult ethically to be accepted and that lawyer-controlled MDPs are the furthest the House of Delegates may be willing to indulge.

156. See *ABA Delegates Vote Note to Approve MDPs "Unless and Until" More Study Dispels Risks*, 77 *Antitrust & Trade Reg. Rep.* (BNA) No. 1922, at 197 (Aug. 12, 1999).

The MDP Commission must recognize the political realities facing their Proposal. A platform that continues to endorse nonlawyer-controlled MDPs, regardless of any supposed protections, will surely fail. If any progress is to be made, the Proposal must be amended to remove the nonlawyer MDP option and focus solely on MDPs that lie within the control of practicing attorneys.

E. MDP COMMISSION IS PREDISPOSED AGAINST NONLAWYER-CONTROLLED MDPs

A final point is that dismissing nonlawyer-controlled MDPs should not be a very difficult pill for the MDP Commission to swallow. Throughout its proposal, it is very clear that although nonlawyer-controlled MDPs are allowed, they are held on a very tight leash. The professional audit required of such MDPs may have the practical effect of discouraging their formation altogether. The Big Five have expressed their disdain for the strict application of such procedures and it is likely that they will simply proceed with their present approach of network development rather than tangle with the ethical audit procedures suggested in the Commission's Proposal. If these strict requirements for nonlawyer-MDPs are any indication of such an intent, it should not be difficult for the Commission to take the next step and outlaw their formation in an outright fashion.

VI. CONCLUSION

The time for Multidisciplinary Practices has arrived in America. The practical and economic convenience of "one stop shopping" has reached professional services, and the only questions that remain revolve around "how" rather than "if." The ABA's MDP Commission has developed a Proposal to amend the Model Rules of Professional Conduct, repeal the present ban on fee-sharing with nonlawyers, and allow for MDP formation, but it has done so in a reckless manner. The Commission's proposal is an unrealistic vision of MDPs that ignores the ethical, practical, and political difficulties of allowing MDPs to form under nonlawyer control. MDPs will undeniably benefit the American legal profession, but must be welcomed with careful attention and great caution. Professional combinations that remain under the control and direction of practicing attorneys retain the necessary ethical standards of the legal profession and allow for the proper development of the MDP format. If any advancement within the legal community is to occur, the MDP Commission should amend its Proposal—denying nonlawyer-controlled MDPs the opportunity to gain a foothold and allowing lawyer-controlled MDPs to become the standard.

Casenotes

