

MULTIDISCIPLINARY PRACTICES: CHANGING THE GLOBAL VIEW OF THE LEGAL PROFESSION

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1. INTRODUCTION

The expansion of professional service firms into the business of law has been called the most important issue to face the legal profession.¹ This phenomenon is most visible in the activity of the Big Five accounting firms.² These firms, once involved only in accounting and tax work, have expanded into contracts, mergers and acquisitions, and even litigation.³ “All of the Big Five are actively pursuing clients— and offering legal services— in markets as diverse as France, Spain, Australia, Canada, and the Confederation of the Independent States of the former Soviet Union.”⁴ Most European countries allow accounting firms to engage the practice of law themselves or to affiliate with independent law firms.⁵

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¹ See Commission on Multidisciplinary Practice to the ABA House of Delegates, *Background Paper on Multidisciplinary Practice: Issues and Developments*, Jan. 1999, at Cover Letter [hereinafter *Background Paper*].

² The Big Five accounting firms are PricewaterhouseCoopers, Arthur Andersen, KPMG Peat Marwick, Ernst & Young, and Deloitte Touche Tohmatsu.

³ See John Gibeaut, *Squeeze Play*, A.B.A. J., Feb. 1998, at 42, 42-43. Much of the expansion of the Big Five is a natural extension of services they already provide. Elijah Farrel, *Accounting Firms and the Unauthorized Practice of Law: Who Is the Bar Really Trying to Protect?*, 33 IND. L. REV. 599, 599 (2000).

⁴ Dianne Molvig, *Multidisciplinary Practices: Service Package of the Future?*, WIS. LAW., Apr. 1999, at 44, available at <http://www.wisbar.org/wislawmag/archive/april99/mdp2.html>.

⁵ See Gibeaut, *supra* note 3, at 44. Businesses combining the services of attorneys and other professionals, commonly referred to as multidisciplinary practices, are allowed in Australia, Canada, and other European countries such as France and Spain. See Molvig, *supra* note 4, at 11.

The Big Five accounting firms have made “significant headway into the practice of law in Europe,”⁶ and “most observers agree, the accounting giants are muscling into the [U.S.] legal market.”⁷ So why is the incursion of the Big Five on U.S. law firms a problem? Some fear that even though “lawyers retain a monopoly on the representation of clients in court, many other services are up for grabs.”⁸ However, the legal profession cannot justify ethics rules because of the economic protections they afford attorneys; to be justified, they must serve the public interest. The real debate is whether multidisciplinary practices (“MDPs”) actually serve the clients’ best interest or are detrimental because they trample the attorney/client privilege, pose problems regarding conflicts of interest, and infringe on professional independent judgment.⁹

In 1998, the ABA created the Commission on Multidisciplinary Practice (“Commission”) to study MDPs and to propose changes to the Model Rules of Professional Conduct. In August 1999, the Commission recommended that the ABA House of Delegates vote to amend Model Rule 5.4, which currently bans fee-splitting and partnerships with non-attorneys.¹⁰ However, the ABA House of Delegates voted in 1999 to postpone amendment of the Model Rules until further study demonstrated that the modification would further the public interest and would not jeopardize lawyers’ ethical obligations.¹¹ In July 2000, after an

⁶ John Gibeaut & James Podgers, *Feeling the Squeeze*, A.B.A. J., Oct. 1998, at 88; Gibeaut, *supra* note 3, at 42.

⁷ Gibeaut, *supra* note 3, at 43; see also Lawrence J. Fox, *Defend Our Clients, Defend Our Profession*, PA. LAW., July-Aug. 1999, at 20, 21 (1999) (“While we slept, the Big Five have systematically hired thousands of our best and brightest.”).

⁸ Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559, 562 (1992).

⁹ Donald S. Gray, *Multidisciplinary Practice of Law*, ORANGE COUNTY LAW., Apr. 1999, at 5.

¹⁰ See Commission on Multidisciplinary Practice Report, at <http://www.abanet.org/cpr/mdpreport.html> (last visited Oct. 16, 2000); MODEL RULES OF PROF'L CONDUCT R. 5.4 (1998); House of Delegates 2000 Annual Meeting Summary of Recommendations, at <http://www.abanet.org/leadership/recommend2/117.html> (last visited Sept. 29, 2000).

¹¹ Commission on Multidisciplinary Practice, Florida Bar Recommendation, at <http://www.abanet.org/cpr/flbarrec.html> (last visited Oct. 2, 2000). The ABA House of Delegates adopted the resolution put forth by the Florida Bar at the August 1999 meeting. *Id.*

additional year of study, the Commission again recommended amending Model Rule 5.4 to the ABA House of Delegates.¹² The ABA House of Delegates, however, voted “by a 3-1 margin . . . to continue the ban on lawyers partnering with non-lawyers in multidisciplinary practices.”¹³

Although the ABA rejected the Commission’s proposal regarding MDPs, the issue is far from decided. Current law actually requires attorneys to work with professionals from other disciplines. In fact, MDPs are presently in existence in the United States. MDPs are not a new phenomenon, nor are they going to disappear.

This Comment will give an overview of the current legal situation regarding MDPs in the United States. Section 2 analyzes the current ethics rules governing the creation of MDPs in the United States and compares it to the legal system in Canada. Section 3 explores the significance of the problems surrounding MDPs and investigates the activities of the Big Five accounting firms. Section 4 surveys the arguments in favor of and against allowing MDPs and Section 5 suggests several reasons why the Model Rules should be amended to allow MDPs. This Comment concludes that Model Rule 5.4 should be amended for three reasons: first, the current rule serves lawyers’ financial interests rather than the public interest; second, it is an economic rather than ethical rule and does not belong in the Model Rules of Professional Conduct; and third, foreign countries provide a positive model endorsing the formation of MDPs.

2. OVERVIEW OF THE CURRENT LEGAL SITUATION

2.1. *Rules Governing MDPs*

A multidisciplinary practice provides integrated services from both lawyers and non-lawyers.¹⁴ In a multidisciplinary partnership, lawyers share fees or enter into partnerships with professionals from different disciplines (e.g., a lawyer and an account-

¹² See House of Delegates 2000 Annual Meeting Summary of Recommendations, at <http://www.abanet.org/leadership/recommend2/117.html> (last visited Sept. 29, 2000).

¹³ Wendy Davis, *MDP Overwhelmingly Rejected*, N.Y.L.J., July 12, 2000, at 1.

¹⁴ See *Background Paper*, *supra* note 1, at 4 n.1.

ant, a lawyer and a financial planner, or a lawyer and a social worker).¹⁵ The following Section examines how different rules in a variety of jurisdictions treat MDPs.

2.2. ABA Model Rule 5.4

The ABA's Model Rules of Professional Conduct ("Model Rules") preclude lawyers from sharing fees or entering into partnerships with non-lawyers.¹⁶ The Model Rules are generally acknowledged as a national standard and the ABA is accepted as the "national leader for discussing, drafting, and promulgating rules governing lawyer conduct."¹⁷

The current version of Rule 5.4 effectively bans MDPs with provisions designed to prevent or limit the influence by non-lawyer third parties.¹⁸ Model Rule 5.4(a) prohibits lawyers from fee-sharing with non-lawyers, Model Rule 5.4(b) prevents partnerships with non-lawyers if the activities are not ancillary to the practice of law, and Model Rule 5.4(d) precludes lawyers from

¹⁵ See *id.* The MDP Commission's 1999 Final Report offered the following definition of MDPs:

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

Commission on Multidisciplinary Practice Report, at <http://www.abanet.org/cpr/mdpfinalreport.html> (last visited Nov. 16, 1999).

¹⁶ MODEL RULES OF PROF'L CONDUCT R. 5.4 (1998).

¹⁷ Promoting Professionalism: ABA Programs, Plans and Strategies, at 9 [hereinafter Promoting Professionalism]. Further information on this material may be obtained by calling 1-800-285-2221.

¹⁸ See *Background Paper*, *supra* note 1, at 11. These rules do not preclude, and the current debate does not include the issue of, lawyers working with professionals in other disciplines to solve client problems when they are not engaged in fee splitting or partnerships.

There is *nothing* in those rules that prohibits a lawyer from working with a professional trained in another discipline if such cooperation is needed to solve the client's difficulties. A lawyer may directly employ such a professional on the lawyer's staff, retain an unaffiliated professional with the client's counsel, or assist a professional who is separately retained by the client.

Id. at 11.

practicing in a professional corporation if a non-lawyer owns an interest, has the right to control, or is a director in that corporation.¹⁹

2.3. History of the Code

Since 1928, rules governing lawyers in the United States have precluded the formation of MDPs.²⁰ The stated purpose of the

¹⁹ Model Rule 5.4 states:

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

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and

(3) a lawyer or law firm may include nonlawyer employees in compensation or retirement plans, even though the plan is based in whole or in part on a profit-sharing arrangement.

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

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

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

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

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

MODEL RULES OF PROF'L CONDUCT R. 5.4 (1998).

²⁰ Ethical standards promulgated by the ABA have been adopted by forty-two jurisdictions; however, with the exception of the District of Columbia (discussed *infra* Section 2.4.), prohibitions against forming partnerships with nonlawyers are contained in the ethics codes of all states. See ABA/BNA LAW. MAN. PROF. CONDUCT 91:401.

rule prohibiting lawyers from forming partnerships with non-lawyers is to safeguard lawyers' professional judgment from the pressures and problems that could arise if non-lawyers had authority over lawyers.²¹ The fear that lawyers would violate their ethical duties when pressured by non-lawyers is based on the realization that non-lawyers "are not subject to the same ethical mandates regarding independence, conflicts of interest, fees and the other important provisions of the [legal] profession's code of conduct."²²

2.3.1. *Canons of Professional Ethics*

Although not found in the original 1908 version of the ABA Canons of Professional Ethics, prohibitions against "nonlawyer financial or managerial involvement in the business of law" were added in 1928.²³ The addition of Canons 33 to 35 in 1928 was interpreted to "prohibit nearly any form of business association between lawyers and nonlawyers that offered legal services to the public."²⁴

²¹ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-392, in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998, 311-319 (1995) [hereinafter ABA Ethics Opinion]. "[T]he Model Code and the Model Rules both seek to protect the independence of the 'professional judgment of a lawyer' in the following general ways: prohibiting lawyers from forming partnerships with a nonlawyer to practice law and proscribing the sharing [of] fees with a nonlawyer." Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2587 (1999); see also Farrell, *supra* note 3, at 616.

²² ABA Ethics Opinion, *supra* note 21.

²³ Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 584 (1989).

²⁴ *Id.* at 588. Canon 33 provided in part:

In the formation of partnerships for the practice of law, no person should be admitted or held out as a practitioner or member who is not a member of the legal profession, duly authorized to practice, and amenable to professional discipline. . . . Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where a part of the partnership business consists of the practice of law.

CANONS OF PROF'L ETHICS, Canon 33 (1928). Canons 34 and 35 also contain related provisions. Canon 34 provided that "[n]o division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility." CANONS OF PROF'L ETHICS, Canon 34 (1928). Canon 35 provided that "[t]he professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. . . . He should avoid all relations which direct the perform-

2.3.2. *Model Code of Professional Responsibility*

The Canons were replaced by the Model Code of Professional Responsibility ("Model Code") in 1969.²⁵ Portions of Canons 33 and 34 became Disciplinary Rules in the Model Code; however, Canon 35, which prohibited lawyers from permitting nonlawyers to control their services, did not survive in the new Model Code as a discrete rule.²⁶ Canon 33, prohibiting partnerships between lawyers and non-lawyers became Disciplinary Rule ("DR") 3-103(A),²⁷ and Canon 34, which prohibited fee-splitting, became DR 3-102(A).²⁸

2.3.3. *Model Rules of Professional Conduct*

Ethics rules in the United States underwent another major revision and in 1983 the Model Rules of Professional Conduct ("Model Rules") replaced the Model Code of Professional Responsibility.²⁹ Although the 1983 changes did not ultimately affect Model Rule 5.4, which bans non-lawyer involvement in the law, the rule was the subject of much review and debate by the ABA Commission on Evaluation of Professional Standards, known as the "Kutak Commission."³⁰

ance of his duties by or in the interest of such intermediary." CANONS OF PROF'L ETHICS, Canon 35 (1928).

²⁵ One perspective is that the Code's replacement did not change the treatment of MDPs.

Within five years of the ABA's adoption of the Model Code, practically every state in the union had adopted it either officially or unofficially. Although the format and the content of the old Canons changed dramatically in the new Model Code, the content of the restrictions on lawyer-nonlawyer business associations did not.

Andrews, *supra* note 23, at 588.

²⁶ *Id.* at 589.

²⁷ See *id.* at 588. DR 3-103(A) provided that "[a] lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." MODEL CODE OF PROF'L RESPONSIBILITY DR 3-103(A) (1969).

²⁸ Andrews, *supra* note 23, at 588. DR 3-102(A) provided that "[a] lawyer or law firm shall not share legal fees with a non-lawyer. . . ." MODEL CODE OF PROF'L RESPONSIBILITY DR 3-102(A) (1969).

²⁹ Andrews, *supra* note 23, at 593.

³⁰ *Id.* at 593-96.

In 1976, the Kutak Commission proposed an amended Rule 5.4 that would have allowed the formation of MDPs.³¹ The Kutak Commission's version of Rule 5.4 allowed lawyers "to share fees with nonlawyers . . . so long as the nonlawyers agreed not to influence the lawyer's independent professional judgment and to abide by the rules of legal ethics regarding confidentiality, solicitation, and legal fees."³² However, the proposed version of Rule 5.4 was opposed on several grounds, including fear that it would permit accounting firms to open law firms and compete with traditional ones,³³ fear that non-lawyer ownership would threaten lawyers' independent judgment, and fear that it would have a "fundamental but unknown effect on the legal profession."³⁴ Based on these objections, the proposal under the Kutak Commission addressing the subject of non-lawyer involvement in the law was rejected in favor of an absolute ban on fee sharing.³⁵

³¹ See *id.* at 593-94. The text of the proposed amended Rule 5.4 reads as follows:

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

- (a) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
- (b) Information relating to representation of the client is protected as required by Rule 1.6;
- (c) The organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rule 7.2 or Rule 7.3; and
- (d) The arrangement does not result in charging a fee that violates Rule 1.5.

Id.

³² ABA Ethics Opinion *supra* note 21; Farrell, *supra* note 3, at 618.

³³ Another concern was that large department stores, such as J.C. Penny or Sears, would open their own law firms and provide even greater competition. Andrews, *supra* note 23, at 595-96.

³⁴ *Id.*

³⁵ See *id.* at 596.

2.4. Washington, D.C.'s Version

Washington, D.C. ("D.C.") is the only jurisdiction that permits lawyers to share fees with non-lawyers.³⁶ Rule 5.4 of the D.C. Rules of Professional Conduct allows lawyers and non-lawyers to form partnerships and share fees.³⁷ The ethics rule

³⁶ Gianluca Morello, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should be Permitted in the United States*, 21 *FORDHAM INT'L L.J.* 190, 207 (1997); Janet Conley, *Ernst & Young Set to Hire Tax Lawyers*, *LEGAL INTELLIGENCER*, Oct. 7, 1999, at 4.

³⁷ Rule 5.4 ("Professional Independence of a Lawyer") of the Washington, D.C. Rules of Professional Conduct provides:

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

- (1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;
- (3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
- (4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b).

(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

- (1) The partnership or organization has as its sole purpose providing legal services to clients;
- (2) All persons having such managerial authority or holding a financial interest undertake to abide by these rules of professional conduct;
- (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;
- (4) The foregoing conditions are set forth in writing.

seems broad but it “does not give blanket approval to a multidisciplinary practice.”³⁸ The D.C. rule restricts fee-sharing and partnership agreements to organizations that are structured as law firms and solely provide legal services to clients.³⁹ The D.C. rule is further tempered by ABA Formal Opinion 91-360, which prohibits law firms with offices in more than one jurisdiction from forming partnerships with non-lawyer professionals in the D.C. office.⁴⁰ Thus, D.C. is the only jurisdiction in the United States that allows fee-splitting and partnerships with non-attorneys; however, such arrangements are only allowed where the attorneys are providing legal services and the non-attorneys are providing services that are incidental to the legal services.

2.5. The Commission on Multidisciplinary Practice's 1999 and 2000 Recommendations and the ABA House of Delegates' Response

2.5.1. MDP Commission's 1999 Report and Recommendation

In August 1998, Philip S. Anderson, former President of the American Bar Association, appointed a twelve-person Commission on Multidisciplinary Practice⁴¹ to “study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public.”⁴² Well-known practitioners, judges, and academics comprised the Committee to

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

WASHINGTON, D.C. RULES OF PROF'L CONDUCT R. 5.4 (1999).

³⁸ *Background Paper*, *supra* note 1, at 14.

³⁹ *Id.* at 17 n.5; Morello, *supra* note 36, at 207-09.

⁴⁰ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-360 (1991); *see also* Molvig, *supra* note 4, at 12.

⁴¹ *Background Paper*, *supra* note 1, at 2; Commission on Multidisciplinary Practice Report, *supra* note 10.

⁴² *Background Paper*, *supra* note 1, at App. A; News Release, ABA President Philip S. Anderson Appoints Commission on Multidisciplinary Practice, Aug. 4, 1998.

provide a comprehensive sampling of views within the legal profession.⁴³

"The Commission was asked to place the interests of clients and the public ahead of those of the bar, as lawyers do every day in resolving potential conflicts of interest."⁴⁴ The Commission heard sixty hours of testimony from fifty-six witnesses and reviewed written comments from numerous others.⁴⁵ In January 1999, the MDP Commission published an informational paper addressing the developments in multidisciplinary practice and the issues facing the business of law.⁴⁶ The Commission also submitted reports with recommendations endorsing the amendment of Rule 5.4 at both the 1999 and 2000 Annual Meetings of the American Bar Association.⁴⁷

2.5.2. MDP Commission's Final Report 1999

In a unanimous decision, the Commission recommended that Rule 5.4 be revised to allow fee-splitting and partnerships between lawyers and non-lawyers.⁴⁸ The Commission wrote that "[w]hile

⁴³ PA. BAR ASS'N COMM'N ON MULTIDISCIPLINARY PRACTICE AND RELATED TRENDS AFFECTING THE PROFESSION, PRELIMINARY REPORT TO 1999 MID-YEAR MEETING OF PBA HOUSE OF DELEGATES 4 (Sept. 15, 1999) [hereinafter PRELIMINARY REPORT]; *Background Paper*, *supra* note 1, at 2.

⁴⁴ Philip S. Anderson, *If a Multidisciplinary Practice Offers Legal Services, Its Lawyers Must Be Regulated*, NAT'L L.J., Aug. 9, 1999, at B7.

⁴⁵ See Commission on Multidisciplinary Practice, Report to the House of Delegates, at <http://www.abanet.org/cpr/mdpreport.html> (last visited Nov. 8, 2000); *ABA Multidisciplinary Practice Commission Recommends Amending Rules to Allow MDPs*, 67 LEGAL NEWS, June 15, 1999, at 2742 [hereinafter *ABA Recommendation*]. The Commission's Report also noted that

[t]estimony and/or written materials have been 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.

Commission on Multidisciplinary Practice, *supra* note 45.

⁴⁶ See *Background Paper*, *supra* note 1; PRELIMINARY REPORT, *supra* note 43, at 4.

⁴⁷ See Commission on Multidisciplinary Practice, *supra* note 45; see also Commission on Multidisciplinary Practice Report to the House of Delegates, at <http://www.abanet.org/mdpfinalrep2000.html> (July 2000).

⁴⁸ The first recommendation of the ABA Commission stated: "The legal profession should adopt and maintain rules of professional conduct that pro-

detailed empirical data is not available, representatives of both individual and corporate clients expressed support for relaxing the rules of professional conduct that currently either foreclose or make it extremely difficult" to form MDPs.⁴⁹

The Commission decided that clients have an interest in having the option of lawyers and non-lawyers practicing together in MDPs.⁵⁰ The highlights of the Commission's report are:

1. Lawyers would be able to form partnerships, and share legal fees, with nonlawyers.
2. Lawyers in MDPs offering legal services would be bound by the same ethics rules as lawyers in traditional law firms, including the imputation-of-knowledge standard of Model Rule 1.10.
3. Nonlawyers working on the same team as lawyers on a client's matter within an MDP would be bound by the lawyer's conflict rules as to that matter.
4. Nonlawyers in MDPs would not be permitted to practice law.

tect its core values, independence of professional judgment, protection of confidential client information, and loyalty to the client through avoidance of conflicts of interest, but should not permit existing rules to unnecessarily inhibit the development of new structures for the more effective delivery of services and better public access to the legal system." ABA Commission on Multidisciplinary Practice Report to the House of Delegates: Recommendation, at <http://www.abanet.org/cpr/mdprecommendation.html> (last visited Nov. 8, 2000).

⁴⁹ Commission on Multidisciplinary Practice, *supra* note 45; PRELIMINARY REPORT, *supra* note 43, at 8.

⁵⁰ See Anderson, *supra* note 44, at B7.

5. Safeguards must be implemented to guarantee the ability of lawyers within an MDP to exercise independence of their professional judgment, as lawyers in law firms, corporations, and other existing practice forms are already bound to do.⁵¹

The Commission's focus in preparing the proposed regulation was on the protection of the core values of the legal system: preserving the independence of lawyers' advice, protecting clients' secrets, and loyalty to clients through avoidance of conflicts of interest. "These goals would be attained by making professional conduct rules that apply to lawyers in traditional law firms apply equally to any lawyer delivering legal services to the public, regardless of the practice setting."⁵²

The MDP Commission submitted a draft of a new Model Rule 5.8, entitled "Responsibilities of a Lawyer in a Multidisciplinary Practice Firm."⁵³ The proposed rule required that MDPs be subject to the same ethical rules that apply to lawyers in traditional firms,⁵⁴ adopt specific procedures and policies to protect the lawyers' core values, obtain licenses to practice as MDPs, and submit to annual audits.⁵⁵ Neither the proposed rule nor the

⁵¹ *ABA Recommendation*, *supra* note 45, at 2743.

⁵² Anderson, *supra* note 44, at B7.

⁵³ Commission on Multidisciplinary Practice, *supra* note 45, at App. A.

⁵⁴ In addition, the highest appellate state court of each state would be responsible for regulating MDPs. *See id.* "MDPs owned by nonlawyers would be required to obtain a license to practice as an MDP, and the license fees would finance the cost of regulation." Anderson, *supra* note 44, at B1. "A licensed MDP would have to certify at specified intervals, usually every year or two, that it is in compliance with the rules and that nonlawyers at the firm have not interfered with the independence of advice given by lawyers." *Id.*

Critics point out that state supreme court justices already have too much to do and should not be expected also to license MDPs and regulate lawyers who practice in them. If state supreme courts do not protect the public, however, who will? . . .

The alternatives are to permit MDP lawyers to remain unregulated, to attempt to regulate them without their employers' consent or to prohibit lawyers from providing services in MDPs. All seem impractical, if not improvident, compared to the commission's proposal.

Id.

⁵⁵ *See ABA Recommendation*, *supra* note 45, at 2743; *see also* Anderson, *supra* note 44.

Commission's recommendation would allow non-lawyers to practice law.⁵⁶

2.5.3. ABA Resolution, August 1999

In August 1999, the ABA House of Delegates decided to postpone endorsing the Commission's proposal⁵⁷ and stated that it would not sanction MDPs until further study showed that the

⁵⁶ The Commission defined the practice of law as including the following conduct when undertaken on another's behalf:

- (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 at 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; or
- (f) Furnishing an attorney or attorneys, or other persons, to render the services described in subparagraphs (a) through (e) above.

Commission on Multidisciplinary Practice, *supra* note 45, at App. A.

⁵⁷ That decision stated:

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

ABA Resolution Adopted by the House of Delegates, Aug. 1999, at <http://www.abanet.org/cpr/flbarrec.html> (last visited Nov. 9, 2000).

formation of MDPs would further the public interest rather than jeopardize the core values that the ABA sought to protect.⁵⁸

2.5.4. *MDP Commission's 2000 Report and Recommendation*

After an additional year of careful study, the MDP Commission once again proposed a “policy to permit lawyers to share fees and join with nonlawyers in a practice that delivers both legal and nonlegal professional services . . . provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services.”⁵⁹ The Commission stated that “[t]he forces of change are bearing down on society and the legal profession with an unprecedented intensity . . . [and the] legal profession must take a proactive role . . . in order to best serve the public interest and maintain its crucial role in the maintenance of a democratic society.”⁶⁰ The MDP Commission recommended the following:

RESOLVED, that the American Bar Association amend the Model Rules of Professional Conduct consistent with the following principles:

⁵⁸ *ABA Refuses to Change Ethics Rules Unless Studies of MDPs Dispel Concerns*, 15 CONFERENCE REP., Aug. 18, 1999, at 396.

⁵⁹ A.B.A., COMMISSION ON MULTIDISCIPLINARY PRACTICE REPORT TO THE HOUSE OF DELEGATES, at <http://www.abanet.org/cpr/mdpfinalrep2000.html> (last visited Oct. 24, 2000).

⁶⁰ *Id.* The Commission found that the driving forces behind change in the legal profession are:

continued client interest in more efficient and less costly legal services; client dissatisfaction with the delays and outcomes in the legal system as they affect both dispute resolution and transactions; advances in technology and telecommunications; globalization; new competition through services such as computerized self-help legal software, legal advice sites on the Internet, and the wide-reaching, stepped-up activities of banks, investment companies, and financial planners providing products that embody a significant amount of legal engineering; and the strategy of Big Five professional services firms and their smaller-size counterparts that has resulted in thousands of lawyers providing services to the public while denying their accountability to the lawyer regulatory system.

Id.

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

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

Regulatory authorities should enforce existing rules and adopt such additional enforcement procedures as are needed to implement these principles and to protect the public interest.

The prohibition on nonlawyers delivering legal services and the obligations of all lawyers to observe the rules of professional conduct should not be altered.

Passive investment in a Multidisciplinary Practice should not be permitted.⁶¹

The Commission's Recommendation in favor of allowing MDPs was submitted to the House of Delegates for consideration at the 2000 Annual Meeting.⁶² After two years of extensive study,

⁶¹ *Id.*

⁶² *Id.*

the Commission believed that its proposal “recognize[d] the realities of a changing marketplace, open[ed] up new avenues for service to clients, respond[ed] to the suggestions of consumer advocates, and provide[d] new opportunities for lawyers.”⁶³ The ABA House of Delegates did not agree.

2.5.5. *ABA Resolution, July 2000*

On July 11, 2000, by a margin of nearly 3-to-1, the Commission’s Recommendation was rejected.⁶⁴ The anti-MDP resolution⁶⁵ was sponsored by New York, New Jersey, Illinois, Florida,

⁶³ *Id.*

⁶⁴ See John Gibeaut, “*It’s a Done Deal*”: *House of Delegates Vote Crushes Chances for MDP*, 86 A.B.A. J. 92, 93 (2000) (“The 314-106 vote at the New York sessions of the association’s annual meeting came after a coalition of state and local bars went head-on against the ABA Commission on Multidisciplinary Practice, which had pushed for relaxation of professional conduct rules to allow lawyers and other disciplines to join together as single businesses.”).

⁶⁵ The anti-MDP resolution included the following points:

RESOLVED, that each jurisdiction is urged to revise its law governing lawyers to implement the following principles and preserve the core values of the legal profession:

1. It is in the public interest to preserve the core values of the legal profession, among which are:
 - a. the lawyer’s duty of undivided loyalty to the client;
 - b. the lawyer’s duty competently to exercise independent legal judgment for the benefit of the client;
 - c. the lawyer’s duty to hold client confidences inviolate;
 - d. the lawyer’s duty to avoid conflicts of interest with the client; and
 - e. the lawyer’s duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.
2. All lawyers are members of one profession subject in each jurisdiction to the law governing lawyers.
3. The law governing lawyers was developed to protect the public interest and to preserve the core values of the legal profession, that are essential to the proper functioning of the American justice system.
4. State bar associations and other entities charged with attorney

and Ohio. The resolution enumerated the “core values” of the legal profession and announced that MDPs were not compatible with those values.⁶⁶ In addition, the July vote disbanded the ABA’s Commission on Multidisciplinary Practice.⁶⁷

discipline should reaffirm their commitment to enforcing vigorously their respective law governing lawyers.

5. Each jurisdiction should reevaluate and refine to the extent necessary the definition of “the practice of law.”

6. Jurisdictions should retain and enforce laws that generally bar the practice of law by entities other than law firms.

7. The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.

8. The law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised.

FURTHER RESOLVED that the Standing Committee on Ethics and Professional Responsibility of the American Bar Association shall, in consultation with state, local and territorial bar associations and interested ABA sections, divisions, and committees undertake a review of the Model Rules of Professional Conduct (“MRPC”) and shall recommend to the House of Delegates such amendments to the MRPC as are necessary to assure that there are safeguards in the MRPC relating to strategic alliances and other contractual relationships with nonlegal professional service providers consistent with the statement of principles in this Recommendation.

FURTHER RESOLVED that the American Bar Association recommends that in jurisdictions that permit lawyers and law firms to own and operate nonlegal businesses, no nonlawyer or nonlegal entity involved in the provision of such services should own or control the practice of law by a lawyer or law firm or otherwise be permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person.

FURTHER RESOLVED that the Commission on Multidisciplinary Practice be discharged with the Association’s gratitude for the Commission’s hard work and with commendation for its substantial contributions to the profession.

ILL. STATE BAR ASS’N ET AL., Recommendation, at <http://www.abanet.org/cpr/mdprecom10F.html> (last visited Oct. 24, 2000).

⁶⁶ Wendy Davis, *ABA Emphatically Rejects MDPs*, NAT’L L.J., July 24, 2000, at A5.

⁶⁷ See Gibeaut, *supra* note 64, at 92.

The ABA House of Delegates' recent decision on the MDP issue has not settled the issue. Although the Commission completed its study, the August vote was premature, as many state and local bar associations have yet to finish their individual studies of the MDP issue.⁶⁸ The states that have commissioned a study of MDPs but have not yet taken action include more than 500,000 lawyers, which is about half of the lawyers licensed in the United States.⁶⁹ The outcome of these studies could reverse the 3-to-1 margin by which the MDP proposal was voted down this year.

In the meantime, the House of Delegates has voted to "preserve its core values" and maintain the status quo.⁷⁰ However, as former ABA President Philip Anderson said, the problem with the House of Delegates vote is that "the ABA has lost the chance to provide essential leadership on the most crucial issue of our generation"⁷¹ and has attempted to preserve a status quo that no longer exists.

2.6. *Current Ethics Rules Affecting the Existence of MDPs in Canada*

2.6.1. *Overview of the MDP Situation in Canada*

Fear of accounting firms capturing the legal market exists in Canada as well as the United States.⁷² In Canada, "the push for MDPs has largely come from the . . . Big 5 accounting firms, which, having seen revenue from some areas decline, have moved aggressively into areas such as management and human resources consulting and provision of legal and quasi-legal services."⁷³ There

⁶⁸ According to the Commission on Multidisciplinary Practice, twenty-three states have appointed committees to study the MDP issue but have not yet returned reports, ten states have submitted reports that take no action, three states have taken favorable action toward MDPs, nine states have taken action against change, four states have not appointed commissions, and information is not available from two states. ABA Commission on MDPs, MDP Report on State Positions, at <http://www.abanet.org/cpr/mdpstats.html> (last visited Oct. 24, 2000).

⁶⁹ See Gibeaut, *supra* note 64, at 93.

⁷⁰ *Id.* at 92.

⁷¹ *Id.* at 93.

⁷² Luis Millan, *Quebec Accounting Firms Already Seeking Law Partners*, LAW. WKLY., May 21, 1999.

⁷³ Geoffrey Scotton, *CPA Report Sees No Need for Bar to Control MDPs*,

has been extensive study of the MDP issue at both the federal and provincial level in Canada, and not surprisingly, studies by organizations such as the Federation of Law Societies⁷⁴ and the Canadian Bar Association ("CBA")⁷⁵ focus on protecting the core values of the profession: "independence of the profession, avoidance of conflicts of interest, preservation of client confidentiality, and preservation of solicitor-client privilege."⁷⁶ Surprisingly, their conclusions regarding the feasibility of MDPs differ from those of the American Bar Association.⁷⁷

2.6.2. *Current Status of Canadian Laws Regarding MDPs*

The current status of laws regulating MDPs in Canada is not much different than in the United States.⁷⁸ Similar to Rule 5.4 of the Model Rules of Professional Conduct, Chapter XI of the Canadian Bar Association's Code of Professional Conduct bans a non-lawyer from sharing in the profits generated by a law practice.⁷⁹

LAW. WKLY., Sept. 3, 1999.

⁷⁴ The Federation of the Legal Societies Profession is the umbrella organization that governs the administration of each of the governing bodies of legal practice. Although each organization has promulgated its own reports, they appear to be working parallel to each other on MDP issues.

⁷⁵ The Canadian Bar Association is a national volunteer professional association. Similar to the American Bar Association, they provide a national standard but are not responsible for creating governing law for any of the individual law societies.

⁷⁶ CAN. BAR ASS'N, THOMAS G. HEINZTMAN, Q.C. ET AL., STRIKING A BALANCE: THE REPORT OF THE INTERNATIONAL PRACTICE OF LAW COMMISSION ON MULTI-DISCIPLINARY PRACTICES AND THE LEGAL PROFESSION 5 (1999), available at <http://www.cba.org/MDP/StrikingABalance.asp> (last visited Oct. 24, 2000) [hereinafter STRIKING A BALANCE].

⁷⁷ The CBA Report on MDPs "concludes that where emerging business organizations include the practice of law, they need not be controlled by lawyers." Scotton, *supra* note 73.

⁷⁸ One commentator has noted that "[a]t the present time, the Canadian legal profession's regulatory framework permits only some forms of multi-disciplinary practice. For example, law firms may employ other professionals, such as engineers, accountants and patent and trademark agents. However, law society rules allow only lawyers to be partners of law firms . . ." MELINDA BUCKLEY, SPECIAL COMM. ON THE INT'L PRAC. OF L., CAN. BAR ASS'N, MULTI-DISCIPLINARY PRACTICES: TOWARDS A POLICY FRAMEWORK 1, available at http://www.cba.org/Content/MDPS/buckley_mdp-paper.pdf (1998).

⁷⁹ N.Z. LAW SOC'Y, MULTI-DISCIPLINARY PRACTICES AND OTHER RELATED MATTERS, Appendix, available at <http://www.nz-lawsoc.org.nz/general/mdp.htm> (Apr. 1999). The CBA's Code of Professional Conduct,

Like the United States, Canada has a minority jurisdiction. The Law Society of Upper Canada ("LSUC"), which is the rule-making body for all Ontario lawyers, has adopted a rule similar to Rule 5.4 of Washington, D.C. In Ontario, By-Law 25 of the Law Society Act endorses the principle that lawyers and non-lawyers can become partners in MDPs if the MDP is controlled by lawyers and its main business is the practice of law.⁸⁰ The LSUC requires application fees for MDPs and requires non-lawyer partners to carry the same mandatory insurance as lawyer partners.⁸¹ Thus, "MDPs are permitted in Ontario only if they are controlled by lawyers, render only legal services and services ancillary thereto, and are subject to the professional rules of the legal profession."⁸²

Although LSUC's rule appears to be progressive in the sense that lawyers and non-lawyers can form partnerships in limited situations, the Canadian Bar Association is recommending even more lenient rules of professional conduct that would allow full integration into MDPs.⁸³ With the exception of the LSUC, this policy is not expected to encounter opposition and is expected to be carried out in many of the Canadian provinces in the coming

Chapter XI Fees, Commentary 8 provides: "any arrangement whereby the lawyer directly or indirectly shares, splits or divides fees with notaries public, law students, clerks or other nonlawyers who bring or refer business to the lawyer's office is improper and constitutes professional misconduct." BUCKLEY, *supra* note 78, at 1. Commentary 9 states that "the lawyer shall not enter into a lease or other arrangement whereby a landlord or other person directly or indirectly shares in fees or revenues generated by the law practice." *Id.*

⁸⁰ Law Society of Upper Canada, Multi-Disciplinary Practices By-Law, By-Law 25, available at http://www.lsuc.on.ca/services/services_bylaws_en.shtml#bylaw25 (last visited October 9, 2000). By-Law 25 was adopted by LSUC on April 30, 1999 and amended on May 28, 1999. See New Zealand Law Society, *Multi-Disciplinary Practices and Other Related Matters*, Apr. 1999, Appendix, available at <http://www.nz-lawsoc.org.nz/general/mdp.htm> at 2, (last visited Oct. 24, 2000). See generally Eric Atkins, *Rules on Acceptable Law Firms Names Now Vary from Province to Province*, LAW. WKLY., Sept. 22, 2000 (discussing the issues involved in naming an MDP).

⁸¹ See *MDP Application Fees Set by Law Society*, LAW. WKLY., June 11, 1999 (stating that the LSUC approved application fees of \$250 for MDPs with one non-lawyer partner and \$50 for each additional non-lawyer partner).

⁸² N.Y. STATE BAR ASS'N, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS 284 (April 2000) [hereinafter PRESERVING THE CORE VALUES].

⁸³ See Atkins, *supra* note 80.

months.⁸⁴ The Law Society of Quebec,⁸⁵ for example, agrees with the CBA that the LSUC has been too restrictive in its approach and thinks that the bar should press for proper controls as opposed to trying to prohibit them outside the practice of law.⁸⁶

2.6.3. *Canadian Bar Association's Resolution*

At the federal level, the CBA studied the MDP issue extensively and solidly endorsed the formation of MDPs.⁸⁷ The CBA established the International Practice of Law Committee ("IPLC") in the fall of 1997 to study the MDP issue.⁸⁸ As of February 1999, the IPLC stated that the absolute prohibition on fee-sharing was not justified.⁸⁹ In August 1999, the IPLC released a report entitled "Striking a Balance: Multidisciplinary Practices and the Legal Profession."⁹⁰ The IPLC's report stated that "[l]awyers should be able to offer their services in any business entity delivering services, so long as those services conform with applicable regulatory or other legal requirements."⁹¹

⁸⁴ See *id.*

⁸⁵ The Law Society of Quebec recently endorsed the formation of MDPs and plans to make implementation of this type of practice a priority. See Luis Millan, *Quebec Bar Association Solidly Endorses MDPs*, LAW. WKLY., May 21, 1999.

⁸⁶ See Millan, *supra* note 72.

⁸⁷ The Federation of Law Societies also studied the MDP issue extensively and solidly endorsed the formation of MDPs. See Multi-Disciplinary Partnerships, *Report to the Delegates*, prepared by National Multi-Disciplinary Partnerships Committee for the Federation of Law Societies of Canada, Aug. 19, 1999, at 12 [hereinafter *Report to Delegates*]. In fact, the National Multi-Disciplinary Partnerships Committee, formed by the Federation of Law Societies of Canada, recommended that they begin the preparation of Model Rules Respecting Lawyer Participation in Multi-Disciplinary Partnerships. See *id.*

⁸⁸ See CAN. BAR ASS'N, STATUS REPORT ON MULTIDISCIPLINARY PRACTICES, Presented by the Special Committee on the International Practice of Law at the 1999 Mid-Winter Meeting of Council (Feb. 1999) at 1, at http://www.cba.org/mdp/pdf/statusreport_eng.pdf [hereinafter *Status Report*].

⁸⁹ See *id.* at 3.

⁹⁰ See STRIKING A BALANCE, *supra* note 76; see also *Focus on CBA Annual Meeting: Edmonton to Host Annual CBA Conference*, LAW. WKLY., Aug. 20, 1999.

⁹¹ Scotton, *supra* note 73; see also Canadian Bar Association, *Multi-Disciplinary Practices: Summary of Striking a Balance*, at http://www.cba.org/MDP/SAB_Summary.asp (last visited Oct. 29, 2000).

At the time of the release of the IPLC's report in 1999, there were diverse sentiments about both MDPs and the recommendations of the IPLC within the CBA.⁹² However, after a year of additional study of the MDP issue, it appears that feelings within the CBA are no longer mixed.

The CBA met in Halifax in August 2000 to debate the MDP issue.⁹³ At the meeting, the CBA voted overwhelmingly to let lawyers and non-lawyer professionals join in multidisciplinary practices.⁹⁴ The Canadian Bar's liberal approach recognized that multidisciplinary practices can be created while still protecting the core values of the profession. Under the CBA's approach, individual lawyers, not MDPs, are regulated⁹⁵ and the MDPs do not have to be controlled by lawyers or solely provide legal services.⁹⁶ However, in order to protect the core values of the profession, lawyers cannot form partnerships with other professionals who have conflicting ethical responsibilities.⁹⁷

Aside from the Law Society of Upper Canada, most of the Canadian law societies are responsive to the CBA's resolution because they view MDPs as inevitable.⁹⁸ The law societies believe that "the Bar should focus on ensuring that they are regulated so as to protect the public and so as to ensure that law firms can compete on a level playing field with MDPs in terms of size, globalization and so on."⁹⁹

⁹² See Multi-Disciplinary Practices: Summary of Striking a Balance, *supra* note 91.

⁹³ See Eric Atkins, *Lawyers Should Control MDPs Says Sask. CBA*, LAW. WKLY., Aug. 18, 2000.

⁹⁴ See Cristin Schmitz, *CBA Wants Law Societies to Let Lawyers Join MDPs*, LAW. WKLY., Sept. 1, 2000 ("The CBA's governing Council voted to go boldly where few countries, other than France and Australia, have gone, by asking provincial regulators to remove obstacles which make MDPs impossible. . .").

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *id.* ("For instance, lawyers practicing in MDPs should not provide legal services to clients who retain the MDP for auditing services.")

⁹⁸ According to the Treasurer of the LSUC, Robert Armstrong, the CBA resolution is just a "statement of policy" and it will not persuade the Society to change its position. *Id.*

⁹⁹ *Status Report*, *supra* note 88, at 2. The law societies believed that "[a]ttempting to ensure lawyer control or a predominance of legal services is not practical, will restrict lawyers' choices and potential and will be viewed as lawyers simply protecting their 'turf.'" See *id.*

The CBA's decision stands in stark contrast to the ABA's 3-to-1 vote against the recommendation to allow lawyers to form partnerships with non-lawyer professionals. The contradictory positions of the ABA and the CBA demonstrate that "MDPs are viewed by many lawyers as both a danger and an opportunity."¹⁰⁰ Canada's resolution struck a balance between two sets of public interests: the preservation of the lawyers' role in the administration of justice and the freedom of choice, freedom of association, and competition and efficiency in the market.¹⁰¹ The CBA concluded that they were able to endorse the formation of MDPs and protect the core values of the profession by addressing specific issues that were of particular concern.¹⁰² Canada's proactive endorsement of MDPs supports the conclusion that the ABA's defensive stance is archaic because the core values of the profession can be protected without Model Rule 5.4.

3. SIGNIFICANCE OF THE MDP PROBLEM AND ACTIVITY OF THE BIG FIVE

3.1. *Problem's Significance*

Accounting firms are expanding and providing more than just traditional accounting services.¹⁰³ These firms are "aggressively soliciting clients [and] offering services remarkably similar to those traditionally offered by law firms. . . ."¹⁰⁴ This Comment focuses on the activity of the Big Five accounting firms because the MDP phenomenon is most evident with them¹⁰⁵ and the abundance of public information available¹⁰⁶ make them good case studies.

¹⁰⁰ Schmitz, *supra* note 94.

¹⁰¹ See Multi-Disciplinary Practices: Summary of Striking a Balance, *supra* note 91.

¹⁰² Issues of particular concern include the formation of partnerships with non-lawyer professionals who have conflicting ethical responsibilities. This type of partnership is not allowed. *Id.*

¹⁰³ See Molvig, *supra* note 4, at 10.

¹⁰⁴ *Background Paper*, *supra* note 1, at 2.

¹⁰⁵ "[The Big Five's] publicly stated goals are to become major players in the global marketplace for legal services." Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 231 (2000).

¹⁰⁶ The familiarity with these firms is garnered through a variety of forums:

The accounting firm expansion into the business of law began about ten years ago when the market for traditional accounting and tax work decreased and firms looked to consulting and litigation support to increase their revenue.¹⁰⁷ Currently, accounting firms “consult on everything from tax matters, mergers and acquisitions, organizational structures, management programs, government relations, employment decisions, defense contracts, stock options, retirement plans, crisis management, insurance programs, land development, policies and procedures, real estate transactions, manufacturing processes, workforce deployment, Y2K, litigation support, and of course, accounting.”¹⁰⁸

Accounting firms have been able to form MDPs in foreign countries where regulations have been relaxed.¹⁰⁹ The Big Five accounting firms have taken advantage of the standards in France, Spain, Australia, Canada, and the Confederation of the Independent States of the former Soviet Union by offering legal services in those markets.¹¹⁰ The Big Five have made significant headway in

Each of the [large accounting] firms [has] several hundred partners. The[y] . . . provide a wide range of services to a broad spectrum of clients. The vast majority of the [big firms'] clients are the 6,500-plus enterprises whose securities are traded in the major stock markets in the United States and the enterprises listed on the stock exchanges in other countries.

ANTHONY PHILLIPS ET AL., *BASIC ACCOUNTING FOR LAWYERS* 73 (4th ed. 1988). As far back as 1988, it was estimated that the large accounting firms had ninety-five percent of the enterprises listed on the New York Stock Exchange as their clients. *See id.*

¹⁰⁷ *See* Robert M. Cearley, Jr., *Multidisciplinary Practice*, *ARK. LAW.*, Winter 1999, at 2.

¹⁰⁸ Gray, *supra* note 9, at 4. “The legal profession has generally acknowledged the right of an accounting firm to provide services to its clients that call for an understanding and application of federal law relating to the taxation of property, goods, and services.” *Background Paper*, *supra* note 1, at 9. “In 1981, the ABA and the American Institute of Certified Public Accountants (AICPA) adopted a statement in which the two organizations agreed that accounting firms could provide tax planning advice to clients, but would not draft legal documents.” *Id.* at 9, n.29. But the accounting firms have become more aggressive; they are offering a broader selection of services and are actively recruiting both law school recruits and practicing attorneys. *See id.* at 9-10.

¹⁰⁹ *See* Kenneth J. Vacovec, *A Multidisciplinary Practice Primer*, at http://161.58.222.91/phpslash/public_html/article.php3?sid=20000616114839 (last visited Nov. 9, 2000) [hereinafter *MDP Primer*].

¹¹⁰ Molvig, *supra* note 4, at 44.

Europe and are looking to expand into the United States legal market.¹¹¹

The Big Five accounting firms currently employ over 5000 lawyers who provide law-related "consulting" services in the United States.¹¹² Although U.S. attorneys employed by accounting firms protect their ethical obligations by stating that they are not practicing law,¹¹³ critics believe these lawyers are engaging in the unauthorized practice of law. Lawrence J. Fox states, "[t]he 5,000 lawyers practicing law in accounting firms are 'engaged in civil disobedience and violating Rule 5.4, Rule 1.7 on conflicts of interest, and Rule 1.6 on client confidentiality.'"¹¹⁴

The organized bar historically challenged non-legal ventures as being engaged in the unauthorized practice of law. However, a more laissez-faire market type has evolved,¹¹⁵ and the majority of activity by the Big Five inside the United States has gone unchallenged.¹¹⁶

¹¹¹ The Big Five accounting firms are currently precluded from forming partnerships with lawyers by Rule 5.4 of the ABA Model Rules of Professional Conduct. MODEL RULES OF PROF'L CONDUCT R. 5.4 (1998).

¹¹² See *MDP Primer*, *supra* note 109.

¹¹³ See *id.*

¹¹⁴ ABA Refuses to Change Ethics Rules Unless Studies of MDPs Dispel Concerns, Conference Report Vol. 15, No. 15, Aug. 18, 1999, at 396. See also Fox, *supra* note 7, at 21 ("[T]hese lawyers are violating Rule 5.4 by fee sharing with non-lawyers. Recognizing the impediments presented by Rule 5.4, the accounting firms argue these lawyers are not practicing law—no, they are practicing tax or investigations or mergers and acquisitions. But not law.")

¹¹⁵ See Munneke, *supra* note 8, at 563.

¹¹⁶ In fact, there are "records of only two recent enforcement actions against accounting firms." *Background Paper*, *supra* note 1, at 10. The state of Texas lodged a complaint against both Arthur Andersen and Deloitte & Touche; however, eleven months later the complaint was dismissed. Molvig, *supra* note 4, at 12; see also Elizabeth MacDonald, *Texas Probes Andersen, Deloitte on Charges of Practicing of Law*, WALL ST. J., May 28, 1998, at B1 (reporting the Texas investigation against Deloitte & Touche and Arthur Andersen on the aforementioned charges). In addition, the January 1999 ABA *Background Paper* revealed that there is currently an investigation in Virginia regarding a charge against Ernst & Young for the unauthorized practice of law. Molvig, *supra* note 4, at 12.

3.2. *International Activity of Big Five Accounting Firms*¹¹⁷

The national ambitions of the Big Five are not doubted, nor is their international success at breaking into the legal market.¹¹⁸ “MDPs are the subject of intense interest around the world, with studies or new legislation either pending or recently completed in Australia, Canada, the CCBE (the European Bar Association), England, France, the International Bar Association, the Netherlands and the Union Internationale des Avocats.”¹¹⁹ This global interest has allowed the Big Five to be successful in recruiting top attorneys. “All combined, they employ more than 5,500 nontax attorneys worldwide (excluding lawyers practicing tax law exclusively within the firm’s accounting or tax divisions). . . .”¹²⁰

3.2.1. *Arthur Andersen*

By January 1998, Arthur Andersen had subsidiaries practicing law in England, France, Spain, and Australia.¹²¹ As of November 1998, the firm had more than 1500 lawyers working in twenty-seven different countries.¹²² In France, Arthur Andersen took over the Paris office of the London law firm S.G. Archibald and renamed it Archibald Andersen Association d’Avocats in 1992.¹²³ In England, Andersen’s affiliate, Garrett & Co., has grown to over 150 lawyers with seven offices in England and Scotland.¹²⁴

¹¹⁷ The debate over MDPs is not limited to the Big Five accounting firms, although they are the most visible because of their presence in Europe. An MDP is any partnership between attorneys and non-lawyers providing professional services to the partnership’s clients. This Comment is limited to a review of the Big Five accounting firms. However, possible other overlaps and areas for MDPs include: insurance professionals, financial planners, real estate consultants, and investment bankers.

¹¹⁸ See, e.g., PRELIMINARY REPORT, *supra* note 43, at 2 (“The head of the Paris office of Arthur Andersen has stated: ‘We provide all the typical services of a business law firm.’ The head of PricewaterhouseCooper’s Brussels office stated: ‘We’re doing more commercial agreements, M&A work and capital markets. The hope is to expand.’”).

¹¹⁹ Testimony of Laurel S. Terry, Professor, Penn State Dickinson School of Law, Before the ABA Commission on Multidisciplinary Practice, at <http://www.aba.net.org/cpr/terryremarks.html> (Mar. 12, 1999).

¹²⁰ Molvig, *supra* note 4, at 44.

¹²¹ Cearley, *supra* note 107, at 2.

¹²² PRELIMINARY REPORT, *supra* note 43, at 2.

¹²³ 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.

¹²⁴ John E. Morris, *London Braces for the Big Six Invasion*, AM. LAW., Dec.

Additionally, the Spanish law firm J & A Garrigues merged into Garrigues & Andersen, "to make Andersen the largest law firm in the world."¹²⁵

3.2.2. *Deloitte Touche Tohmatsu*

As of November 1998, Deloitte Touche Tohmatsu had 586 lawyers working in fourteen countries,¹²⁶ including lawyers in France, Austria, Belgium, the Netherlands, and Spain.¹²⁷ In France, Deloitte & Touche practices under the name Deloitte et Touche Juridique et Fiscal.¹²⁸

3.2.3. *Ernst & Young*

According to the *American Lawyer*, Ernst & Young has more than 850 lawyers working in thirty-two countries.¹²⁹ More than 600 of those lawyers are working in Europe.¹³⁰ In addition, Ernst & Young has a presence in Canada and has acquired Donahue & Partners, a captive law firm in Toronto.¹³¹

3.2.4. *KPMG Peat Marwick*

KPMG Peat Marwick has over 980 lawyers working worldwide.¹³² KPMG recently acquired the largest law firm in France,

1996, at 5.

¹²⁵ Cearley, *supra* note 107, at 2.

¹²⁶ PRELIMINARY REPORT, *supra* note 43, at 2.

¹²⁷ Cearley, *supra* note 107, at 2.

¹²⁸ Gray, *supra* note 9, at 4.

¹²⁹ PRELIMINARY REPORT, *supra* note 43, at 2.

¹³⁰ See Gray, *supra* note 9, at 4.

¹³¹ Multi-Disciplinary Practice Task Force, *The Affiliated or "Captive" Law Firm* (Sept. 1999), at http://www.lsuc.on.ca/services/mdpbkgrdpapercaptive_en.shtml. A captive law firm is one form of MDP arrangement where a law firm is affiliated with a professional service or accounting firm. It is called "captive" because of the close affiliation the law firm has with the other professional service entity. Although there is sharing of office space and computer equipment, there is supposedly no sharing of fees. The Canadian captive affiliated with Ernst & Young is the only example to date. *Id.*; Janet L. Conley, *ABA Takes on Multidisciplinary Practice*, N.Y.L.J., Aug. 5, 1999, at 11; see also Daly, *supra* note 105, at 224 ("The terms 'captive' or 'networked' are frequently used to describe a law firm that has a . . . close contractual relationship with a Big Five firm.")

¹³² PRELIMINARY REPORT, *supra* note 43, at 2.

DPMG Fidal Peat International.¹³³ In the United Kingdom, KPMG created its own law firm, KLegal, with the expectation that the Law Society would approve multidisciplinary partnerships.¹³⁴ In addition, KPMG recently formed a strategic alliance with the U.S. international law firm Morrison & Foerster which marks the first major tie-up between a Big Five accounting firm and a United States law firm.¹³⁵

3.2.5. PricewaterhouseCoopers

PricewaterhouseCoopers ("PwC") has led the pack with over 1600 lawyers practicing in thirty-nine countries.¹³⁶ In addition, PwC has law firm affiliates with over 350 lawyers in seventeen European countries, including 50 in Spain¹³⁷ and 160 in France.¹³⁸ PwC has also "boasted of its aim to build the fifth largest law firm in the world by the year 2004, estimating that it will employ three thousand lawyers and generate one billion dollars in revenue."¹³⁹

4. ARGUMENTS FOR AND AGAINST MDPs

Arguments for and against MDPs can be grouped into two categories: core values and one-stop shopping. The core value arguments, addressed below, focus on conflicts of interest, confidentiality, and independence of judgment,¹⁴⁰ while the one-stop

¹³³ See Gray, *supra* note 9, at 4.

¹³⁴ Chris Dignan, *KPMG Forges Link with Top 25 U.S. Law Practice*, THE LAWYER, Aug. 9, 1999, at 7, available at 1999 WL 9133121.

¹³⁵ *Id.* Note however, that it is only a tax alliance for the moment. *Id.* See also Brenda Sandburg, *MOFO Allies With Accounting Giant*, N.Y.L.J., Aug. 9, 1999, at 2 ("While the agreement is limited solely to the tax arena . . . , it is a first step toward the marriage of two diverse practices.").

¹³⁶ PRELIMINARY REPORT, *supra* note 43, at 2.

¹³⁷ In the Spanish market, the law firm of PricewaterhouseCoopers Juridico y Fiscal merged with Estudio Legal and the Madrid operations of Mulerrat & Roca. PRESERVING THE CORE VALUES, *supra* note 82, at 274.

¹³⁸ Morris, *supra* note 124, at 5.

¹³⁹ Daly, *supra* note 105, at 231. See also Jim Kelly & Robert Rice, *PwC Plans to Build \$1bn Global Law Firm Network: Five-Year Target to be Among the World's Largest Legal Practices*, FIN. TIMES (London), Jan. 7, 1999, at 24 (announcing merger talks between PwC and a Spanish law firm).

¹⁴⁰ In addition to the core values listed above, the Commission on Multidisciplinary Practice addressed competence. The Commission stated that competence is undoubtedly a core value and "[t]he Commission is convinced that allowing lawyers and nonlawyers to join in a single entity that delivers both

shopping argument centers on efficiency, quality of work, and effects of competition.

4.1. Core Values

One of the most important concerns in the amendment of Model Rule 5.4 is the protection of the core values of the legal profession. The importance arises from the fact that “[t]he ethical integrity of the lawyer [is] the profession’s hallmark and call for public confidence. Ethics is not just a set of rules. It is a value-system, a mind-set, a responsibility that must remain constant in the lawyer’s conscious.”¹⁴¹ The defenders of Model Rule 5.4 contend that this restriction is necessary to preserve a lawyer’s ethical obligations,¹⁴² while the Commission of Multidisciplinary Practice believes that we can allow the formation of MDPs and safeguard the legal profession’s core values at the same time. The debate surrounding each of the core values is addressed below.

4.1.1. Conflicts of Interest

Opponents of MDPs argue that work performed in multidisciplinary firms has a significant risk of conflicts of interest. The problem arises because non-lawyer professionals are “not governed by lawyers’ ethics standards.”¹⁴³ For example, “while accountants can do work for clients with competing interests, self-imposed conflict rules more often than not prohibit entire law firms from undertaking such representations, even if the conflict involves only a single lawyer in the firm.”¹⁴⁴ These critics argue that at the Big Five level, where firms are already competing for an elite and limited client base, “[c]onflicts thus pose a potentially insurmountable quandary.”¹⁴⁵

legal and nonlegal services will have no detrimental effect upon lawyer competence.” ABA Commission on Multidisciplinary Practice Report to the House of Delegates, *available at* <http://www.abanet.org/cpr/mdpfinalrep2000.html> (July 2000). In fact, the Commission believes that creating a single entity to provide client assistance will promote more efficient delivery systems and will enhance “lawyer competence by expanding the lawyer’s integrated knowledge base.” *Id.*

¹⁴¹ Promoting Professionalism, *supra* note 17.

¹⁴² *Background Paper*, *supra* note 1, at 1.

¹⁴³ Morello, *supra* note 36, at 245.

¹⁴⁴ Gibeaut, *supra* note 3, at 46.

¹⁴⁵ *Id.* at 47. “Moreover, accountants who become advocates for clients may destroy the independence and objectivity of their own functions in the

Proponents of MDPs argue that the core values, including lawyers' rules governing conflicts of interest, are only threatened when the multidisciplinary business entity is controlled by non-lawyers. In situations where there is not control by a lawyer, the Commission recommends reliance on the control and authority principle put forth in their Recommendation. "As part of the control and authority principle . . . the lawyers in an MDP, not the nonlawyer professionals, will determine the application of the conflicts of interest rules to the clients of the MDP seeking legal services."¹⁴⁶ This will ensure that conflicts of interest matters are handled properly.

4.1.2. *Possible Threats to the Confidentiality of Client Information*

Opponents of MDPs argue that accounting firms and lawyers are not governed by the same rules and that the integration of their services is incompatible; this is especially evident in areas such as the confidentiality of client communications.¹⁴⁷ In the traditional legal setting, "[c]lients are expected to and generally provide candid communications with their attorneys. Clients rely upon and have the right to expect that those communications will remain confidential and will be used exclusively for their benefit."¹⁴⁸ The fear is that if a client uses the services of an MDP and the client's dispute ends in a lawsuit, any communications the client had with an attorney would be protected under the attorney/client privilege but that same privilege would not be extended to communications with accountants.¹⁴⁹ For instance, "the

process." *Id.*

¹⁴⁶ ABA Commission on Multidisciplinary Practice Report to the House of Delegates, *supra* note 140.

¹⁴⁷ See Morello, *supra* note 36, at 245.

¹⁴⁸ PRELIMINARY REPORT, *supra* note 43, at 3.

¹⁴⁹ One critic of MDPs, Lawrence J. Fox, has called accounting firms

a one-profession wrecking crew, destroying any ethical rules that stand in their path. Take confidentiality. Our rules preserve confidential treatment for all information learned in the course of a representation By definition, the core value of the attest function of an accounting firm is the public disclosure of material information.

Fox, *supra* note 7, at 21.

accountant with whom the client has shared information could be called as a witness— against the client.”¹⁵⁰

Advocates of MDPs point out that it would be possible to form business structures integrating the services of attorneys with other non-attorney professionals in such a way that the attorney/client privilege is retained. In addition, the problem of lack of privilege between non-lawyers and clients is not new. “[C]lients today may enter a traditional law firm and reveal their cases to nonlawyers such as clerks, and thus lose the attorney-client privilege.”¹⁵¹ Attorneys deal with this problem currently in the traditional law firm and the same type of problem is not insurmountable in an MDP.

The Commission on Multidisciplinary Practice suggests that to effectively secure the protection of client confidences, an affirmative responsibility should be placed on the lawyer.¹⁵² The lawyer would be responsible for assuring “(1) that the communications the lawyer and client intend to be protected by the attorney-client privilege satisfy the jurisdiction’s applicable requirements, and (2) that the client understands that all other communications are not privileged.”¹⁵³

In both 1999 and 2000, the Commission on Multidisciplinary Practice emphasized the importance of the protection of confidential information. However, this year the Commission explicitly stated its view, in agreement with the opponents of MDPs, that because of the differing rules regarding disclosure of client information to a third party in auditing versus legal services, there is in fact incompatibility between these two services. The Commission does not “believe that a single entity should be allowed to provide legal and audit services to the same client.”¹⁵⁴ However, unlike the opponents of MDPs, the Commission does not believe this incompatibility serves as an absolute bar to the formation of other types of multidisciplinary practices.¹⁵⁵

¹⁵⁰ Molvig, *supra* note 4, at 44.

¹⁵¹ Morello, *supra* note 36, at 246.

¹⁵² See ABA Commission on Multidisciplinary Practice Report to the House of Delegates, *supra* note 140.

¹⁵³ *Id.*

¹⁵⁴ *Id.* According to the Commission, the Independence Standards Board is currently evaluating the issue of incompatibility. *Id.*

¹⁵⁵ *Id.*

4.1.3. *Challenges to Independence of Judgment*

Critics of multidisciplinary practice argue that MDPs threaten the independent professional judgment of lawyers. Non-lawyers may influence lawyers' decisions regarding law firm management, the firm's involvement in legal activities, and the public role of the firm's attorneys.¹⁵⁶ "They say that if lawyers deliver legal services to non-employer clients . . . the influence of the bottom line will overpower the lawyers' ability to be loyal to the client or to make independent decisions with judgment unclouded by considerations of profit."¹⁵⁷ Opponents further argue that Model Rule 5.4's ban on fee-sharing and partnerships with non-attorneys is the "only prohibition that is likely to be effective in maintaining [lawyers'] professional independence."¹⁵⁸

The rationale underlying the argument of those against the formation of MDPs is the belief that if a lawyer is answerable to a nonlawyer or shares fees with a nonlawyer, "there is an overwhelming risk that the lawyer's professional judgment could be swayed by his or her own economic interests or by other improper considerations."¹⁵⁹ There are two responses to why this basic assumption is incorrect.

First, "[t]o suggest that today's law practice operates free of the influence of profit flies in the face of every recent trend."¹⁶⁰ Even if accounting firms are concerned about cutting costs, this is not a new concern. There are competitive pressures in the legal industry for law firms to keep down costs as well.¹⁶¹

Second, attorney subjection to pressures from non-lawyers is not new.¹⁶² In fact, it is currently happening in the legal industry.

¹⁵⁶ *Id.*

¹⁵⁷ Eleanor W. Myers, *Multidisciplinary Practice Debate Continues: It's Time to Redefine What We as Lawyers Really Do*, LEGAL INTELLIGENCER, Oct. 12, 1999, at 11.

¹⁵⁸ Fox, *supra* note 7, at 20.

¹⁵⁹ James W. Jones, Remarks at the Phyllis W. Beck Chair in Law Symposium at Temple University Beasley School of Law (Nov. 12, 1999), at 12 (critiquing the traditional rationale for prohibiting non-lawyer ownership interest in law firms) [hereinafter Jones' Remarks].

¹⁶⁰ Myers, *supra* note 157, at 12.

¹⁶¹ See Ted Schneyer, *Reputational Bonding, Ethics Rules, and Law Firm Structure: The Economist as Storyteller*, 84 VA. L. REV. 1777, 1791 (1998).

¹⁶² Professor Robert Gordon stated in testimony at the ABA Commission hearings that:

"[T]he bar has already recognized and approved situations in which lawyers may work for, and even be supervised and compensated entirely by non-lawyers, without compromising their professional integrity or judgment."¹⁶³ Examples of such situations include in-house counsel, government lawyers, and legal services attorneys.¹⁶⁴ Thus, MDP advocates argue that the "concern about diluting the independent judgment of lawyers is only a matter of degree."¹⁶⁵

In order to protect the independent judgment of lawyers, the Commission on Multidisciplinary Practice recommended allowing the formation of MDPs only if the lawyers maintain the "control and authority necessary to assure lawyer independence."¹⁶⁶ The Commission's Report stated that the control and authority requirement can be satisfied in a variety of ways.¹⁶⁷ Factors such as the percentage of ownership by lawyers or the primary pur-

Any and all forms of professional practice are subject to pressures, constraints, and temptations— pressures from hierarchical superiors or peers, payment systems or fee arrangements, incentives to career advancement or financial reward inside the firms or in the profession generally— that may to a greater or lesser extent compromise the exercise of a lawyer's independent judgment. Over the course of this century, the legal profession has adopted many arrangements and organizational forms for representing clients and receiving payment for services that pose conflicts between their own interests on the one hand and the interests of clients and the public good on the other. Hourly billing, to take one of many examples, tempts some lawyers to run the meter, churn cases, and pad bills; contingent fees, to take another, tempts others to shirk on effort, and settle early and low. Such conflicts are unavoidable: No set of arrangements has ever been or ever will be devised that will entirely remove such pressures and temptations. The question your Commission has to ask is, Do the proposed arrangements for lawyers to practice with non-lawyers promise to *add* any significant sources of pressure, constraint, and temptation to those that already exist? And even [if] the answer to that question should turn out to be Yes (or Maybe), does the likely cost or risk of adding new sources of pressure offset the likely benefits of multidisciplinary practices?

Letter from Robert W. Gordon, Professor, Yale Law School, to Sherwin P. Simmons, Esq., Chair, ABA Commission on Multidisciplinary Practice (May 21, 1999), *available at* <http://www.abanet.org/cpr/gordon.html>; Jones' Remarks, *supra* note 159, at 11.

¹⁶³ Jones' Remarks, *supra* note 159, at 12.

¹⁶⁴ *See id.*

¹⁶⁵ Myers, *supra* note 157, at 12.

¹⁶⁶ A.B.A., *supra* note 59.

¹⁶⁷ *See id.* at 2.

pose of the MDP (if it is to deliver legal services) may sometimes be determinative of the control and authority of lawyers in MDPs. However, the Commission did not believe that these factors conclusively determined either control or authority.¹⁶⁸ The Commission believed that independence of judgment could be protected not by dictating the nature and mode of delivery of legal services by MDPs, but by allowing states to “identify and enforce the particular structures that they determine are necessary to protect the interests of clients.”¹⁶⁹

4.2. One-Stop Shopping

Advocates of one-stop shopping endorse the formation of MDPs because they believe that different disciplines working together in MDPs will provide the client with greater convenience and access; by going to just one place, a client can receive assistance for all of his/her needs. Proponents argue that the restrictions banning the formation of MDPs are outdated.¹⁷⁰ “In their view, these restrictions are the unfortunate relics of a regulatory system constructed in the early twentieth century that now impede the delivery of efficient and reasonably priced professional services.”¹⁷¹

Supporters also argue that the ban on fee-sharing and on the formation of partnerships prevents law firms from taking advantage of the possible economies of scale that could result from combining legal and ancillary services within the same com-

¹⁶⁸ *Id.* The Commission believes that “[t]he control and authority principle looks to substance not form.” *Id.*

¹⁶⁹ *Id.* Although the Commission’s Report appears to avoid defining the appropriate delivery of legal services in MDPs, the Commission does state that in large MDPs, a minimum level of safeguards should include:

- (1) structuring the MDP so that the lawyers who are delivering legal services to the MDP’s clients are organized and supervised separately from the MDP’s other units . . . and
- (2) establishing a chain-of-command in which these lawyers report to a lawyer-supervisor whose responsibilities include hiring and firing, fixing the lawyers’ compensation and terms of service, making decisions with respect to professional issues such as staffing of legal matters and the allocation of lawyer and paraprofessional resources, and advising on issues of professional responsibility.

Id.

¹⁷⁰ *Background Paper, supra* note 1, at 1.

¹⁷¹ *Id.*

pany.¹⁷² Clients would benefit from an MDP's ability to combine legal and extralegal issues; this would result in increased efficiency and reduced costs.¹⁷³ "Moreover, because legal and law-related services can be substitutes, albeit imperfect ones, the ban may bias firms toward performing excessive legal services rather than referring clients to outside providers of less expensive but equally valuable law-related services."¹⁷⁴

In addition, MDPs promote more comprehensive solutions to client problems¹⁷⁵ and "Big [Five] accounting firms maintain that their worldwide offices enable them to satisfy the needs of multinational corporate and financial business consulting clients."¹⁷⁶

Opponents of MDPs and one-stop shopping argue that lawyers' competence and diligence may be threatened because they will be distracted from the practice of law.¹⁷⁷ The opponents believe that the costs to the legal profession outweigh the possible convenience to the client.

Duty to clients is impaired because the practitioners of each discipline or profession are not independent of each other. Therefore, the practitioners are not in a position to give the client one of the important components of professional service—an independent evaluation of one another's qualifications or performance.

Duty to society is impaired, because if such firms become characteristic of professional practice they are likely, over a period of time, to reduce the distinctiveness of law as a separate profession. Indeed, the multidisciplinary law firm

¹⁷² See Schneyer, *supra* note 161, at 1792 (noting structural drawbacks created by banning non-lawyer professionals from investing in law firms).

¹⁷³ See Morello, *supra* note 36, at 239; see also Molvig, *supra* note 4, at 43 ("[P]roponents contend that MDPs match with the way organizations like to solve problems in today's world: by bringing together teams of professionals from multiple disciplines. If lawyers can't be part of MDPs, proponents say, they risk becoming dinosaurs.").

¹⁷⁴ Schneyer, *supra* note 161, at 1792.

¹⁷⁵ See PRELIMINARY REPORT, *supra* note 43, at 3.

¹⁷⁶ Morello, *supra* note 36, at 244.

¹⁷⁷ See Morello, *supra* note 36, at 246 (setting forth the arguments often advanced by opponents of MDPs).

may become indistinguishable from multidisciplinary groups organized by members of other disciplines, such as accounting, business management, or financial management.¹⁷⁸

Opponents claim that clients can gain the same benefits of an MDP by hiring professionals from different disciplines to work together with a lawyer.¹⁷⁹ They argue that although there may be a need for the services of several different specialists, there is no need to house them all under one roof.¹⁸⁰

One critic of MDPs stated that “[o]ne-stop shopping . . . is just a benign way of describing the destruction of everything lawyers should and must stand for.”¹⁸¹ Other challengers fear that society will end up with a bunch of general problem-solvers and no specialists.¹⁸²

5. WHY THE MODEL RULES SHOULD BE MODIFIED TO ALLOW MDPs

5.1. MDPs Serve the Public Interest

When the ABA Commission on Multidisciplinary Practice was created, Philip Anderson, president of the ABA, asked the Commission to put the interests of the public before the legal profession.¹⁸³ All lawyers are required to place their clients' needs

¹⁷⁸ *Id.*

¹⁷⁹ See *Background Paper*, *supra* note 1, at 12 (describing arguments for and against the development of MDPs).

¹⁸⁰ See Levinson, *supra* note 178, at 803-04 (claiming that housing different specialists in one conglomerate “impairs the firm’s duty to both its clients as well as to society in general”).

¹⁸¹ Fox, *supra* note 7, at 24.

¹⁸² See Levinson, *supra* note 178, at 804. One such opponent of MDPs has described this problem:

[L]awyers perform a unique role, by making society’s legal system accessible to society. In order to perform this role effectively, lawyers should retain distinctive attitudes, traditions, and methods of reasoning and analysis. This does not mean we must be locked into archaic processes. Of course, we must constantly update and refine our techniques, but we should do so as lawyers, with full regard to the duty we owe to society’s legal system.

Id.

¹⁸³ See Anderson, *supra* note 44.

above their own,¹⁸⁴ but client protection does not justify maintaining an archaic system while the rest of the world continues to develop. Removing the statutory ban that precludes lawyers from forming partnerships with non-lawyers will result in cheaper prices, as well as increased access and greater justice.¹⁸⁵ Critics of MDPs often claim that no client demand for MDPs actually exists and the entire issue is a *fiction* the Big Five has created to generate more revenue.¹⁸⁶ However, even if clients do not specifically demand a multidisciplinary business structure, they do “increasingly demand efficient, timely, comprehensive, and cost-effective services of all of their professional providers.”¹⁸⁷ MDPs are more efficient than traditional business structures and “there is no reason that clients should not be offered the choice of an MDP as one means of meeting their needs.”¹⁸⁸

Client demand for MDPs exists on both the corporate and solo practitioner level. MDPs have the promise of enhancing the practices of small firms and delivering legal services to underrepresented areas.¹⁸⁹ Strong consumer interest in MDPs is also confirmed by the Reporter Notes from the ABA-MDP Commission's Report. After over sixty hours of testimony, Mary Daly wrote:

The Commission heard strong testimony from business clients, representatives of consumer groups, and ABA entities that amending the Model Rules to permit fee sharing and partnership and other association with a nonlawyer is in the best interest of the public. Of particular significance to the Commission was the view of the Council of the ABA General Practice, Solo and Small Firm Section, noting the need for multidisciplinary counseling of individual and business clients [in small firms] The ethics counsel to the Arizona State Bar told the Commission that she has received a substantial number of inquiries from

¹⁸⁴ See PRELIMINARY REPORT, *supra* note 43, at 2.

¹⁸⁵ Denckla, *supra* note 21, at 2581, 2599 (describing how the lawyer monopoly is responsible for a lack of affordable options for low- to moderate-income persons).

¹⁸⁶ See Jones' Remarks, *supra* note 159, at 8.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See *id.* at 9.

lawyers in Arizona expressing an interest in forming a partnership with a nonlawyer. An informal survey of the opinions of state bar associations ethics committees . . . indicates that the overwhelming majority of the inquiries on this subject appear to have been submitted by lawyers in solo or small firms.¹⁹⁰

In addition, the *Financial Times* published a survey in September 1999 reporting that seventy-five percent of major corporations in the United States were willing to consider using MDPs.¹⁹¹ Even if demand for MDPs is not initially apparent, such practices should be allowed due to the willingness of consumers to embrace such a change.¹⁹²

5.2. Economic Rule Rather Than Ethical Rule

All lawyers are required to place their clients' interest above their own; this is also true of monetary interests. Attorneys cannot place the financial interests of their profession before the well-being of their clients.¹⁹³ Maintaining the current Rule 5.4 which bans the formation of MDPs promotes the lawyers' monopoly on the legal market.¹⁹⁴ Removing the current prohibitions on MDPs will allow attorneys to compete more effectively in today's market and "[s]uch changes might actually help law firms survive in the coming decades."¹⁹⁵ MDPs will create more effective delivery models for legal services, more efficient investment in resources, and more comprehensive solutions to client

¹⁹⁰ MDP Commission Report, at C9 (footnotes omitted), *quoted in* Jones' Remarks, *supra* note 159, at 9-10.

¹⁹¹ See Jim Kelly, *Long Arm of the Law: The Big Five May Be Right That Clients Want Them to Move into Legal Services*, FIN. TIMES, Sept. 9, 1999, at 29; see also Jones' Remarks, *supra* note 159, at 8 (stating that "[t]he survey found that more than half of the respondents in Europe and the U. S. said they would consider using MDPs for certain kinds of legal services, and among financial institutions in the U.S. the number rose to 75 percent").

¹⁹² See Joe Dwyer III, *Carlie, Walsh Weigh in on Law-accounting Union*, ST. LOUIS BUS. J., Aug. 2-8, 1999, at 59 ("In service delivery, demand drives the model. If the client doesn't see an improvement in delivery or cost of service, then this could be a non-event.") (interview with Stone Carlie Co's. chief executive, Mark Carlie).

¹⁹³ See PRELIMINARY REPORT, *supra* note 43, at 2.

¹⁹⁴ See *Background Paper*, *supra* note 1, at 12.

¹⁹⁵ Munneke, *supra* note 8, at 568.

problems.¹⁹⁶ As one commentator wrote, "It is both naïve and self-destructive for the legal profession to expect to remain untouched by the structural and technological upheavals that, over the course of the past twenty-five years, have reordered the financial and industrial markets and redrawn the world's geo-political map."¹⁹⁷

Another proponent of MDPs concurred that "[w]e do not need and can ill-afford archaic rules designed merely to maintain the economic hegemony of the legal profession, especially when those rules have become counterproductive to their original purpose."¹⁹⁸ The current Rule 5.4 enables lawyers to "maximize wealth and limit competition" and fails to serve the public interest or advance the administration of justice.¹⁹⁹

5.3. Following the Example of the Canadian Bar Association and Eliminating the Ban on MDPs

European jurisdictions permit various forms of MDPs ranging from captive law firms to full partnerships.²⁰⁰ Currently, MDPs are a well-established reality in Spain, France, Switzerland, and Belgium. In Australia, New South Wales has modified its regulatory scheme to allow the formation of MDPs. "In the UK, the Law Society of England and Wales has given its backing to the concept of MDPs which has allowed a number of law firms to be snapped up by the Big Five."²⁰¹ In Canada, the Canadian Bar Association has endorsed the formation of multidisciplinary practices and is encouraging its law societies to amend their rules to allow lawyers to form partnerships with non-lawyer professionals.

The comparison of the U.S. system to that of Canada is useful, as the CBA, the Federation of Law Societies, and many of the provincial law societies have undertaken extensive study of the MDP issue focusing on furthering the public interest while protecting the same core values that we seek to protect. In addition,

¹⁹⁶ *Background Paper*, *supra* note 1, at 13.

¹⁹⁷ Daly, *supra* note 105, at 281.

¹⁹⁸ Munneke, *supra* note 8, at 615.

¹⁹⁹ See Promoting Professionalism, *supra* note 17.

²⁰⁰ See *Background Paper*, *supra* note 1, at 6-8.

²⁰¹ Mandy Smith, *MDPs: Face the Challenge!*, INT'L ACCT. BULL., Sept. 19, 2000, at 8.

the CBA thinks it is important to watch the ABA and the actions of the United States. "Given the potential for competition between firms in adjoining jurisdictions, the [CBA] believes it is necessary for a consistent North American position on the issue."²⁰² Given this competition and the advances abroad, it may be equally important for the United States to stay in step with Canada.

Critics of MDPs disregard the evidence of MDPs in other countries and claim that the American profession is different.²⁰³ While it is true that many foreign countries have varied concepts of the role of the lawyer, this does not serve as a justification for American lawyers avoiding progressivity. In addition, as one Canadian writing on the issue has stated, it is important to watch the international development of MDPs because "[a]s [they] grow elsewhere, the economic pressure to permit home-based MDPs will grow correspondingly in every country, particularly those that have ambitions to be significant players in the international market for services."²⁰⁴ One can argue that not amending the Model Rules to permit MDPs will prohibit the United States from maintaining its position as a significant player in the international market.

5.4. MDPs are Already in Existence in the United States

Rule 5.4 bans fee-splitting and partnerships with non-attorneys; however, law firms are "inching closer" to MDPs²⁰⁵ and

²⁰² *Status Report*, *supra* note 87, at 3.

²⁰³ In response to international MDP developments, Lawrence J. Fox states, "[w]hatever may be the role of lawyers in these other countries where the Big Five have swallowed law firms with nary a whimper, our profession in America is different." Fox, *supra* note 7, at 24. Another perspective on the international development was that of Leslie W. Jacobs of Cleveland, who told the delegates that

the growth of MDPs in Europe has more to do with 'the historic antecedents of law practice in Europe, which are entirely different than our own.' He pointed out that civil law systems 'are not founded on advocacy,' and that in Europe 'there has never been a comparable concept to the unauthorized practice of law.'

ABA Refuses to Change Ethics Rules Unless Studies of MDPs Dispel Concerns, 15 Conference Report, Aug. 18, 1999, at 397 [hereinafter ABA Conference Report].

²⁰⁴ BUCKLEY, *supra* note 77, at 3.

²⁰⁵ See Ritchenya A. Shepherd, *Law Firm Management: Law and Finance under One Roof*, NAT'L L.J., Nov. 15, 1999, at A21.

“such activities appear to be evolving with or without the imprimatur of the organized bar.”²⁰⁶ In addition, regardless of what the ABA House of Delegates ultimately decides, MDPs will continue to be created and “new delivery systems will continue to be forged by entrepreneurial lawyers.”²⁰⁷

The presence of MDPs in the United States is evidenced by traditional U.S. law firms preparing for the invasion of the Big Five either by forming separate ancillary businesses²⁰⁸ or by forming joint ventures and strategic alliances with non-legal entities.²⁰⁹ In addition, there are many lawyers who work in accounting firms in the United States today; they simply state that they are not violating Rule 5.4 because they are not practicing law.²¹⁰ The problem with lawyers working in accounting firms in the United States is that this type of behavior occurs outside the ban of Rule 5.4; thus, these attorneys are not subject to any ethical regulations.

[B]y insisting that lawyers can practice law *only* in traditional law firm settings, we effectively force lawyers who want to offer their services in non-traditional ways out of the profession. As a consequence, we compel such expatriates to characterize the services they provide as something other than “legal services” and we exclude such offerings from the bar’s ethical and disciplinary system.²¹¹

²⁰⁶ Munneke, *supra* note 8, at 566.

²⁰⁷ *Id.* at 567.

²⁰⁸ See *Background Paper*, *supra* note 1, at 13.

²⁰⁹ In what appears to be the first joint venture between a law firm trust group and an investment company, the Boston-based law firm Bingham Dana L.L.P. announced that the firm had formed an investment management and trust administration group with Baltimore investment giant Legg Mason, Inc. in October of 1999. Shepherd, *supra* note 205, at A21.

²¹⁰ One such explanation for this behavior is that: “[t]hey are getting away with this because the Model Rules of Professional Conduct do not include a definition of the practice of law.” ABA Conference Report, *supra* note 203, at 397. The principles in the MDP Commission’s report “would define the practice of law to include lawyers in MDPs and would thereby ensure that these lawyers do not practice law in MDPs unless they adhere to ethical standards applicable to all lawyers and uphold the core values of the profession.” *Id.*

²¹¹ Jones’ Remarks, *supra* note 159, at 15.

The goal should be to assert ethical regulation over all attorneys offering legal services, regardless of the economic or organizational structure of their business.²¹²

*5.5. ABA House of Delegates' Refusal to Modify Rules
Should Be Neither Disheartening Nor Surprising*

Although the ABA is not yet ready to accept recommendations for allowing the formation of MDPs, its resistance is neither surprising nor disheartening. As James Jones remarked at a recent seminar on multidisciplinary practices, "the American legal profession . . . has always been quite resistant to any changes in the practice of law. This has been especially true where a change threatened to reorder well established economic interests within the profession."²¹³

Examples documenting the legal profession's aversion to change begin as far back as a century ago and continue today. At the end of the last century, the introduction of the modern law firm was criticized as selling out the profession to commercial interests.²¹⁴ The development of in-house law departments by corporations was condemned by many members of the bar as threatening the independence of lawyers.²¹⁵ "In the 1930's, the introduction of group legal service plans . . . to provide affordable legal services to low- and moderate-income people, was also vigorously attacked by the bar and ultimately resolved only in a series of Supreme Court decisions in the 1960's and early 1970's that the bar lost."²¹⁶ The 1970s saw the introduction of paralegals and again the bar was resistant, claiming it was the unauthorized practice of law.²¹⁷ Finally, "the debate within the profession in the late 1980's and early 1990's about ancillary businesses" was so heated that one prominent critic pronounced it as "the end of the profession as we know it."²¹⁸ Jones concluded his speech by stating:

²¹² *Id.*

²¹³ *Id.* at 6.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 7.

²¹⁸ *Id.*

The point is that virtually every innovation in the practice of law over the past 100 years has been, at least initially, criticized and often roundly condemned by the organized bar. In my view, the current debate over MDPs fits the same pattern. And yet, despite the nay-sayers and the prophets of doom—and there have been plenty of them—I think that the American legal profession is better and stronger today because of almost all of the changes described above.²¹⁹

The bar's critical response to the introduction of MDPs should not be surprising. It is merely the bar's typical response to another development in a series of market driven attempts "designed to make legal services more accessible, more efficient, and more cost effective."²²⁰

6. CONCLUSION

Multidisciplinary practices have developed abroad in response to the consolidation of global markets and client demands for efficiency.²²¹ Other countries, such as Canada, are rapidly changing and endorsing the formation of MDPs; however, the United States remains fixed to an archaic model which prohibits fee-sharing and partnership agreements with non-attorneys.

Lawyers are supposed to adhere to that which came before,²²² but society has not remained static. This requires changing the ethical rules to reflect today's society.²²³ Meanwhile, as the debate

²¹⁹ *Id.*

²²⁰ *Id.* at 16.

²²¹ Anderson, *supra* note 44, at B21.

²²² One observer noted that:

We lawyers, after all, are supposed to be the keepers of the status quo, the preservers of the past. *Stare decisis* is nothing if it's not about adhering to that which came before [W]e are living in extraordinary times. For the first time since the founding of this country, we are experiencing fundamental, revolutionary technological and social change in virtually every aspect of our daily lives.

Roberta R. Katz, *At a Crossroads: Law, Courts, and Legal Practice at the End of the 20th Century*, 15 *COMPUTER LAW.*, Apr. 1998, at 14.

²²³ Other commentators have concurred with this view: "The ABA has an ongoing goal of stimulating conduct that reflects high moral ground, our society has not remained static nor can our ethics rule." Promoting Professional-

continues, the Big Five are gearing up to practice law in the United States.

The Model Rules should be amended to allow the formation of MDPs for three reasons. First, the rule serves lawyers' financial interest rather than the public interest. With regulation of non-lawyer controlled MDPs, the core values of the legal profession are protected. Model Rule 5.4 can no longer be defended, and as a result, becomes anti-competitive. Second, Model Rule 5.4 is an economic rule— not an ethical one. Rather than worrying about the legal profession's ability to compete with the Big Five to provide legal services to corporate America, the focus must be on ensuring that clients have legal services that are delivered efficiently. Finally, as state and local bars continue to study the issue, the United States should look abroad to the positive models provided by foreign countries as evidence of the demand for and success of MDPs in the marketplace.

ism, *supra* note 17.

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