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# At the Helm of the Multidisciplinary Practice Issue After the ABA's Recommendation: States Finding Solutions by Taking Stock in European Harmonization to Preserve Their Sovereignty in Regulating the Legal Profession

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## At the Helm of the Multidisciplinary Practice Issue After the ABA's Recommendation: States Finding Solutions by Taking Stock in European Harmonization to Preserve Their Sovereignty in Regulating the Legal Profession

### I. INTRODUCTION

“[A]n MDP [multidisciplinary practice] is an organization owned wholly or in part by non-lawyers which provides legal services directly to the public through owner or employee lawyers.”<sup>1</sup> The issues raised by the multidisciplinary practice of law are numerous and complex, and include international legal trends, economic pressures, consumer demands, the permanency of ethical codes, professional independence, and the scope of a state's power to limit the legal profession.

Possibly for these reasons, multidisciplinary practice has been deemed by many, including the president of the American Bar Association (the “ABA”), to be the most important problem facing the legal profession.<sup>2</sup> Because the multidisciplinary practice of law has been functionally illegal in all fifty states,<sup>3</sup> the decision of whether MDPs are ultimately accepted or rejected has been analogized to a crossroads,<sup>4</sup> a cliff,<sup>5</sup> and to the historical situations of overconfidence

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1. Ward Bower, *The Big Five's Case for MDPs*, 1999 A.B.A. SEC. L. PRAC. MGMT. ANN. MEETING 185 (noting also that “[i]n practice, MDPs also include otherwise independent law firms owned only by lawyers which practice in close cooperation with professional service firms owned exclusively or partly by non-lawyers, usually under a contractual arrangement”).

2. See American Bar Association Commission on Multidisciplinary Practice, *General Information Form* (visited Oct. 30, 2000) <<http://www.abanet.org/cpr/mdpgeninfo.html>>; see also Richard Pena, *Where Do We Go from Here?*, 62 TEX. B.J. 328, 330 (1999).

3. See American Bar Association Commission on Multidisciplinary Practice, *Background Paper on Multidisciplinary Practice: Issues and Developments* (visited Oct. 30, 2000) <<http://www.abanet.org/cpr/multicomreport0199.html>> [hereinafter *Background Paper*].

4. Richard Pena, *The State of the Profession*, 62 TEX. B.J. 110, 110 (1999) (noting that “[t]he legal profession in this state and throughout the country is at a crossroads. We have the opportunity to chart the proper course for the future, and a real chance of being successful . . .”).

5. See Pena, *supra* note 2, at 328.

resulting in loss of industry autonomy, where doctors suffered in the 1990s, timberworkers in the 1980s, and automakers in the 1960s and 1970s.<sup>6</sup>

Traditionally, the discussion of the multidisciplinary practice of law has included lawyers and accountants as central players. Undoubtedly, this is because the larger accounting firms have provided the resources that initially fueled the call for allowing MDPs. Nonetheless, the proposal and issues discussed in this Comment are applicable in nontraditional contexts—including alliances between lawyers and insurance agencies, lawyers and health care providers, and so forth. “The MDP movement is not limited to accounting and law firms”;<sup>7</sup> nor is it confined to the United States.<sup>8</sup> It is an international phenomenon.

In fact, “[t]he International Bar Association appointed a standing committee to study MDPs in 1996, resulting in a September, 1998 resolution recommending that regulators allow MDPs so long as client and public interests are adequately protected.”<sup>9</sup> In 1998, the ABA appointed a special commission, the Commission on Multidisciplinary Practice (the “Commission”), to investigate and report on the viability of the multidisciplinary practice of law in America.<sup>10</sup> Because the regulation of professions is largely within states’ regulatory powers, some state and local bar associations have formed independent commissions on this issue.

In August 1999, the American Bar Association’s Commission “recommended that the Model Rules of Professional Conduct be amended, subject to certain restrictions, to permit a lawyer to partner with a nonlawyer even if the activities of the enterprise consisted of

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6. See *id.* (referring to Jennifer James and anthropologists who believe that how we address modern issues such as the multidisciplinary practice of law puts the legal profession in the same perilous position as past industries while they were losing occupational independence).

7. Talha A. Zobair, *Point-Counterpoint—Multidisciplinary Practices—Firms of the Future*, 79 MICH. B.J. 64, 65 (2000) (referring to professional services such as expense management, travel services, etc.); see also Paul Michael Hassett, *Association Must Forge Consensus on Issues Important to Profession*, N.Y.L.J., Jan. 26, 2000, at S3 (referring to other financial services).

8. Although this Comment focuses on implementing MDPs in the United States, its reasoning is equally applicable to other states and nations dealing with the MDP issue.

9. Bower, *supra* note 1, at 186.

10. See American Bar Association Commission on Multidisciplinary Practice, *Updated Background and Informational Report and Request for Comments* (visited Oct. 30, 2000) <<http://www.abanet.org/cpr/febmdp.html>>.

the practice of law and to share legal fees with a nonlawyer.”<sup>11</sup> This recommendation was based on “more than sixty hours of public hearings, listening to the testimony of fifty-six witnesses, and receiving written comments from interested individuals and organizations . . . .”<sup>12</sup> Much of the Commission’s research was based on the experiences of European countries that, to some extent, have allowed MDPs.<sup>13</sup> Nonetheless, the ABA ignored the recommendation of its own MDP Commission, which it then disbanded, and recently decided to maintain an anti-MDP policy.<sup>14</sup> This appears to be an effort to uphold the “traditional” values of the legal profession, in an atmosphere where the Commission is no longer needed to explore MDP alternatives.

By withdrawing national support from the exploration of MDP alternatives, the ABA has surrendered an important role in developing a meaningful approach to the multidisciplinary practice issue. Categorical rejection of MDPs is not a tenable solution, as evidenced by the many states unable to reconcile the ABA’s anti-MDP policy with all of the evidence suggesting that the time for MDPs has come.<sup>15</sup>

One of the major underpinnings of this issue is the scope and intensity of the regulations to which a regulating authority may subject the legal profession. Many have challenged the scope of “state su-

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11. *Id.*

12. *Id.*

13. See *Background Paper*, *supra* note 3.

14. See American Bar Association Commission on Multidisciplinary Practice, *MDP Recommendation to House* (visited Oct. 30, 2000) <<http://www.abanet.org/cpr/mdprecom10F.html>>; American Bar Association News Release, *American Bar Association Rejects Sharing of Fees with Nonlawyers and Nonlawyer Ownership or Control of Entities that Practice Law* (July 11, 2000) <<http://www.abanet.org/media/jul00/hodrelease.html>> (noting that “[t]he American Bar Association today voted to maintain its position that lawyers not be permitted to share fees with nonlawyers . . . effectively rejecting the concept of multidisciplinary practice . . . .”); NYSSCPA, *ABA Defeats MDP Proposal* (visited Oct. 30, 2000) <<http://www.nysscpa.org/home/ABASaysNoToMDP.htm>> (noting that “[t]he ABA vote goes against the recommendation of its own commission appointed to study the issue. . . . The commission was disbanded after the vote was made.”).

15. See American Bar Association Commission on Multidisciplinary Practice, *Status of Multidisciplinary Practice Studies by State (and some local bars)* (visited Oct. 30, 2000) <[http://www.abanet.org/cpr/mdp-state\\_action.html](http://www.abanet.org/cpr/mdp-state_action.html)> (noting that Arizona, as an advocate for MDPs, “[r]ecognize[s] that multidisciplinary practices already exist de facto in the United States . . . . [and that the] Bar and the Court must participate in the regulation of legal services delivered by lawyers in MDPs to assure that clients who receive those legal services receive the levels of professionalism and protection as clients of lawyers who are not in MDPs”).

premac y in the regulation of lawyers.”<sup>16</sup> Some have suggested that states should substitute national regulations, e.g., codes of conduct, for their own.<sup>17</sup> Such a substitution would be, in light of the ABA’s resolution, patently antagonistic towards MDPs and a step closer to a national policy barring the multidisciplinary practice of law. Naturally, such a policy would not be accepted by the states that have adopted MDP-friendly policies and those states still exploring the issue.<sup>18</sup>

Unfortunately, the present landscape is devoid of solutions and full of controversy. There are currently no proposals that would facilitate a win-win situation for the advocates *and* antagonists of the multidisciplinary practice of law. However, this Comment suggests that by following the European MDP and harmonization experience countries and states facing controversies over the MDP issue can create a successful compromise. Accordingly, this Comment does not demand that states yield the whole of their regulating authority to a national/international entity—regardless of whether that body has accepted MDPs. On the contrary, the author believes it important for states to retain their authority to regulate. Even if states ultimately want to reserve their right to regulate the legal profession, this Comment suggests that there is a “range” in which states should exercise their regulatory power. Although states may retain caution and prudence toward MDPs, state regulating authorities must be willing to work under an objective that does not absolutely discount the concept of the multidisciplinary practice of law.

Part II of this Comment paints the backdrop for the MDP issue by discussing the viewpoints of the institutions that regulate the legal profession and their reasons for disfavoring MDPs. This part also

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16. Anthony E. Davis, *Profession Without a Compass: The Drift to Multidisciplinary Practice*, 1999 A.B.A. SEC. L. PRAC. MGMT. ANN. MEETING 224, 226.

17. *See id.* (“For some time there has been under discussion in the Standing Committee on Rules of Practice and Procedure of the U.S. Judicial Conference . . . a proposal that would create and enact a set of Federal Rules of Ethics, to sit alongside the Federal Rules of Procedure and Evidence.”); Anthony E. Davis, *Poles Apart—New Developments in Unauthorized Practice of Law and Multidisciplinary Practice*, 1999 A.B.A. SEC. L. PRAC. MGMT. ANN. MEETING 232, 237 (noting that “it cannot be clearer that the time has come to replace the state-by-state regulation of lawyers”).

18. *See* American Bar Association Commission on Multidisciplinary Practice, *Report from the ABA Commission on Multidisciplinary Practice* (visited Oct. 30, 2000) <<http://www.abanet.org/cpr/mdpstats.html>> (reporting that 23 states have set up committees but have not returned reports, and three states have taken positive action on pro change reports) [hereinafter *Report from the ABA Commission*].

notes that, in addition to direct experiences with MDPs, the European Community has developed principles of harmonization that can be applied to solve the multidisciplinary practice of law controversy.<sup>19</sup> Part III focuses on the multidisciplinary practice of law in Europe and highlights the utility of the European Community's principles of harmonization as they relate to MDPs. Relying on "new approach harmonization," Part IV charts a suggested course for the future, wherein the regulators of the legal profession can feasibly allow the multidisciplinary practice of law in their own jurisdictions. Part V concludes by emphasizing the need to create a mutually beneficial situation for parties that currently appear to be deadlocked on the MDP issue.

## II. HESITANCY TO ADOPT THE ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE'S RECOMMENDATION

The multidisciplinary practice of law faces many obstacles before it finds broad acceptance. Among the most formidable are the institutions that regulate the practice of law. Generally, these are the national, state, and local bar associations. As evidenced by the ABA's recent rejection of MDPs,<sup>20</sup> these regulatory bodies have predominantly responded to multidisciplinary practice with either outright rejection, measured skepticism, or silence.<sup>21</sup>

A second, related obstacle is found in various Codes of Ethical Conduct. Of particular importance is Rule 5.4 (or its state/local equivalent), which prohibits lawyers from forming partnerships with non-lawyers in providing professional services—the functional equivalent of banning MDPs.

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19. See, e.g., David Rubenstein, *Accounting Firm Legal Practices Expand Rapidly; How the Big Six Firms Are Practicing Law in Europe; Europe First, Then the World?*, CORP. LEGAL TIMES, Nov. 1997, at 1 ("A look at what the accounting firms are doing in Europe will give some idea of what form, or forms, an accounting firm offensive might take here. The expansion into European law practice is happening in one of two ways. The first is by the establishment of an 'in-house' practice: that is, by bringing lawyers into the accounting firm itself."); *Report of the Orange County Bar Association Task Force on Multidisciplinary Practice* (visited Oct. 30, 2000) <<http://www.ocbar.org/multidis.html>> (illustrating that the European experience is vital to how bars approach this issue).

20. See *supra* note 14 and accompanying text.

21. See *infra* Part IV.A.1.

*A. How State Bars Are Approaching Pro-MDP Recommendations**1. A landscape filled with resistance*

On the international level, “[i]n 1996, the Council of the Bars and Law Societies of the European Union (CCBE) adopted a position strongly opposed to multidisciplinary partnerships between lawyers and nonlawyers.”<sup>22</sup> In the face of pro-MDP recommendations from the International Bar Association and the American Bar Association’s former Commission, bar associations appear to be hesitant, even resistant, to allow the multidisciplinary practice of law.<sup>23</sup>

On the state and local level, a handful of state bars, and conceivably many local bars, have not yet formed commissions to inform themselves of the issues surrounding MDPs.<sup>24</sup> Those bars that have formed commissions to study the issues are generally hesitant to adopt or draw any conclusions from their research and recommendations.<sup>25</sup>

*a. Illustrating the resistance.* The Orange County Bar Association responded to the recommendation of the American Bar Association’s Commission as follows. Their response illustrates much of the hesitancy that is associated with the MDP issue:

The [Orange County] Task Force is unable to reach a concrete conclusion of a thumbs up or thumbs down on the Commission’s recommendation and MDPs . . . . The [Orange County Bar Association] could consider focusing on a strong recommendation to the California State Bar to remain independent and not allow MDPs until questions and issues can be adequately addressed. *Let some other jurisdiction undertake the risks associated with MDP formation and be the guinea pig.* The consumers of legal services in

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22. See *Background Paper, supra* note 3 (noting, however, that “[a] proposal to soften that position received a majority of votes cast at the November 1998 plenary session of the CCBE. But it failed to carry since it did not meet a supermajority requirement”).

23. See *Report from the ABA Commission, supra* note 18 (“Twenty-three states have appointed committees but the committees have not yet returned reports . . . . Ten states have appointed committees that have returned reports but have taken no action on the reports. . . . Nine states have taken action against change at the Board or House level . . . . Four states have not appointed committees.”).

24. See *Background Paper, supra* note 3 (noting, however, that “[a] proposal to soften that position received a majority of votes cast at the November 1998 plenary session of the CCBE. But it failed to carry since it did not meet a supermajority requirement”).

25. See *id.*

California and the attorneys here will benefit from that approach in the long run.<sup>26</sup>

The Orange County Bar Association is not alone in its inimical stance on MDPs. The New York State Bar Association, a powerful voice in the ear of the ABA's House of Delegates, recently announced its own

opposition to "any changes in existing regulations prohibiting attorneys from practicing law in MDPs, in the absence of a sufficient demonstration that such changes are in the best interests of clients and society and do not undermine or dilute the integrity of the delivery of legal services by the legal profession."<sup>27</sup>

After hearing the recommendation of the Commission, "[t]he Illinois State Bar Association has asked the ABA to postpone any action pending further study."<sup>28</sup> Minnesota, another vocal player in this debate, has expressed the desire to "take [its] time before considering what course of action benefits [its] clients, protects the public, and best serves [the] profession."<sup>29</sup>

*b. The early bird may get the worm.* To date, three states have adopted pro-MDP policies.<sup>30</sup> Although the Michigan Bar has not chosen to adopt the work of its MDP committee, it has commented on the advantages of articulating a timely and favorable position on MDPs. In its approach, Michigan champions its own sovereign powers to regulate. "The State Bar of Michigan . . . has the opportunity to take the lead by establishing a sound regulatory framework for MDPs in Michigan."<sup>31</sup> This reasoning is encouraging and illustrates the ultimate conclusion of this paper:

By embracing MDPs, the State Bar of Michigan can allow Michigan attorneys to expand their services to accommodate the changing market climate. It can take the lead in addressing the need to

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26. *Report of the Orange County Bar Association Task Force on Multidisciplinary Practice*, *supra* note 19 (emphasis added).

27. Edward J. Cleary, *Multidisciplinary Practice & Professional Independence*, BENCH & B. OF MINN. (visited Oct. 31, 1999) <[http://www2.mnbar.org/benchandbar/1999/sep99/mdp\\_prof\\_resp.htm](http://www2.mnbar.org/benchandbar/1999/sep99/mdp_prof_resp.htm)> (quoting New York State Bar Association).

28. Elizabeth Neff, *No Bane in Non-Lawyer Ties: Poll*, CHI. DAILY L. BULL., Jan. 3, 2000, at 1.

29. Cleary, *supra* note 27.

30. See *Report from the ABA Commission*, *supra* note 18 (noting Arizona, Colorado, and Minnesota as pro-MDP states).

31. Zobair, *supra* note 7, at 66.



regulate MDPs by leading the dialogue. In doing this, Michigan attorneys would be positioned to be the leaders in the professional services business by showing that we can readily adapt to change and that we can help our clients do the same.

This flexibility would also allow Michigan to prosper in a changing global business environment. Furthermore, other Michigan professional services firms will have similar gains with an increase in market share through the expansion of service offerings. Traditional nonlawyer firms will be forced to exchange some professional autonomy for market share. Likewise, Michigan lawyers will have to do the same to become the premier local and global service providers in the new millennium.<sup>32</sup>

## *2. Balancing the considerations in regulating the legal profession*

Undoubtedly, at least in the United States, regulating the legal profession has traditionally been the prerogative of the individual state and local bar associations. Currently, states, not the federal government, are granted the power to regulate the legal profession.<sup>33</sup> Many bar associations are legitimately concerned that ethical conduct may not be properly controlled if the regulation of MDPs is turned over to the free market. Bar associations thus play an important role in policing the ethical conduct of attorneys.

As with any regulating authority, it is important to periodically examine the regulator's role to ensure that those being regulated, as well as the public, are well served by the efforts. Inquiries must be made into whether the authority is fulfilling or overplaying its role. Similar questions apply to those being regulated. Thus, whether outdated regulations allow abuses or inefficiencies should be examined.

The advent of MDPs calls for such an examination of the regulation of the legal profession. Although the bars' concerns on this issue deserve merit, well-researched reports that ultimately support a pro-MDP approach (as was suggested by the research of the ABA's former MDP Commission and the International Bar Association) suggest that it is time to review the regulating relationship. In other words, the recent developments and scholarship on MDPs may re-

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32. *Id.*

33. *See* Bower, *supra* note 1, at 187.

solve many of the bars' concerns, which once justified the strict regulation of the legal profession on this issue, eventually opening the way for MDPs.

On the one hand, no regulating institution would condone a movement that may result in the unethical practice of law—especially when that institution is concerned with ensuring the propriety of the legal profession in its jurisdiction. However, the Commission's recommendation, supported by the work of modern scholars, strongly suggests that such concerns have been addressed.<sup>34</sup> Furthermore, if the commentators are correct in analogizing the advent of MDPs to that of HMOs in the medical profession—usurping some of the doctors' autonomy because of their failure to change with the times<sup>35</sup>—the balance again seems to tip in favor of considering pro-MDP policies.

Indeed, evidence from abroad suggests that current regulations are not really protecting the public but are insulating law firms from the international business market.<sup>36</sup> A recent “poll conducted on behalf of the U.S. Chamber of Commerce and the American Corporate Counsel Association has found 70 percent of Americans favor allowing multi-disciplinary practice.”<sup>37</sup> Steve Bokart, executive vice president of the National Chamber Litigation Center of the U.S. Chamber of Commerce, stated, “The majority of the people in this country are resistant to what they see as unnecessary regulation and feel they are smart enough to make decisions about who can best fulfill their needs. . . . People want to have options of where they get

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34. See generally American Bar Association Commission on Multidisciplinary Practice, *Report, Appendices, and Recommendation*, 1999 A.B.A. SEC. L. PRAC. MGMT. ANN. MEETING 191. The report states, “In reaching these conclusions, the Commission considered the history of and reasons for the prohibition against the sharing of legal fees and forming of partnerships or other entities with nonlawyers.” *Id.* at 192.

For a sampling of scholarly works addressing and resolving the concerns of MDPs, see Ronald A. Landen, Comment, *The Prospects of the Accountant-Lawyer Multidisciplinary Partnership in English-Speaking Countries*, 13 EMORY INT'L L. REV. 763 (1999); Gianluca Morello, Note, *Big Six Accounting Firms Shop World Wide for Law Firms: Why Multi-Disciplinary Practices Should Be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190 (1997).

35. See Pena, *supra* note 4, at 110 (noting that “[a]nthropologists such as Jennifer James warn that the legal profession could very well be where the medical profession was 10 years ago. The medical profession would not accept that a new medical paradigm was unfolding and because doctors waited, the medical profession lost all power.”).

36. See Sheryl Stratton, *Multidisciplinary Practice Issues in the U.S. and Abroad*, TAX NOTES INT'L, Jan. 11, 1999, at 156, 157.

37. Neff, *supra* note 28, at 1.

their services.”<sup>38</sup> As we become a more service-oriented society, Mr. Bokat’s observation warrants careful consideration.<sup>39</sup>

In light of evidence indicating that “[c]lients . . . are demanding—and getting—legal advice from ‘one-stop shopping’ professional service providers,”<sup>40</sup> bars should intently examine their role as regulators and verify whom they are protecting and if that protection is enhanced by unhurried or resistant acceptance of MDPs. If bar associations focus on the consumers of legal services, they are less likely to substitute their own concerns for the desires and economic benefit of the consumers.<sup>41</sup> If the bar is concerned with the welfare of the legal profession, then it needs to realize that prohibiting lawyers from competing in the international marketplace, where many MDPs are already thriving, may be detrimental to the economic relationship between lawyers and consumers. In this light, regulations disallowing MDPs may well be considered without sufficient basis and driven by little more than political jockeying, the fears of naysayers, and the discomfort inherent in change.<sup>42</sup>

Regulators must not be allowed to discount the call for change simply because there are consumer or economic elements motivating the movement. In our consumer-driven economy, it is not unusual for regulations to reflect consumer interests.<sup>43</sup>

[L]egal rules and constructs are increasingly relying on such non-law factors such as economics, quantitative studies, etc. For example, our own Internal Revenue Service employs economists to determine whether transactions have economic substance and to develop safe harbor rules for taxpayers. If the IRS employs economists to establish legal norms, taxpayers must similarly employ such non-

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38. *Id.*

39. See, e.g., David A. Swankin, *Written Testimony of David A. Swankin: President, Citizen Advocacy Center*, 1999 A.B.A. SEC. L. PRAC. MGMT. ANN. MEETING 247 (giving a detailed discussion of the advantages that consumers would enjoy in a pro-MDP environment and addressing many of the bars’ concerns).

40. Stratton, *supra* note 36, at 158 (emphasis added).

41. See generally Zobair, *supra* note 7. Zobair states, “MDPs have become the practical solution to obtaining cost-effective, comprehensive, professional services in an increasingly deregulated global market.” *Id.* at 64.

42. See generally *Oral Remarks of Charles F. Robinson, Solo Practitioner, Clearwater, Florida*, 1999 A.B.A. SEC. L. PRAC. MGMT. ANN. MEETING 274.

43. See Stefan F. Tucker, *Written Remarks of Stefan F. Tucker Submitted to the Commission on Multidisciplinary Practice*, 1999 A.B.A. SEC. L. PRAC. MGMT. ANN. MEETING 280, 286 (“Law firms and multidisciplinary practices are, by virtue of today’s litigious world, truly regulated by external forces—client and customer demands and expectations.”).

law professionals to inform their legal advice. Thus, a tax practice that properly informed its clients on the safe harbor should include the delivery of services from an economist to ensure that the client receives the highest quality representation.<sup>44</sup>

Many interested parties believe that “the existing regulatory framework is broken, and needs fixing.”<sup>45</sup> Although regulators may view economic and consumer demands as too revolutionary a basis to warrant change to the regulatory framework, failure to do so is an oversight rooted in antiquated thinking.

### *B. Model Rules of Conduct*

Current rules of professional conduct, generally Model Rule of Professional Conduct 5.4, or its state/local equivalent, functionally prohibit MDPs by disallowing lawyers to form partnerships with nonlawyers in the provision of legal services. Like many of the attitudes of the bar associations, the rules of conduct would need to be altered before MDPs could become widely established in the United States.

The ABA Commission, in recommending that MDPs be allowed in the United States, proffers thoughtful suggestions of how the rules should be modified—allowing increased occupational freedom without sewing the seeds of unbridled anarchy, which many believe will ensue should the rules be changed. The following selections highlight these modifications:

1. The legal profession should adopt and maintain rules of professional conduct that protect 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.

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44. John Dziekowski, *Statement of Professor John Dziekowski, University of Texas School of Law to ABA Commission on Multidisciplinary Practice*, 1999 A.B.A. SEC. L. PRAC. MGMT. ANN. MEETING 298, 314.

45. Tucker, *supra* note 43, at 286 (giving a detailed discussion of the advantages that consumers would enjoy in a pro-MDP environment and addressing many of the concerns of bars).

2. A lawyer should be permitted to share legal fees with a nonlawyer, subject to certain safeguards that prevent erosion of the core values of the legal profession.

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

. . .

5. A lawyer in an MDP who delivers legal services to the MDP's clients should be bound by the rules of professional conduct.

6. A lawyer acting in accordance with a nonlawyer supervisor's resolution of a question of professional duty should not thereby be excused from failing to observe the rules of professional conduct.

7. All rules of professional conduct that apply to a law firm should also apply to an MDP.<sup>46</sup>

Some regulators of the legal profession have been quick to point out that the ABA Commission's modifications do not exhaustively address every concern and should thus be discarded. "The Report's lack of clarity and guidance caused [the Orange County Bar Association] to raise questions instead of reaching any recommendations or conclusions . . . [T]he Commission . . . should have provided . . . a clearer definition of a MDP . . . and better thought to client confidentiality and conflicts of interest . . ." <sup>47</sup> Although these criticisms may reflect some truth, the Commission's recommendation to modify the rules should prevail for at least three reasons.

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46. American Bar Association Commission on Multidisciplinary Practice, *Report to the House of Delegates* (visited Oct. 31, 2000) <<http://www.abanet.org/cpr/mdprecommendation.html>> (omitting several of the other modifications).

47. *Report of the Orange County Bar Association Task Force on Multidisciplinary Practice*, *supra* note 19.

First, unless state bars wish to nationalize the regulation of the legal profession, it is not the burden of the ABA Commission to exhaust and address every conceivable nuance associated with MDPs. As with other issues of legal professional conduct, such is the prerogative of the individual bar associations. The ABA Commission has fulfilled its mission of determining whether safeguards can be developed to allow the ethical multidisciplinary practice of law. After investing the time and resources necessary, its conclusion is that allowing MDPs is possible *and* necessary. Their work is complete even if it is not exhaustive. Figuratively speaking, the ball now lies in the court of the entities and associations acting as custodians for the legal profession to respond to the research and findings of the ABA. If the state and local bar associations are going to continue to regulate the legal profession, they should recognize their obligation to decide issues such as MDPs before it is too late. Accordingly,

[t]he Commission recognizes that new procedures must be developed to regulate the delivery of legal services through MDPs. This does not mean that a new regulatory body must be established or that regulation must be done on a national level. The Commission's recommendations provide for continued regulation of the delivery of legal services by the highest court of each jurisdiction, regardless of the organizational structure in which a lawyer practices.<sup>48</sup>

Second, bar associations should not unduly adhere to Rule 5.4 as canon. Rules such as 5.4 reflect the ebb and flow of needs in the legal profession and are not among those rules that spring forth from the foundations of ethical conduct. In studying the foundation of Rule 5.4, the Commission found that:

The existing bans found in Model Rule 5.4 were *not* contained in the original Canons of Professional Ethics adopted by the ABA in 1908. It was not until twenty years later that the ABA added Canons 33 through 35, Model Rule 5.4's predecessors. The Canons, moreover, expressed the prohibitions in precatory, not mandatory language.<sup>49</sup>

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48. American Bar Association Commission on Multidisciplinary Practice, *Report*, 1999 A.B.A. SEC. L. PRAC. MGMT. ANN. MEETING 191, 196.

49. *Id.* at 192.

Sentiments that would canonize Rule 5.4 institutionalize the regulation of the legal practice regardless of the harm or benefit and do not allow regulating entities to be true custodians. Possibly the best evidence of the metamorphic nature of Rule 5.4 is found in the District of Columbia's recent modification, which does not allow MDPs but does "permit partnership and fee sharing with nonlawyers."<sup>50</sup> The Commission's report also points out that this is not the first time that Rule 5.4 has been targeted by proposals of relaxation.<sup>51</sup>

Third, failure to reexamine Rule 5.4 will perpetuate a harm to lawyers and consumers of legal services, which will increase as the market becomes more global and the competition becomes more international. These dynamics are apparent in the following observations.

The Big Six [now five] firms have the advantage of seemingly boundless resources. They generate several billions of dollars in revenue and have greater resources for marketing and specialization, observed an attorney. Law firms, by comparison, "are over-matched," . . . . They lack the capital base and financial resources to compete with the Big Six, and they can't afford to have the management structure . . . .

Even if law firms could afford it, ethical rules prevent them from expanding their business . . . "lawyers are in a very regulated profession . . . . It's a hideously rigorous stricture . . . as are the Model Rules [of Professional Conduct] for conflicts of interest."

"A double standard exists . . . . Law firms are not permitted to undertake steps that accounting firms are enabled to do." Attorneys can't charge clients directly for services provided by the law firm's accountants, "yet accounting firms employ attorneys and charge clients for the services of the attorneys."<sup>52</sup>

These are not singular observations. "Traditional law firms are finding themselves in a competitive disadvantage. Witness . . . the ti-

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50. *Background Paper*, *supra* note 3.

51. *See id.* (citing ELAINE REICH, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE HOUSE OF DELEGATES 159-64 (1987)).

52. Sheryl Stratton, *Practice of Law by CPA Firm Members Raises Legal and Ethical Questions*, TAX NOTES TODAY, Apr. 25, 1997, at 80-86.

tle of a recent article in the American Bar Association Journal on this subject: ‘*Squeeze: As Accountants Edge into the Legal Market, Lawyers May Find Themselves Blindsided by the Assault But Also Limited by Professional Rules.*’<sup>53</sup>

In this light, some law firms are finding ways to meet market demands by working around Rule 5.4. Under the current MDP prohibitions, “some law firms have established separate ancillary businesses in which lawyers and nonlawyer partners provide professional services to clients . . . . [I]f the ban on partnerships with nonlawyers . . . [were] modified, some of these law firms would incorporate the ancillary businesses directly into their practices, naming the nonlawyers as partners.”<sup>54</sup> But, as long as the ban is in place, working around Rule 5.4 also incurs disapproval and is not a viable solution for a stable future in the legal profession—especially with many regulators and practitioners at loggerheads. For example, the Pennsylvania Bar notes, “[d]e facto MDPs are everywhere around us and the ‘*civil disobedience*’ of more than 5,000 of our lawyer brethren in the accounting firms and elsewhere as yet goes unchecked and unchallenged.”<sup>55</sup>

These sentiments buttress the findings of the Commission: there are strong arguments suggesting that the time has come to modify Rule 5.4 to reflect the needs of the consumers and producers of the legal services.

Market forces and the structure set forth by the Commission suggest that ethical conduct can still be maintained, and consumers protected, under the multidisciplinary practice of law. Thus, it is time to reexamine the justification for regulations prohibiting MDPs and realize that what may have once been legitimate is now arbitrary, no longer justifying current forms of regulatory intervention.

The present circumstances suggest that the regulations do not justify the end. A state’s regulatory power must have limits.

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53. Ronald D. Rotunda, *Multidisciplinary Practice: An Idea Whose Time Has Come* (visited Oct. 31, 2000) <<http://www.fed-soc.org/multidisciplinaryprofv3i2.htm>> (citing John Gibeaut, *Squeeze: As Accountants Edge into the Legal Market, Lawyers May Find Themselves Blindsided by the Assault But Also Limited by Professional Rules*, A.B.A. J., Feb. 1998, at 42).

54. *Background Paper*, *supra* note 3 (footnote omitted).

55. Pennsylvania Bar Association Commission on Multidisciplinary Practice and Related Trends Affecting the Profession, *Preliminary Report to 1999 Mid-Year Meeting of PBA House of Delegates* (visited Oct. 31, 2000) <<http://www.pabar.org/mdp915rp.shtml>>.



[Without limits] the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint.<sup>56</sup>

Some may question whether this issue falls more directly in the lap of *Holden v. Hardy*,<sup>57</sup> where state regulations limiting the hours of miners was upheld as a legitimate means of protecting the health and safety of the miners, a “valid exercise of the police power of the State.”<sup>58</sup> However, the MPD issue is easily distinguishable. In *Holden*, without the state’s interference, the miners would have been left without protection against poor work conditions.

[T]he proprietors of these [mining] establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.<sup>59</sup>

Evidence shows that MDPs do not create such inequalities. In other words, the harms of MDPs, which regulating authorities seek to circumvent, do not exist in the same way as they did in *Holden*.<sup>60</sup> By way of illustration, modern consumers of legal services are more sophisticated, and, based on their sophistication, they can choose a traditional or multidisciplinary practice of law. By choosing a traditional practice, the consumer is assured the familiar, status quo protections.

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56. *Lochner v. New York*, 198 U.S. 45, 56 (1905); see also discussion *infra* Part IV.B.3.

57. 169 U.S. 366 (1898).

58. *Id.* at 398.

59. *Id.* at 397.

60. See *infra* Part IV.A.2.

Undoubtedly, this issue is a very delicate one, requiring a balance between protecting the providers and consumers of legal services with international trends and a consumer-wide consensus demanding MDPs. Fortunately this is not an issue of first impression. Europe's long-time association with MDPs provides numerous examples of solutions that, by analogy, could help the United States and other countries to successfully incorporate the multidisciplinary practice of law.

### III. EUROPEAN COMMUNITY SETS THE STAGE FOR PROFESSIONAL GLOBALIZATION

As previously discussed, domestic bar associations addressing multidisciplinary practice have expressed hesitancy and even resistance in charting their jurisdiction's relationship to the issue. It is understandable that the associations may feel that they are being asked to forge ahead at full throttle in uncharted waters. Perhaps for these reasons the ABA's Commission collected data from entities who have already had experience with the MDP issue, such as many of the European states.

Presumably, most state bar associations do not have, at least to the extent of the ABA's Commission, the resources to conduct an independent study of the European experience with MDPs. However, the extensive research of the Commission, combined with the observations of several prominent scholars, provide an excellent foundation for domestic entities to begin assimilating Europe's experience in solving this problem. Accordingly, the author has highlighted some of the data in Section A.

Nonetheless, simply observing how a handful of European states have addressed the MDP issue has limited utility in solving the ultimate problem of formulating a profession-wide approach to this issue. After all, even the European Community continues to grapple with building a consensus across their jurisdictions.<sup>61</sup>

The real utility of the European experience is discussed in Section B. Principles of harmonization, which have evolved in the European Community, are sufficiently developed to be useful to the resolution of this issue.

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61. *See infra* Part III.A.

*A. European States and MDPs*

Although domestic bar associations may feel that they are being asked to resolve an issue with no precedence or prior application, such is not the case. State bar associations can look to Europe, as well as other nations, for a wealth of knowledge on the implications of MDPs. Indeed, MDPs have a long history in Europe. "MDPs originated in Germany, where, since the end of World War II, lawyers have been able to practice in partnership with tax accountants . . . [and] [i]n the past decade, the MDP movement has spread throughout Europe."<sup>62</sup>

Because Europe is a few steps ahead of the United States on this issue, a look at Europe's recent history may serve as a template for the United States' future resolution of the MDP issue. Europe's history shows that, like the United States, there were, and in select cases still are, voices disfavoring MDPs. However, the voices opposing MDPs in Europe are slowly succumbing to international and Community trends. For example, "In 1996, the Council of the Bars and Law Societies of the European Union (CCBE) adopted a position strongly opposed to multidisciplinary partnerships between lawyers and nonlawyers . . . [but a] proposal to soften that position received a majority of votes cast at the November 1998 plenary session . . . ."<sup>63</sup>

Naturally, there is a range of acceptance of MDPs across Europe. "The positions . . . range from the liberal allowance of such arrangements in Germany, to France, where lawyers practicing in firms owned by non-lawyers are asked only to swear to an affidavit averring

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62. Bower, *supra* note 1, at 185. By way of illustration:

The *American Lawyer* reported in November 1998 that PricewaterhouseCoopers employed 1,663 nontax lawyers in 39 countries; Arthur Andersen, 1,500 in 27 countries; KPMG, 988 in an unidentified number of countries; Ernst & Young, 851 in 32 countries; and Deloitte Touche Tohmatsu, 586 in 14 countries. When compared to the largest law firms, these figures placed PricewaterhouseCoopers and Arthur Andersen third and fourth, respectively, in total number of lawyers employed worldwide, behind only Baker & McKenzie and Clifford Chance. The accounting firms are actively pursuing clients in markets as diverse as those of France, Spain, Australia, Canada, and the Confederation of the Independent States of the former Soviet Union.

*Background Paper, supra* note 3 (footnotes omitted).

63. *Id.* (footnote omitted) (noting however that a supermajority was required to pass the vote).

their professional independence.”<sup>64</sup> Notwithstanding the exceptions, the main thrust behind the trend toward universal European acceptance of MDPs appears to be twofold. First, as will be discussed more thoroughly in Part IV, international market forces and consumer trends demand the liberalization of regulations on lawyers—allowing them to expand their practice to fit today’s market. Second, at least in the European Community, Community principles of competition demand the deregulation of the legal profession.

*1. International market and consumer trends*

Several European states that have opposed MDPs are now re-tooling their positions. For example, in recent years “[i]n the UK, [MDPs were] banned outright, legislatively, but ‘independent’ law firms [could] practice in close cooperation with Big Five firms under a contractual arrangement for management services, holding themselves out as a part of the worldwide legal network of the appropriate Big Five firm.”<sup>65</sup>

The United Kingdom has recently recognized that there are other forces at play, which demand the deregulation of the legal profession if the profession is to remain competitive. The year “1999 ended with the Law Society council voting overwhelmingly in favour of mixed partnerships. The council recognised that the implementation of full MDPs will take time and considerable legislation but has agreed to work toward allowing solicitors to provide any legal service through any medium to anyone.”<sup>66</sup>

The contrast between the U.K. and the U.S. approach

could not [be] starker. On the one hand, the Mother of all common law courts, the House of Lords, is acknowledging the fundamental change that has already occurred in Europe—that what is at issue in cases involving the regulation of professional ethics is not to be determined by reference to *who* is providing the service—or by the particular *qualifications* of the provider—but rather that what is central is the nature of the service itself. By extension, the House of Lords is undercutting the arguments voiced in the US by die-hards clinging to the old ways, who assert that only lawyers,

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64. Bower, *supra* note 1, at 186.

65. *Id.* at 187.

66. Abigail Townsend, *Defiance or Alliance?*, THE LAW., Jan. 10, 2000, at 16 (citing THE LAW., Oct. 18, 1999).

with their higher standards of professional responsibility, can be trusted to put their clients' interests first, by establishing the principle that indeed the clients' interests must be protected—by applying those standards to *whoever* supplies the services.<sup>67</sup>

In analyzing the motivation behind the United Kingdom's decision, one commentator stated that “[m]ost believe the move . . . is inevitable because of economic and political pressures. But exponents of the practice say the biggest push will come from the clients who, in an increasingly global market, want a one-stop shop for legal and financial services that they can use anywhere in the world.”<sup>68</sup> Furthermore, there are the arguments that “those who retain multidisciplinary firms ‘will be sophisticated clients who have chosen a lawyer associated with an accountancy firm for the benefits they believe will flow from that relationship . . . [and] are able to distinguish when it would be in their interests to seek “arm’s length” independent legal advice.’”<sup>69</sup>

## 2. *Community competition*

The European Court of Justice appears to be active in this debate and laying the foundation for lawyers to be able to compete in the international market by practicing law in a multidisciplinary setting. In the face of state sovereignty, the judicial activity seems to be warranted as a means of preserving established fundamental rights created by the European Union. Among these rights are freedom of profession, freedom of trade, freedom of industry, and, most significantly, freedom of competition.<sup>70</sup> A recent dispute in the Netherlands illustrates how MDPs intersect with these fundamental rights.

In the Netherlands, where MDPs likewise are banned, two of the Big Five firms sued the Law Society seeking a judicial determination that the ban against MDPs violated competition laws. The Trial Court of Amsterdam upheld the ban, but that decision has been appealed to the European Court as *inconsistent with the new*

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67. Davis, *supra* note 17, at 236. Although the contrast is actually between the U.K. and New Jersey, the comparison is intuitively applicable to the United States as a whole.

68. Townsend, *supra* note 66, at 16.

69. Bruce Balestier, *Under One Roof: ABA Faces Arrival of Lawyer-Accountant Pairings*, N.Y.L.J., Nov. 19, 1998, at 5 (quoting Alison Crawley of the Law Society of England and Wales).

70. See *Respect for Fundamental Rights in the Union* (visited Oct. 31, 2000) <[http://www.europarl.eu.int/dg4/factsheets/en/2\\_1\\_0.htm](http://www.europarl.eu.int/dg4/factsheets/en/2_1_0.htm)>.

*competition laws of the European Union.* Reportedly negotiation between those Big Five firms and the Law Society could result in a compromise position, probably similar to that which has emerged de facto in the UK (“independent” law firms, contractually associated with Big Five firms).<sup>71</sup>

The writing on the wall is that MDPs will be universally acceptable, at least on a Community level, in order to facilitate the new structure of the European Union’s fundamental rights. However, realistically, the Netherlands’ example is not likely to be the end of legal cases on the subject.<sup>72</sup>

In this light, the question, applicable both to the United States and the European Union, becomes how to reconcile the sovereign powers of states and nations to regulate professions with overarching considerations such as Community fundamental rights and international market forces.

*B. Old and New Approaches to Harmonization: Invaluable Tools in Addressing MDPs*

Harmonization is exactly what the word implies: reconciling differences to achieve a common objective. Applied to the MDP issue, the goal of harmonization would be to reconcile the sovereign powers of the legal profession’s regulators, and even the noncontrolling naysaying of the ABA, with the evidence that suggests the time has come to allow MDPs. Domestically and abroad, the author envisions the goal in implementing MDPs as the establishment of a common “legal services” market and the ultimate establishment of free competition.

Unlike Europe, “[e]xcept for national banking and the securities sector, there has been little attempt [by the United States] to ‘federalize’ . . . fields or to harmonize the diverse state systems. In contrast, the European Community has extensively harmonized Member State legislation in these areas.”<sup>73</sup>

Consequently, in its historical, and especially present, experience with harmonization, the European Union provides the template for reconciling the implementation of MDPs with the powers of states

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71. Bower, *supra* note 1, at 187 (emphasis added).

72. See Townsend, *supra* note 66, at 16–17.

73. GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 545 (1993).

to resist such implementation. Lessons learned from the old approach show the United States what pitfalls to avoid, and the promise of the new approach gives confidence in a path that may be followed to resolve the MDP issue worldwide.

*1. Historically: The old approach to harmonization*

Historically, the European Union relied upon what is now termed the “old approach” to harmonize individual state rules with the demands of the common Union.<sup>74</sup> Illustrative of this approach is “the removal of obstacles to economic activity . . . through the adoption of detailed harmonisation measures. In every area where national legislation served an accepted interest and thereby restricted trade between Member States, it was thought necessary for this interest to be protected in the same way in every Member State.”<sup>75</sup>

The old approach, especially when applied to the harmonization of professions, demanded such an extensive reconciliation of national and Union regulations, that “such measures were . . . agreed, if at all, only after years of negotiation.”<sup>76</sup> Under the old approach, “[e]ven where agreement was reached, the resulting measures might not be geared to potential technological developments and might even be capable of obstructing them.”<sup>77</sup>

The majority of United States bar associations seem to demand an analogue of the “old approach” applied to the multidisciplinary practice of law. States are not willing to harmonize their own jurisdictional regulations with the recommendation of the ABA Commission until the details of every concern are explored and resolved.<sup>78</sup> In the United States, the extent of detail demanded to be harmonized has slowed the process and may even deter MDPs altogether.<sup>79</sup> Indeed, this type of stonewalling may be the entire goal of the states’ approach.<sup>80</sup>

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74. See ANDREW EVANS, A TEXTBOOK ON EU LAW 474–75 (1998).

75. *Id.* at 474.

76. *Id.* at 475.

77. *Id.*

78. See *supra* Part II.B.

79. See *supra* Part II.A.

80. See Townsend, *supra* note 66, at 17 (“It is widely believed that the [ABA] House of Delegates will not vote in favour because the state bars, particularly the influential New York bar, are against MDPs.”).

As technology brings our world closer together in an international marketplace with one-stop shopping and sophisticated consumerism, the old approach is not only “capable of obstructing”<sup>81</sup> the creation of MDPs but also of postponing resolution of an issue that needs to be decided quickly.

*2. Presently: The new approach to harmonization*

Fortunately, the European Union has improved its approach to harmonization and now offers, in what has been termed the “new approach,” a template with which MDPs may be implemented without severely threatening the sovereign powers of the regulators of the legal profession. “This approach is characterised by a willingness to allow certain derogations from harmonisation measures and a reliance on outline legislation and mutual recognition.”<sup>82</sup>

The new approach is particularly useful in resolving the conflicts surrounding MDPs, because under the new approach “[d]irectives may be couched in general terms, and detailed implementation may be left to others.”<sup>83</sup> Such an approach is often called “outline legislation” and is supported by the European Community Treaty, Article 189(3), where “directives lay down objectives to be achieved by the Member States, while leaving the latter free, in principle, to choose the means of implementation.”<sup>84</sup>

Addressing MDPs with an objective, rather than detail-oriented, approach gives MDP antagonists the opportunity to chart their own solutions with a framework of the protagonist’s policy. This type of harmonization turns the MDP conflict into a win-win situation and leaves the ground fertile for the growth of solutions.

It is significant to note that the new approach evolved out of the “need to enable Union industry to have a chance of competing with the United States, Japan [etc.]”<sup>85</sup> In the context of multidisciplinary practice, the same need exists today: lawyers must have the shackles of MDP prohibition removed if they are to be economically competitive.

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81. EVANS, *supra* note 74, at 475.

82. *Id.*

83. *Id.* at 476.

84. *Id.*

85. *Id.* at 475.



The criticisms of the new approach are fairly confined but should be addressed here. Some have suggested that the new approach “fail[s] to have sufficient regard to requirements other than those of trade liberalisation.”<sup>86</sup> However, as discussed below, new approach harmonization will not usurp the power of regulators of the legal profession to protect consumer, safety, ethical, and other interests.<sup>87</sup>

The final parts of this Comment expand upon the principles of harmonization mentioned above, applying new approach harmonization directly to the problems inherent in the multidisciplinary practice of law.

#### IV. WHERE DO WE GO FROM HERE? OBJECTIVES AND HARMONIZATION

Because new approach harmonization requires objectives, a few words should be devoted to understanding the problem before an objective and tentative solution are proposed.

##### *A. Understanding the Challenges*

The MDP debate is complicated and involved. The controversy involves MDP adversaries not wanting to yield regulatory power and MDP advocates pointing to a myriad of circumstances suggesting that the time for MDPs has come. However, the challenges on either side of the debate, outlined below, can be harmonized.

##### *1. Challenges: MDP antagonists*

Although the challenges to the multidisciplinary practice of law cannot be uniformly prioritized, due to the variance in the commentary, the reasons to prohibit MDPs include at least the following text. Because “[t]he primary purpose in regulating the legal profession is to protect the public interest,”<sup>88</sup> many worry about the ability of MDPs to protect the public interest. Also, many “believe [that] MDPs are properly banned by Rule 5.4 and are inherently dangerous to client and public interests due to potential conflicts of interest and compromise of client privilege.”<sup>89</sup> The ABA Commission’s Report

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86. *Id.* at 477.

87. *See infra* Part IV.B.2.

88. Dzienkowski, *supra* note 44, at 300.

89. Bower, *supra* note 1, at 187.

states that, “[t]he most frequently raised concern before the Commission relating to the protection of professional independence of judgment involved nonlawyer supervision of lawyers.”<sup>90</sup> Additionally, the following challenges highlight the many concerns heard by the Commission:

- **Confidentiality.** “Concerns were expressed about the possible inappropriate disclosure of confidential client information within an MDP, since there is not uniformity among different professions about the circumstances under which client information may, must, or must not be disclosed to a third party.”<sup>91</sup>
- **Attorney-client privilege.** “The concern for the potential impairment of the attorney-client privilege arises from the possibility that a client of an MDP would not be properly informed as to the separate functions performed by the MDP and that the members or employees of the MDP would not treat legal matters in a manner appropriate to the preservation of the privilege.”<sup>92</sup>
- **Conflicts of interest.** “The concern about conflicts of interest arises from differences between the rules of lawyer conduct related to the lawyer’s obligation of loyalty to the client and the ethics rules of other professions.”<sup>93</sup>
- **Holding out as a lawyer.** “[P]rotections offered to a client by a lawyer can be lost if appropriate care is not paid to the manner in which the lawyer is identified to the client and the manner in which the lawyer forms and maintains the client-lawyer relationship.”<sup>94</sup>
- **Pro bono service.** Many fear that lawyers in an MDP will shirk their responsibility to provide “legal services to persons of limited means or to charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the legal needs of persons of limited means.”<sup>95</sup>

90. American Bar Association Commission on Multidisciplinary Practice, *supra* note 48, at 193.

91. *Id.* at 194.

92. *Id.*

93. *Id.*

94. *Id.* at 195.

95. *Id.*

- **Legal fees and client trust accounts.** “Lawyers in an MDP may not have the same direct supervision over the handling of funds that they do in a law firm. Moreover, whereas fees paid by clients to law firms are by definition legal fees, fees paid by clients to MDPs will often cover both legal and nonlegal services.”<sup>96</sup>

## 2. *Challenges: MDP advocates*

Although the MDP advocates do not assert any challenges to MDPs, at least in the literal sense, there are several points of urgency that must be reconciled with the adversarial side of the debates.<sup>97</sup> For instance, if MDPs are not universally accepted, the advocates express concerns about the future economic viability and competitiveness of the legal profession. “[C]onsumers in the marketplace are demanding changes to the methods in which professional services are offered and delivered, and . . . consumers expect lawyers and other professionals to meet these changes.”<sup>98</sup> Furthermore, advocates suggest “that Rule 5.4 in this instance is being used for the economic protection of independent, private law firms, and is not necessary for the protection of client and public interests, which it is agreed by both groups is the only justifiable basis for regulation.”<sup>99</sup>

MDP advocates, in harmony with the Commission’s findings, believe that the adversarial challenges can be easily overcome. Nonetheless, in the face of so many conflicting voices, resolution seems distant at best and non-existent at worst. Under new approach harmonization, however, the challenges detailed above can be reconciled.

### *B. The Solution: New Approach Harmonization*

Under the template set forth by new approach harmonization, there are several levels at which the MDP issue can be resolved in a way that is mutually beneficial to both the advocates and adversaries of the multidisciplinary practice of law. None of these methods are mutually exclusive; in fact, a mixed approach may be the most effective. In general terms, the first method is the most faithful to how

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96. *Id.* at 195–96.

97. See discussion *supra* Part II.A.2.

98. Dzienkowski, *supra* note 44, at 298.

99. Bower, *supra* note 1, at 187.

new approach harmonization has occurred in Europe. The second method, realizing that the United States lacks many aspects of the European setting that facilitate new approach harmonization, broadly interprets Europe's experience to synthesize a workable compromise—the end result of which is new approach harmonization in hybrid form. The final method, well suited to use in conjunction with the first two, calls upon the judicial system to facilitate workable MDP solutions as opportunities are presented.

Regardless of the method employed to accomplish harmonization, an objective that does not allow at least a minimum level of multidisciplinary practice will leave the parties at an impasse. Whether one believes the evidence suggesting that fully-integrated MDPs are appropriate, refusal to permit any level of MDP leaves both parties with nothing to gain and much to lose. Accordingly, the objective under any method of harmonization should be MDP-friendly yet need not embrace the concept fully—leaving such a decision to the discretion of the state.

*1. First method: National mandates and strict adherence to new approach harmonization*

To be true new approach harmonization, there must be a mandate analogous to a treaty provision or national mandate. Such treaties and mandates have traditionally acted as the objectives around which individual states (or nations in the case of the European Community) harmonize their domestic laws. In Europe, these mandates have traditionally been broad—allowing for states/nations to maintain much of their individuality while mandating their compliance with community objectives. For example, “Union legislation accepts that differences exist between Member States in professional training courses. However, the final qualifications giving access to similar fields of activity are in practice broadly comparable.”<sup>100</sup>

*a. Commerce clause: A possible focal point for harmonization.* Because a treaty regime similar to that used by the European Community is largely absent in the United States, an analogous and successful MDP objective in the United States would require a federal statute or regulation. One commentator remarked, “If we do not

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100. EVANS, *supra* note 74, at 477 (“[D]irectives on the mutual recognition of professional qualifications . . . resort as little as possible to the prescription of detailed training requirements.”).

construct a system that moves us toward national bar admission and national regulation . . . we will find one day that, like the dinosaurs, we have become extinct.”<sup>101</sup> Such an objective would not be without foundation and is entirely feasible under the Commerce Clause. Because states limit the economic activity of legal services providers, “[t]he interstate commerce clause . . . [is] a possible override to eliminate state barriers.”<sup>102</sup> In short, because the legal profession is an important dynamic in interstate commerce, the federal government, under the power of the Commerce Clause, could form an objective that would mandate a minimal acceptance of MDPs. This would open the door to increased economic activity by the legal profession as it expands its role to meet the demands of consumers and changes in the international market. However, as in Europe, the individual states would be left with broad authority to prescribe the technical specifications of multidisciplinary practice in that state.

*b. Structuring a range of harmonization.* Europe’s experience with MDPs creates the template for defining the “range” of state individuality under the objective. The United Kingdom has proposed to structure the low, or more regulated, end of the range by “[r]ecognising that full MDPs require legislation and time to implement, the council plans two interim solutions . . . a ‘legal practice plus’ and a ‘linked partnership.’ The former would not allow full-fledged one-stop-shops, but would enable law firms to have a minority of non-solicitor partners.”<sup>103</sup> The latter “is based on the alliances many big accountancy firms already have with law firms, although the working party is to explore whether the ban on fees-sharing could be relaxed entirely or only in specified alliances.”<sup>104</sup> At the other end of the range, the less regulated end, “working parties” or the regulators of the legal profession may choose to encourage open competition under the full multidisciplinary practice of law.

This framework approach is in perfect harmony with the Commission’s work. Indeed, “the Commission has outlined . . . five possible approaches, which range from ad hoc teaming between separate

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101. Anthony E. Davis, *The Drift to Multidisciplinary Practice*, N.Y.L.J., Nov. 2, 1998, at 3, 6.

102. American Bar Association Commission on Multidisciplinary Practice, *Oral Testimony of Stefan F. Tucker* (visited Oct. 31, 2000) <<http://www.abanet.org/cpr/tucker4.html>>.

103. Lucy Hickman, *LawSoc Votes for MDPs After 10-Year Wait*, THE LAW., Oct. 18, 1999, at 2.

104. *Id.*

firms of professionals for client specific projects to fully integrated multidisciplinary firms.”<sup>105</sup> Because of the Commission’s work, and the abundance of scholarship in this area, states are not left without resources to aid in defining how they will individually approach MDPs under a national objective.

Although forming a national objective requiring base-level acceptance of MDPs may seem novel and unlikely, the power to do so is found in the Commerce Clause.<sup>106</sup> This Comment encourages federal legislators to form a national objective, allowing providers of legal services to be more competitive and the consumers of legal services to enjoy greater economic freedom and choice, while preserving state sovereignty to regulate and define the extent of MDP allowed in each jurisdiction.

*2. Second method: An analogue of new approach harmonization and relying on persuasion and voluntary participation*

The fact that the United States lacks a national mandate allowing a base level of multidisciplinary practice and that legislation to create such a mandate will not likely be passed soon is not fatal to harmonization and resolution of the MDP debate. States need not wait for “formal” new approach harmonization to take place under a mandate from Congress that may or may not be forthcoming. Based on a desire to preserve state regulatory power in this issue, state bars should voluntarily pick a point on the MDP “range” or adopt one of the models proposed by the Commission.<sup>107</sup>

In this regard, the ABA could have done much to encourage this second method by outlining a “range” of suggested MDP activity.<sup>108</sup> Although the ABA’s rejection of MDPs may be interpreted as a voice defining the most constrictive end of the MDP range, it is more likely that the ABA’s recommendation does little more than affirm an anti-MDP status quo and is well off the range of MDP alternatives. Fortunately, the ABA left more to work with than an anti-MDP recommendation. Although the ABA’s Commission on Multidiscipli-

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105. Dzienkowski, *supra* note 44, at 298. This article also contains a discussion and analysis of the range and select models set forth by the Commission. *See id.*

106. *See supra* Part IV.B.1.a.

107. *See supra* text accompanying notes 104–06.

108. The author does wish to recognize the immense contribution of the American Bar Association through its appointed MDP Commission.

nary Practice was dissolved, the Commission's work remains an important resource for states to formulate their position on their preferred "range" of MDP activity.

In accordance with the Commission's work, the better solution would have been for the ABA to consider that there need not be a hard-line stance on this issue. To resume a leadership role in this area, the ABA should reconsider its recommendation against MDPs and speak nationally for a "range" of solutions. For example, on the conservative end of the range, the ABA could recognize those who would ban "fee-sharing arrangements, investment in law practices by nonlawyers, nonlawyer ownership interests in law firms, and the inclusion of the names of nonlawyers . . . in a law firm name."<sup>109</sup> On the more permissive end of the spectrum, the ABA could follow the Commission's July 1999 recommendation and "allow MDPs and fee-splitting between lawyers and nonlawyers, provided that 'lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services.'"<sup>110</sup>

Within such a range, states, most likely through their state bar associations, can engage in a process that is at the heart of our nation: individual state experimentation encouraged by national objectives and goals. Indeed, encouragement for states to experiment and engage in various levels of the multidisciplinary practice of law will lead to solutions and may even lead to a uniform approach to the MDP issue.<sup>111</sup>

Recognizing that there are proposals that would take the power to determine the MDP issue entirely from the states should motivate active and creative state participation.<sup>112</sup> Further motivation may be found in evidence suggesting that failure to do something will ultimately work to the detriment of lawyers wanting to compete in today's international market, where consumers are demanding, and finding in other places, one-stop shopping.

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109. Geanne Rosenberg, *In 11th-Hour Move, MDP Issue Is Back on ABA's Summer Schedule*, NAT'L L.J., June 19, 2000, at B9.

110. *Id.* (quoting the ABA Commission's Proposal).

111. An example from the last decade is how the individual states have approached the welfare question. As various states have experimented with a broad variety of welfare policies, certain states are emerging winners and, as such, are examples for others to follow.

112. *See generally* Tucker, *supra* note 43, at 286. Tucker notes, "Such regulation should be nationally based and Federally implemented, without the ability for state-to-state variance." *Id.*

Although such action would not qualify as “formal” new approach harmonization where individual states rally around a national objective, the objective under this analogous approach would be the desire of a state to chart its own destiny within the MDP debate.

But, because there are a myriad of concerns, many of which have yet to be articulated, this informal new approach is attractive because it leaves power with the regulating entities to address such issues as they arise—some of which may be specific to a particular jurisdiction.

### *3. Third method: Court involvement*

Regardless of which method states use to further their regulatory authority, there is another player to consider in this debate. The judicial system can do much to initialize, guide, and set a substantive foundation for harmonization.

In Europe, the European Court of Justice ensures that the MDP issue is decided in harmony with treaty and Community principles.<sup>113</sup> Similarly, domestic courts are in the position to become the impetus in harmonizing conflicts surrounding MDPs and ensuring that the debate is rooted in Constitutional principles.

The U.S. Supreme Court has looked favorably upon state control over bar admission, but has yet to respond to a challenge based upon the Commerce Clause of article I, section 8 of the U.S. Constitution. Short of federal legislation, such a challenge may be the best mechanism for accomplishing meaningful substantive change. The pertinent test was announced in *Pike v. Bruce Church, Inc.*: state regulation will be upheld where effects on interstate commerce are incidental “unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>114</sup>

The courts can help the players of the MDP controversy determine which challenges are truly substantive. For example, using the interstate bar admission debate as an analogy to the MDP debate, the *New Hampshire v. Piper* court offers some guidance that could be extended to the issue at hand.

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113. See *supra* text accompanying note 70.

114. Eric Williams, *A National Bar—Carpe Diem*, 5 KAN. J.L. & PUB. POL’Y 201, 206 (1996) (footnotes omitted) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).



There is no evidence to support appellant's claim that nonresidents might be less likely to keep abreast of local rules and procedures. Nor may we assume that a nonresident lawyer—any more than a resident—would disserve his clients by failing to familiarize himself with the rules . . . .

[T]here is no reason to believe that a nonresident lawyer will conduct his practice in a dishonest manner. The nonresident lawyer's professional duty and interest in his reputation should provide the same incentive to maintain high ethical standards as they do for resident lawyers. A lawyer will be concerned with his reputation in any community where he practices, regardless of where he may live. Furthermore, a nonresident lawyer may be disciplined for unethical conduct.<sup>115</sup>

The courts can engage in a similar analysis in determining whether restrictions on MDPs are excessive in relation to the putative local benefits. “[A] second test [under the Commerce Clause] applies when the state regulation is discriminatory, either facially or in practical effect . . . . [and] requires that the discrimination be justified by reasons unrelated to economic protectionism.”<sup>116</sup>

Before and during harmonization, courts can resolve MDP disputes using the aforementioned tests—providing objective guidelines for states to determine how to regulate MDPs. The evidence discussed in this Comment suggests that the benefits of regulating MDPs so as to totally prohibit them are being outweighed by sophisticated consumerism, market trends, and the fact that concerns about MDPs can be mitigated by solutions worked out by the Commission and others. But, without judicial participation, there may be insufficient motivation from Congress and individual states to form and act under pro-MDP objectives.

### *C. Building the Bridge to Solutions*

Figuratively speaking, without harmonization, parties interested in the MDP issue stand at the edge of a chasm without a bridge to carry them to the other side where solutions and reconciliation await. Whether under formal “new approach,” voluntary state action, or

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115. Supreme Court v. Piper, 470 U.S. 274, 285–86 (1985).

116. Scariano v. Justices of the Supreme Court, 38 F.3d 920, 926 (7th Cir. 1994) (citations omitted).

court intervention, harmonization is critical before solutions can be tooled. In this sense, harmonization will serve as the bridge upon which conflicting parties may cross to begin reconciling their concerns. Fortunately, much has already been done on the other side of the bridge. Returning to the concerns of MDP adversaries discussed in Part IV.A.1, extensive efforts have been made by the Commission and others to address each point. The following examples are highlights of the types of measures that can be taken to reconcile concerns about MDPs once the bridge of harmonization is crossed.

- **Professional Independence of Judgment.** “[T]he Commission recommends that the . . . Model Rules of Professional Conduct clearly state that a lawyer who is supervised by a nonlawyer may not use as a defense to a violation of the rules of professional conduct the fact that the lawyer acted in accordance with the nonlawyer’s resolution of a question of professional duty.”<sup>117</sup>
- **Confidentiality.** “The Commission recommends that no change be made to the lawyer’s obligation to protect confidential client information. [Since] a nonlawyer in an MDP may be subject to an obligation of disclosure that is inconsistent with the lawyer’s obligation of confidentiality . . . , the Commission specifically recommends several safeguards to assure that a nonlawyer who works with, or assists, a lawyer in the delivery of legal services will act in a manner consistent with the lawyer’s professional obligations.”<sup>118</sup>
- **Attorney-client privilege.** “[T]he Commission recommends amendments to the ABA Model Rules of Professional Conduct that would clarify a lawyer’s position within the MDP, the lawyer’s relationship with the MDP’s clients and the obligations of an MDP to protect client and public interests.”<sup>119</sup>
- **Conflicts of interest.** “The Commission recommends that in connection with its delivery of legal services, an MDP be governed by the same rules of professional con-

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117. American Bar Association Commission on Multidisciplinary Practice, *supra* note 48, at 193.

118. *Id.* at 194.

119. *Id.*

duct as a law firm with regard to the imputation of conflicts and permissible screening measures.”<sup>120</sup>

- **Holding out as a lawyer.** “[T]he Commission emphasizes the need for lawyers to fully disclose to clients their status. Lawyers in an MDP who hold themselves out, or who are held out, as providing services, which, if provided by a lawyer otherwise engaged in the practice of law, would be regarded as part of such practice of law for purposes of application of the rules of professional conduct, must adhere to all the professional conduct rules.”<sup>121</sup>
- **Pro bono service.** “Lawyers in an MDP should fulfill [the pro bono service] responsibility in the same way”<sup>122</sup> as those in traditional practices.
- **Legal fees and client trust accounts.** “MDP[s] must also comply with any and all financial recordkeeping rules of the jurisdiction in which the legal services are being delivered.”<sup>123</sup>

The above list is neither comprehensive nor exhaustive. Undoubtedly many MDP issues have yet to be resolved. The advantage of harmonization is that under a pro-MDP objective states will continue to be the leaders in ensuring that the above measures, and others yet to be determined, are executed and modified to guard against MDP abuses within that jurisdiction.<sup>124</sup>

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120. *Id.*

121. *Id.* at 195.

122. *Id.*

123. *Id.* at 196.

124. The Commission also suggests the following:

As a condition of permitting a lawyer to engage in the practice of law in an MDP, the MDP should be required to give to the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in the delivery of legal services a written undertaking, signed by the chief executive officer (or similar official) and the board of directors (or similar body) that:

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

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

(C) it will establish, maintain and enforce procedures to protect a lawyer’s professional obligation to segregate client funds.

(D) the members of the MDP delivering or assisting in the delivery of legal services

Nonetheless, states will only maintain the power to regulate should they be willing to act under a pro-MDP objective, such as demanded by today's consumers and the dynamics of the international market. If states fail to relax their regulations barring MDPs, they may lose the power to effectively regulate. "If we [state regulators] do not ourselves take the steps to redefine . . . how we—and our activities—are to be regulated, others in the new global economy will do it for us."<sup>125</sup>

## V. CONCLUSION

The research of the Commission and experience of Europe and other countries show that Model Rule 5.4 is primarily prophylactic and is not necessary to maintain ethical conduct in MDPs. Indeed, the evidence should persuade the courts to find such regulations inconsistent with the two tests under the Commerce Clause.<sup>126</sup> "[T]here are surely better ways of protecting professional independence than by restricting the development of forms of multidisciplinary practice that promise many benefits in innovative and

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will abide by the rules of professional conduct;

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

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

(G) it will annually file a signed and verified copy of the certificate described in subsection (F) with the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in the delivery of legal services, along with relevant information about each lawyer who is a member of the MDP.

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

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

American Bar Association Commission on Multidisciplinary Practice, *Appendix C: Reporter's Notes*, n.62 (visited Oct. 31, 2000) <<http://www.abanet.org/cpr/mdpappendixc.html>>.

125. Davis, *supra* note 16, at 230 (illustrating the importance of acting in unison under a common objective).

126. *See supra* Part IV.B.3.

cost-effective services to clients and consumers.”<sup>127</sup> This Comment encourages regulating authorities to exercise their regulatory power and find those ways. Tenable means do exist to protect the players in the legal services field while allowing the multidisciplinary practice of law.

An objective generated under new approach harmonization and supported by the varying models of commitment to MDP suggested by the ABA Commission can keep regulators from aimlessly postponing the issue, while leaving them in control of choosing alternatives. “[C]linging to old rallying cries, like the suggestion that our commitment to client protection makes us different, and will enable us to hold back the tide, simply ignores both the coming realities and the existing pressures for change.”<sup>128</sup>

Under this proposal, some may argue that the role of regulating authorities is so reduced that it becomes trivial. However, this is not supported by Europe’s general experience where the authorities play a critical role in that it is “incumbent upon the competent public authorities—including legally recognized professional bodies—to ensure that . . . practice . . . is applied in accordance with the objective defined . . . relating to the freedom of establishment.”<sup>129</sup>

Although the acceptance of MDPs is necessary for the many reasons discussed above, it is not an imperative without advantages. Professor John Dzienowski emphasizes the following advantages:

The major benefit of MDP services is the delivery of an integrated team approach to serving client interests . . . . The second major benefit of MDP services is the efficiency that translates into savings of time or money, and results in a higher quality product . . . . Third, an MDP is more likely to identify both legal and non-legal issues and problems by lawyers and non-lawyers.<sup>130</sup>

Regulators of the legal profession should recognize that the MDP issue need not be an all-or-nothing proposition. Even regulators choosing the most pro-MDP end of the range can effectively maintain the authority to preserve the ethical values unique to law-

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127. Robert W. Gordon, *Letter to ABA Commission on Multidisciplinary Practice*, May 21, 1999, 1999 A.B.A. SEC. L. PRAC. MGMT. ANN. MEETING 288, 296.

128. Davis, *supra* note 16, at 230.

129. BERMANN ET AL., *supra* note 73, at 592 (quoting Thieffry v. Conseil de l’Ordre des Avocats a la Cour de Paris, 1977 E.C.R. 765).

130. Dzienowski, *supra* note 44, at 313–14.

yers. Indeed, it is the experience of some that “the fully integrated multidisciplinary firm, is optimal . . . [and] could be regulated so that the core values of the legal profession would not be endangered.”<sup>131</sup>

In varying degrees, the ABA, state bar associations, Congress, and the judiciary, should work under new approach harmonization to form an objective that encourages a workable framework of options that will allow MDPs. States should not seek the detailed harmonization of the old approach but should exercise their independence and create efficient ways to follow a pro-MDP objective. Through harmonization, the advocates and adversaries of MDPs can reach a mutually beneficial solution. Regulating authorities will preserve their power to keep a vigilant eye on the evolution of the multidisciplinary practice of law. Providers of legal services will be free to respond to the competitive nature of today’s market, and consumers of legal services will be able to obtain services better tailored and priced to fit their needs. Although the process requires compromise and change, it is important to remember that acceptance of multidisciplinary practices is “not revolutionary; it is evolutionary.”<sup>132</sup>

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131. *Id.* at 299; *see also* Neff, *supra* note 28, at 22 (noting that “MDPs can be implemented while protecting consumers from unscrupulous professionals”).

132. Tucker, *supra* note 43, at 286.