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John H. Matheson

Edward S. Adams

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# Not "If" but "How": Reflecting on the ABA Commission's Recommendations on Multidisciplinary Practice

John H. Matheson<sup>†</sup> and Edward S. Adams<sup>††</sup>

## I. INTRODUCTION

Multidisciplinary practice (MDP) has been aptly described as the "most important issue facing the legal profession today."<sup>1</sup> The American Bar Association's Commission on Multidisciplinary Practice (Commission) surprised most observers on June 8, 1999 by recommending that the American Bar Association (ABA) amend the Model Rules of Professional Conduct (Model Rules) to allow lawyers to combine with, and share fees with, other professionals within a single professional entity.<sup>2</sup> Under

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<sup>†</sup> S. Walter Richey Professor of Corporate Law and Co-Director of the Center for Business Law and Entrepreneurship at the University of Minnesota Law School. Of Counsel at Kaplan, Strangis and Kaplan, P.A., Minneapolis, MN. I would like to thank Peter Favorite, Class of 2000, for excellent research assistance on this Article.

<sup>††</sup> Associate Dean for Academic Affairs, Julius E. Davis Chair and Professor of Law and Co-Director of the Center for Business Law and Entrepreneurship at the University of Minnesota Law School. President and CEO of Equity Securities Investments, Inc., Minneapolis, MN. Principal at Jon Adams Financial Co., LLP, Wayzata, MN.

1. Darryl Van Duch, *ABA Honchos Differ over MDP Vote*, NAT'L L.J., Aug. 23, 1999, at A6. This is, for instance, the description used by the President of the American Bar Association, William G. Paul. *See id.*

2. COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, REPORT (1999), available at <<http://www.abanet.org/cpr/mdpreport.html>> [hereinafter REPORT]. There are a few terms used in this paper which typically carry a precise meaning. For the sake of clarity, short definitions are provided here. The term "MDP" is defined, for the purposes of both the Commission and this Article, 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 non-legal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, and there is a direct or indirect sharing of profits as part of

the proposal, lawyers could create partnerships with accountants, developers, engineers, bankers, and all other professionals, thereby giving clients access to one-stop shopping at multidisciplinary firms.

The recent expansion of nonlegal professional firms—typically accounting firms—into the practice of law has moved some commentators to propose “necessary” changes concerning the regulation of lawyers, and at the same time has prompted others to demand that the profession resist the temptation to change. The subject of the necessary change, or the dangerous temptation, is multidisciplinary practice. Proponents of MDPs cite globalization of markets, advances in technology and information sharing, expansive governmental regulation of commercial and private activities, and clients’ demands as reasons for changing the regulation of lawyers. These clients, say those in favor of MDPs, more than ever before desire coordinated advice from lawyers, financial planners, accountants, social workers, and other professionals. As the global economy expands, both large and small business clients will look to teams of professionals from different disciplines for consolidated advice on complex commercial and regulatory issues.<sup>3</sup>

Some argue that the Commission’s Report and Recommendation on MDPs simply realizes and accepts trends that have been evolving for years in the United States and, for that matter, throughout the world. While the specific techniques of partnership and fee sharing among lawyers and nonlawyers has hardly been the norm, some legal and nonlegal professional firms are so interdependent that the technical prohibitions on partnership and fee sharing have become mere outdated, bothersome obstacles.<sup>4</sup> On the other hand, those opposing MDPs,

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the arrangement.

COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS’N, REPORT APPENDIX A (1999), available at <<http://www.abanet.org/cpr/mdpappendixa.html>> [hereinafter APPENDIX A]. “Legal services” is defined as those services which are considered the “practice of law” by relevant professional regulations. *Id.* “Practice of law” means “the provision of professional legal advice or services where there is a [lawyer-]client relationship of trust or reliance.” *Id.* Such services include, among others, preparing or expressing legal opinions and appearing or acting as an attorney. *See id.*

3. *See* COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS’N, BACKGROUND PAPER ON MULTIDISCIPLINARY PRACTICE: ISSUES AND DEVELOPMENTS (1999), available at <<http://www.abanet.org/cpr/multicomreport0199.html>> [hereinafter BACKGROUND PAPER].

4. *See ABA Urges One-Stop Shopping*, J. ACCT., Sept. 1, 1999, at 15, 15-17.

while recognizing the steady change in professional firms over the years, argue that the changes have reached a critical point, and that these changes must be answered with the maintenance or strengthening—not the relaxation—of the current regulations.

We agree generally with the proponents of MDPs who suggest regulating such entities to the extent necessary to preserve the essential attributes of the attorney-client relationship. Indeed, well before the Commission's Report, we were on record as supporting access by lawyers to capital markets by allowing nonlawyer investment in law firms.<sup>5</sup> The issues surrounding the MDP issue, while broader in scope, involve substantially similar concerns. In Part II, we explore the reasons why the MDP issue is of such current concern. In Part III, we examine and comment on the Commission's process and product. Finally, in Part IV, we address the issues of professional integrity which form the basis for the intellectual attack on permitting MDPs.

## II. WHY IS MULTIDISCIPLINARY PRACTICE AN ISSUE AT ALL?

The emergence, or re-emergence, of the MDP issue began roughly ten years ago. The accounting profession was searching for new growth opportunities, and began to offer corporations a large variety of professional services. Consulting firms followed suit, aggressively promoting "services remarkably similar to those traditionally offered by law firms, such as advice on mergers and acquisitions, estate planning, human resources, and litigation support systems."<sup>6</sup> This strategy was based on the concept of full service stations—firms that would cover all of a corporation's significant needs. The legal profession took note of these purportedly troubling developments.<sup>7</sup>

From one perspective these developments should not be troubling at all. If some members of the legal profession wish to maintain the single service focus of the practice of law, they

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5. See Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CAL. L. REV. 1 (1998).

6. BACKGROUND PAPER, *supra* note 3.

7. "I think it's a fact that the accounting firms are winning the war when it comes to who's going to represent business." John Gibéaut, *Squeeze Play*, A.B.A. J., Feb. 1998, at 42, 44 (quoting Roger L. Page, national tax practice director for Deloitte & Touche).

should do so. Alternatively, if professional services firms feel the need to expand into the legal services market in order to meet client needs and to enhance their own business growth, they should do so. The problem with these last two statements is that neither reflects reality for at least two reasons. First, multidisciplinary practice is an issue because the expansion of professional service firms into the legal market threatens the viability of traditional law practice. Second, multidisciplinary practice is an issue because the regulations governing the legal profession prohibit lawyers from engaging in such a practice. Let us look at each of these factors in turn.

#### A. THE MARKET REALITY OF MULTIDISCIPLINARY PRACTICE

The growth of nonlegal professional service firms includes the practice of hiring more and more lawyers.<sup>8</sup> The employment of lawyers by accounting firms, for example, necessarily raises questions of unethical practice (under the Model Rules), but accounting firms typically manage to dodge this issue by insisting that their lawyers are not “practicing law,” but merely giving “tax advice.”<sup>9</sup> Current ABA President William G. Paul argues that this is one reason for the bar to take aggressive action: “Thousands of lawyers are already working for the Big 5 accounting firms.”<sup>10</sup> Those lawyers, argues Paul, “need to be properly regulated.”<sup>11</sup>

While accounting firms contend that they are not practicing law, the matter is clearly one of perspective. What lawyers contend is practice of law, accountants call “consulting.” For example, under the heading “legal consulting,” an accounting firm might offer advice that covers all stages of the litigation process, from initiating a claim to negotiating a settlement.<sup>12</sup> It is still largely unsettled whether the Model Rules prevent lawyers who work for accounting firms from performing these

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8. Arthur Anderson has made public its “goal of becoming the largest law firm in the world shortly after the year 2000.” SPECIAL COMM. ON MULTIDISCIPLINARY PRACTICE AND THE LEGAL PROFESSION, NEW YORK STATE BAR ASS’N, REPORT (1999), available at <<http://www.nysba.org/whatsnew/multi-discript.html>>.

9. Gibéaut, *supra* note 7, at 44.

10. Van Duch, *supra* note 1.

11. *Id.*

12. BACKGROUND PAPER, *supra* note 3. Two of the Big Five accounting firms have been investigated by at least one state for engaging in the unauthorized practice of law. See Elizabeth MacDonald, *Texas Probes Andersen, Deloitte on Charges of Practicing Law*, WALL ST. J., May 28, 1998, at B15.

services. The resolution of this issue is, of course, crucial for the legal profession. "If there aren't differences, then accountants don't need to be hiring lawyers," according to Houston lawyer Steve Salch, past chair of the ABA Tax Section.<sup>13</sup>

Legal distinctions between the professions have blurred a bit, as well, in the past few years.<sup>14</sup> Accounting firms, for instance, may now represent clients in tax court, and Congress recently created an "accountant-client privilege" under the Internal Revenue Code.<sup>15</sup> Many observers in the legal profession see the general trend, in law and in business, as one which rejects traditional distinctions between lawyers and other professionals, and these observers warn of dire consequences should the profession not take heed of this trend.<sup>16</sup> The definitions and interpretations of the terms "legal services" and "unauthorized practice of law" are, of course, critical. The courts have yet to tackle these issues with any energy, so the policies provided by or adopted by the ABA will most likely influence the profession's course for the foreseeable future.<sup>17</sup>

While large law firms are naturally the loudest voice in the cry for MDP reform, some small and solo providers are also interested in the idea, but perhaps for different reasons.<sup>18</sup> There is, of course, a hierarchy among professional firms in market-coverage. Those firms already at the top are interested in staying there and those immediately below are interested in securing a higher position, and so on. The large law firms are concerned that large nonlawyer firms are seizing a dangerously large portion of the professional services market. At the same time, small law firms expressing support for MDP reform are

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13. Gibéaut, *supra* note 7, at 44.

14. See REPORT, *supra* note 2.

15. Anna Snider, *Lawyers Wary of Accountant-Client Privilege*, N.Y. L.J., July 17, 1998, at 1.

16. See Gibéaut, *supra* note 7, at 44 (relating the argument of some lawyers that MDPs are "a sort of Armageddon for the profession"). On the other hand, ABA Commissioner Burnele V. Powell relays the sentiments of most lawyers: "They're saying if we don't have more flexibility [with MDPs], the accountants are going to eat our lunch." John Gibéaut, *Practice Debate Heats Up*, A.B.A. J., Aug. 1999, at 14, 16.

17. For an overview of the many issues related to prohibiting unauthorized practice of law, see generally Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

18. See COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, REPORTER'S NOTES (1999), available at <<http://www.abanet.org/cpr/mdpappendixc.html>> [hereinafter REPORTER'S NOTES].

interested in opportunities to compete with the large law firms.<sup>19</sup> On the other hand, lawyers at both large and small firms are concerned that MDPs are a dangerous temptation for the profession, seeing the issue as a threat to the profession's core values, perhaps tarnishing them beyond repair.<sup>20</sup>

In Europe, the Big Five accounting firms are expanding into the legal services market. Most European countries have relaxed restrictions on MDPs, and accounting firms have a head start on international law firms in taking advantage of the new market.<sup>21</sup> PricewaterhouseCoopers, for example, employs over 1600 non-tax lawyers outside the United States, making it in effect the third-largest law firm in the world.<sup>22</sup> Thus, while American law firms are beginning to feel the threat in the United States, they already have lost significant ground overseas. These business realities are forcing the legal profession to take action on the MDP issue.

#### B. THE ABA'S REGULATORY SCHEME CONCERNING MDPs

The purpose of regulating lawyers is to protect a lawyer's independent professional judgment in service to the lawyer's clients and to the court. Since 1928, the ABA fairly consistently has stood against MDPs. Through its Canons of Professional Ethics, the Model Code of Professional Responsibility, and the Model Rules of Professional Conduct, the ABA has sought to limit the influence of third parties on the legal profession.

Although the ABA is only a professional association and has no direct authority over lawyers, it nevertheless wields a powerful influence in informing the judgments of state court systems and legislatures—the entities directly responsible for exercising control over the legal profession. The ABA's model regulations typically are adopted by state authorities in similar

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19. Larry Ramirez, head of the ABA's Solo and Small Firm Section, commented that "[i]f solo and small-firm lawyers are able to enter into these kinds of relationships with other professionals, we can provide the same or similar service as a big firm, without having the 150-200 lawyer office." Edward Brodsky, *ABA Endorsement of Multidisciplinary Practices*, N.Y. L.J., July 14, 1999, at 3, 3, 7.

20. See *id.* at 7.

21. See generally REPORTER'S NOTES, *supra* note 18; Gianluca Morello, Note, *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 (1997).

22. See Brodsky, *supra* note 19, at 3.

form.<sup>23</sup> Thus, if one is interested in effecting widespread changes in the regulation of the legal profession, one had best pursue those changes within the ABA's model system. Thus, most likely because of the ABA's profound influence, MDPs are currently prohibited in all fifty states.<sup>24</sup>

### 1. ABA Canons of Ethics

In 1908, the ABA promulgated the original Canons of Professional Ethics (Canons).<sup>25</sup> The Canons represented the ABA's formal position on matters of legal ethics. As originally promulgated, the Canons did not address whether practicing lawyers could enter into business associations with nonlawyers. Twenty years later, however, the ABA adopted additional rules which essentially prohibited practicing lawyers from entering into partnerships or business associations with nonlawyers.<sup>26</sup>

In 1928 the ABA adopted Canons 33, 34, and 35 prohibiting the partnership of lawyers and nonlegal professionals.<sup>27</sup> Canon 33 stated that "[p]artnerships 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."<sup>28</sup> 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."<sup>29</sup> Canon 35 added that "the professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. . . . [The lawyer] should avoid all relations which

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23. See Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 596-600 (1989).

24. The only United States jurisdiction that permits combinations of lawyers and nonlawyers in the provision of legal services is the District of Columbia. See D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4(b) (1990). However, the District's rules mandate that such firms have as their sole function the practice of law. See *id.* Rule 5.4(b)(1).

25. CANONS OF PROFESSIONAL ETHICS (1908), reprinted in COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASS'N, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 11-197 (1967) (annotated version).

26. See 53 REP. A.B.A. 119-30 (1928) (printing proceedings of the 51st Annual ABA Meeting).

27. See *id.* at 120-30.

28. *Id.* at 778.

29. *Id.*



direct the performance of his duties in the interest of such intermediary."<sup>30</sup>

These new canons, promulgated by the ABA, drew objections from the bar. In fact, the drafting committee acknowledged that "there is substantial difference of view in the profession respecting its recommendations as to partnerships, division of fees, intermediaries, and the bonding of lawyers."<sup>31</sup> At least one member of the drafting committee expressed the opinion that "aside from professional policy . . . there is nothing inherently 'unethical' in the formation of partnerships between lawyers largely engaged in certain kinds of work and an expert engineer, student of finance, or some other form of expert."<sup>32</sup> In the end, this member voted for the proposed canons as a matter of "professional policy."<sup>33</sup> The official reports do not include any other discussion of the rationale for implementing these rules.

For over forty years the ABA Committee on Professional Ethics (Committee) applied a broad interpretation to the restrictions of Canons 33, 34, and 35, consistently ruling that any business association between lawyers and nonlawyers that offered legal services was prohibited.<sup>34</sup> In an opinion addressing a lawyer's employment by an accounting firm, for example, the ABA Committee stated:

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30. *Id.* at 779.

31. 52 REP. A.B.A. 378 (1927).

32. *Id.* at 388 (minority report of F.W. Grinnell).

33. *Id.*

34. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 269 (1945) (requiring an attorney entering into a partnership with a certified public accountant to specialize in income tax work and related accounting matters, to cease holding himself out as an attorney-at-law, and to strictly confine his activities to those open only to a lay accountant); *id.* Formal Op. 257 (1944) (allowing an attorney to enter into a partnership with a layperson who is an agent licensed by the United States Patent Office if the partnership's activities are limited to such as permitted laypersons under patent office rules); *id.* Formal Op. 239 (1942) (disallowing a practicing attorney from forming a partnership with a certified public accountant to act as consultant in tax matters or to represent taxpayers before the Internal Revenue Service Board of Tax Appeals); *id.* Formal Op. 201 (1940) (preventing a partnership between an attorney and layperson where the services rendered, if rendered by an attorney, would constitute the practice of law even though laypersons are allowed to render the same services under the law); *id.* Formal Op. 32 (1931) (preventing an attorney from associating with a layperson who is admitted to prosecute patent applications in the United States Patent Office when the layperson does business under the name of a firm holding itself out as "attorneys" or as "solicitors in patent causes"); *id.* Formal Op. 31 (1931) (prohibiting a lawyer from accepting employment at a corporation in the business of preparing incorporation documents).

When a lawyer-employee advises his lay employer in regard to a matter pertaining to the affairs of a client of the employer and the giving of such advice by the lawyer-employee directly to the client would involve him in the practice of law, the lawyer is proceeding in violation of *Canon 35* when he operates through his employer as an intermediary.<sup>35</sup>

The Committee also thwarted attempts by lawyers to avoid the rules by entering into non-partnership business associations with nonlawyers. Although the Committee had allowed lawyers to form professional law corporations under certain conditions, one such condition prevented any nonlawyer from owning any interest in the corporation or from acting as a director or officer of the corporation.<sup>36</sup> After noting that "Canon 33 . . . promulgates underlying principles that must be observed no matter in what form of organization lawyers practice," the committee asserted:

Canon 33 prohibits the formation of a partnership for the practice of a partnership between lawyers and non-lawyers. This prohibition would likewise apply to the practice of law in any other form. Permanent beneficial and voting rights in the organization set up to practice law, whatever its form, must be restricted to lawyers while the organization is engaged in the practice of law.<sup>37</sup>

In brief, the Committee's opinion made it clear that it would look to substance over form in enforcing Canons 33, 34, and 35. Subsequently, the ABA incorporated the substance of this opinion into its next version of ethical rules.

Thus, during the years that the Canons were in force, the Committee consistently found that these provisions prohibited nearly any form of partnership between lawyers and nonlegal professionals that offered services to the public.<sup>38</sup> If the lawyer

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35. ABA Comm. on Professional Ethics, Formal Op. 297 (1961).

36. *See id.* Formal Op. 303 (1961). Opinion 303 permitted attorneys to practice in the corporate form provided that:

(1) the lawyer rendering the legal services to the client must be personally responsible to the client; (2) restrictions on liability as to other lawyers in the organization must be made apparent to the client; (3) none of the stockholders may be non-lawyers, or if stock falls into the hands of laymen, provision must be made for transfer back to lawyers; (4) there must be no profit-sharing plans including employees who are non-lawyers; and (5) no layman may be permitted to participate in the management of the firm.

*Id.*

37. *Id.*

38. *See Andrews, supra* note 23, at 586.

completely disassociated himself from the profession, of course, the lawyer could enter such partnerships.<sup>39</sup>

## 2. ABA Model Code of Professional Responsibility

In 1969, the Canons of Ethics were replaced by another regulatory framework, the ABA Model Code of Professional Responsibility (Model Code).<sup>40</sup> Canons 33, 34, and 35 were replaced by different language and titles, but the prohibitions remained remarkably similar.

The Model Code's prohibition on multidisciplinary partnerships reads: "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."<sup>41</sup> The Model Code's prohibition on fee splitting among lawyers and nonlegal professionals stated that "[a] lawyer or law firm shall not share legal fees with a non-lawyer."<sup>42</sup> The Model Code did not retain the nonlawyer oversight provision as a distinct rule, but expressed much the same prohibition in various parts of its text. One provision prohibits a lawyer from being part of a professional corporation in which the lawyer's professional judgment is directed or controlled by a nonlawyer.<sup>43</sup> Another prohibits the regulation of a lawyer's professional judgment by a nonlawyer who pays or employs that lawyer.<sup>44</sup>

The Committee has seldom visited MDP issues since the institution of the Model Code, but the Committee's opinions have interpreted ethics rules to prohibit the partnership of lawyers and nonlawyers when such partnership is for profit, when the nonlawyer has a strong managerial or financial role, and when the organization's business is law or is law-related.<sup>45</sup>

## 3. ABA Model Rules of Professional Conduct

Fifteen years later, the ABA revised its ethical regulations in adopting the Model Rules of Professional Conduct (Model Rules).<sup>46</sup> Despite the technical changes, the general prohibi-

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39. *See id.* at 587.

40. 94 REP. A.B.A. 389-91 (1969).

41. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-103(A) (1980).

42. *Id.* DR 3-102(A).

43. *See id.* DR 5-107(C)(3).

44. *See id.* DR 5-107(B).

45. For a concise description of the Committee's opinions and action, see Andrews, *supra* note 23, at 591-93.

46. Over 40 states have adopted portions of the Model Rules. Unlike the

tions on MDPs, fee splitting, and nonlawyer oversight were continued.

Critical to the issues of MDP are the restrictions found in Model Rule 5.4. Since this Rule is directly related to the issues discussed in this paper, it is quoted at length here:

(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 a compensation or retirement plan, 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.<sup>47</sup>

The formulation of the Model Rules began with the creation of the ABA Commission on Evaluation of Professional Standards (Kutak Commission).<sup>48</sup> During the drafting of the Model Rules, the Kutak Commission considered and rejected the traditional view that practicing lawyers should be prohib-

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District of Columbia, guidelines similar to those contained in Model Rule 5.4(b) & (d) are found in the ethics codes of the 50 states. See Laws. Man. on Prof. Conduct (ABA/BNA) 91:402 (May 18, 1994).

47. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1983) (emphasis added).

48. See Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 384 (1988). This commission became known as the Kutak Commission, named after its chair Robert Kutak. See *id.*

ited from entering into business associations with nonlawyers.<sup>49</sup> As a result, the Commission's 1981 draft recommended that the ABA adopt Proposed Rule 5.4, which provided:

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer . . . such as a business corporation, insurance company, legal services organization or government agency, but only if the terms of the relationship provide in writing that:

(a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;

(b) information relating to the representation of a client is protected as required by [the rule on confidentiality of information];

(c) the arrangement does not involve advertising or personal contract with prospective clients prohibited by [the advertising and soliciting rules]; and

(d) the arrangement does not result in charging a fee that violates [the rule on fees].<sup>50</sup>

Proposed Rule 5.4 represented a dramatic departure from the traditional stance taken earlier by the Canons and the Model Code.<sup>51</sup> As written, Proposed Rule 5.4 would have allowed corporate investment and, thus, nonlawyer control of law firms. Indeed, it would have opened the door for law firms to "go public." In light of traditional thinking, it is no surprise that this proposed rule was the only rule from the 1982 final draft that was rejected in its entirety and rewritten by the House of Delegates.<sup>52</sup>

The Kutak Commission justified its rejection of the traditional approach in both the Comment and Legal Background sections which accompanied the final draft of its Proposed Rule

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49. *See id.*

50. STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 299-300 (1998).

51. The Comment and Notes accompanying the Proposed Rule 5.4 rationalized this departure from traditional prohibitions on forming partnerships or sharing fees with nonlawyers by noting the changes in the practice of law over time. *See* Gilbert & Lempert, *supra* note 48, at 386. The Commission noted that law firms no longer consist solely of lawyers. *See id.* Law firms rely increasingly on paralegals and professionals from other fields to manage various aspects of the firm. *See id.* Additionally, many lawyers work in organizations other than law firms, such as government agencies, private corporations, and public defender and group legal service organizations. *See id.* Nonlawyers often direct the work of attorneys in these organizations. *See id.* In fact, the ABA specifically discussed the role of nonlawyers in supervising the board of directors of a legal services association in a formal opinion. *See* ABA Comm. on Professional Ethics, Formal Op. 324 (1970).

52. *See* GILLERS & SIMON, *supra* note 50, at 300.

5.4.<sup>53</sup> The Legal Background section, in particular, was highly critical of the traditional approach:

To prohibit all intermediary arrangements is to assume that the lawyer's professional judgment is impeded by the fact of being employed by a lay organization . . . . The assumed equivalence between employment and interference with the lawyer's professional judgment is at best tenuous . . . . Applications of unauthorized practice principles, only tenuously related to substantial ethical concerns raised by intermediary relationships, may be viewed as economic protectionism for traditional legal service organizations . . . .

The exceptions to per se prohibitions on legal service arrangements involving non-lawyers have substantially eroded the general rule, leading to inconsistent treatment of various methods of organization on the basis of form or sponsorship. Adherence to the traditional prohibitions has impeded development of new methods of providing legal services.<sup>54</sup>

Similarly, the comment to Proposed Rule 5.4 noted that "[g]iven the complex variety of modern legal services, it is impractical to define organizational forms that uniquely can guarantee compliance with the Rules of Professional Conduct."<sup>55</sup>

Apparently, the ABA House of Delegates saw things differently. In February 1983, the Kutak Commission's Proposed Rule 5.4 became the subject of debate at a House of Delegates meeting.<sup>56</sup> The proponents of the Rule met strong opposition from the General Practice Section.<sup>57</sup> Earlier, the General Practice Section had submitted an amendment to Proposed Rule 5.4 which essentially continued the traditional prohibitions against sharing fees and forming business associations with nonlaw-

53. See Andrews, *supra* note 23, at 594.

54. COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, AMERICAN BAR ASS'N, PROPOSED FINAL DRAFT: AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT 177, 178 (1981), *quoted in* Andrews, *supra* note 23, at 594-95.

55. 107 REP. A.B.A. 887 (1982). The Kutak Commission included a listing of the different legal services organizations:

[M]ultimember partnerships, firms employing paraprofessionals and professionals of other disciplines, professional corporations, insurance companies that employ counsel who represent insureds, law departments of private organizations and government agencies, legal service agencies and defender organizations, and group legal service organizations in which nonlawyers, or lawyers acting in a managerial capacity, may be directors or have managerial responsibility.

*Id.*

56. See Gilbert & Lempert, *supra* note 48, at 391.

57. See *id.* at 392.

yers.<sup>58</sup> Those opposing the Kutak Commission's version of the rule asserted several grounds for their opposition.<sup>59</sup> First, the Commission's proposal would permit Sears, Roebuck & Co., H & R Block, or Big Eight accounting firms to open law offices which would compete with traditional law firms.<sup>60</sup> Second, nonlawyer ownership of law firms would interfere with the professional independence of lawyers.<sup>61</sup> Third, nonlawyer ownership would result in economic pressures that undermine the professionalism of law.<sup>62</sup> Finally, opponents to the Proposed Rule stated that the such a rule could dramatically alter, in unforeseeable ways, the structure of the legal profession.<sup>63</sup> Ac-

58. See *id* at 391-92.

59. See Andrews, *supra* note 23, at 595.

60. See *id*. During the debate, a member opposing the Kutak Commission's proposed rule admonished: "You each have a constituency. How will you explain to the sole practitioner who finds himself in competition with Sears why you voted for this? How will you explain to the man in the mid-size firm who is being put out of business by the big eight law [sic] firms? How will you explain that?" Unedited Transcript of ABA House of Delegates Session 48 (Feb. 8, 1983) (statement of Al Conant), *quoted in* Andrews, *supra* note 23, at 595 n.107.

61. See Andrews, *supra* note 23, at 595. Another opponent had stated: I cannot conceive that a lawyer can maintain his independence and his independent judgment over a period of time when he's on a salary from a corporation that's looking over his shoulder at his results in terms of profit. Now if you wish to destroy our profession as we've known it . . . if you want to destroy it, the young lawyer's opportunities in this country to enjoy the same professional independence that you and I have known, then . . . support the Commission.

Unedited Transcript of ABA House of Delegates Session 46-47 (Feb. 8, 1983) (statement of Bob Hawkins), *quoted in* Andrews, *supra* note 23, at 595 n.108.

62. See Andrews, *supra* note 23, at 595. Another opponent inquired: Is it cost-effect[ive] to provide full representation? Is it cost-effective to zealously represent your client? Is it cost-effective to spend enough time with your client to get the job properly done? I think the answer is no. But clearly as lawyers, as professionals, we must get the job done properly, and we must spend that time and we must do those things. But what about the business venturer who owns this firm, he who hires or fires the lawyers? They needn't view it that way. Now if the safeguards of the Commission were adequate . . . fine. But [they] won't be, and I submit who is in trouble if there is a violation of these rules? Is it the venturer or the lawyer? It's the lawyer; the venturer isn't even under the jurisdiction.

Unedited Transcript of ABA House of Delegates Session 41-42 (Feb. 8, 1983) (statement of Charles Kettlewell), *quoted in* Andrews, *supra* note 23, at 595 n.109.

63. No one can tell you what the impact of Rule 5.4 is going to be on the legal profession, but everyone can assure you, and you can assure yourself merely by reading it, that it is going to have a major impact and mark a fundamental change in the practice of law.

Unedited Transcript of ABA House of Delegates Session 37-38 (Feb. 8, 1983)

According to Professor Geoffrey Hazard, Jr., the debate wound down quickly after he responded "yes" to the question: "Does this rule mean that Sears, Roebuck will be able to open a law office?"<sup>64</sup> In the end, the General Practice Section's traditional view carried the day, and the Kutak Commission's Proposed Rule 5.4 was rejected.<sup>65</sup>

As it turns out then, current Model Rule 5.4(a) prohibits a lawyer from sharing fees with a nonlawyer, except for extremely limited cases.<sup>66</sup> Rule 5.4(b) prohibits the formation of a partnership with a nonlawyer if any of the activities of the partnership consist of the "practice of law."<sup>67</sup> And Rule 5.4(d) prohibits a lawyer from practicing in a professional corporation or association if a nonlawyer is a corporate director or officer or has the right to direct or control the professional judgment of the lawyer.<sup>68</sup> Therefore, Model Rule 5.4, while allowing lawyer-nonlawyer cooperation in the responsible representation of a client, does not permit "multidisciplinary practice" as contemplated by the tradition of ABA regulations.<sup>69</sup>

#### 4. The District of Columbia Rule

One jurisdiction in the United States, the District of Columbia, has adopted a version of Rule 5.4 which permits a lawyer's partnership and fee sharing with nonlawyers. The D.C. rule provides, in relevant part:

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

. . . .

(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;

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(statement of Al Conant), *quoted in* Andrews, *supra* note 23, at 596 n.110.

64. Gilbert & Lempert, *supra* note 48, at 392.

65. *See id.*

66. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a) (1983).

67. *Id.* Rule 5.4(b).

68. *Id.* Rule 5.4(d).

69. *See supra* note 2 (defining the term "multidisciplinary practice").



(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.<sup>70</sup>

While the D.C. rule does differ in strength and coverage from Model Rule 5.4, it does not remove all prohibitions concerning MDPs, but rather provides some restrictions as to lawyer-nonlawyer partnerships and fee sharing. For example, the D.C. rule would not permit an accountant and a lawyer to enter into a partnership or share legal fees if a purpose of the partnership is to provide nonlegal services.<sup>71</sup>

### C. FEEBLE ATTEMPTS TO SURVIVE IN THE CURRENT ENVIRONMENT

Modern law firms are run as businesses, and these businesses must find ways to meet the needs of clients. In response to the expansion of professional services firms and the restrictions of the Model Code, some law firms have established separate "ancillary businesses" in which lawyers and nonlawyer partners provide professional services to clients.<sup>72</sup> An example of such an arrangement is where a law firm and a Big Five accounting firm cooperate to share clients and serve each other's professional needs.<sup>73</sup> These service-structures, since designed to deliver nonlegal services, are not affected by the prohibitions on partnerships and fee sharing with nonlawyers.<sup>74</sup> But critics charge that these ancillary businesses—as one might have expected—are approaching, if they have not already met, the definition of "prohibited activities" under the Model Code.<sup>75</sup> While some defenders and advocates of these ancillary business

70. D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1990).

71. See American Bar Association, *Background Paper on Multidisciplinary Practice: Issues and Developments*, PROF. LAW., Fall 1998, at 7, 7. The rules do not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes. See *id.*

72. REPORTER'S NOTES, *supra* note 18.

73. See *id.*

74. See *id.*; see also *supra* Part II.B. (discussing the scheme of regulation).

75. See generally Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363 (1993).

arrangements argued that the arrangements did not violate the text of the Model Code, others argued just as forcefully that the spirit of the Model Code had been violated, if not its letter.<sup>76</sup> The ABA House of Delegates, after much discussion and debate, finally tackled the issue with the adoption of a rule which made all lawyers providing "law-related" services subject to the Model Rules.<sup>77</sup>

Those lawyers and firms particularly frustrated by the Model Code's prohibitions on MDPs attempted to find a solution to the prohibitions by creating patchwork relationships with other professionals. In so doing, however, these "solutions" have not reduced the sparring over MDP-related issues.<sup>78</sup> Ancillary businesses not only face ethics-related challenges in the ABA, but they face competitive disadvantages in the raising of capital and other elements of business.<sup>79</sup> The ABA, perhaps tired and frustrated with the debate, decided to establish a special commission to examine MDPs.

### III. THE ABA COMMISSION (AND REPORT) ON MULTIDISCIPLINARY PRACTICE

In 1998, the American Bar Association established its Commission on Multidisciplinary Practice to examine the issue of MDPs and deliver a recommendation.<sup>80</sup> The Commission was to report on the extent of the encroachment into the legal profession by other professionals; the potential impact of MDPs on the legal profession; and possible modifications to current ethical rules and principles.<sup>81</sup>

Over a ten-month period, the Commission sought opinions from the public, from bar regulators, from lawyers, and from interests both national and international.<sup>82</sup> In February 1999, the Commission submitted a study containing background information on MDPs to the ABA House of Delegates.<sup>83</sup> That same month, the Commission forwarded a second paper to the

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76. See REPORTER'S NOTES, *supra* note 18.

77. See *id.*

78. See *id.*

79. See *id.*

80. See *id.*

81. See *id.*

82. Between September 1998 and June 1999, the Commission conducted extensive hearings. Fifty-six witnesses testified before the Commission, and other interested persons submitted written comments. See *id.*

83. See BACKGROUND PAPER, *supra* note 3.

House of Delegates describing possible models of multidisciplinary practice.<sup>84</sup>

#### A. THE COMMISSION'S RECOMMENDATION

After further deliberations and study, the Commission submitted a Report and Recommendation to the House of Delegates.<sup>85</sup> The Commission recommended a "relaxation of the prohibitions against sharing legal fees and forming a partnership or other association with a nonlawyer when one of the activities is the practice of law."<sup>86</sup> Among the specific items of recommendation were these:

- "A lawyer should be permitted to share legal fees with a nonlawyer [within a MDP], subject to certain safeguards that prevent erosion of the core values of the legal profession."<sup>87</sup>
- "A lawyer should be permitted to deliver legal services through a multidisciplinary practice (MDP) . . . 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."<sup>88</sup>
- "All rules of professional conduct that apply to a law firm should also apply to an MDP."<sup>89</sup>
- MDPs controlled by nonlawyers would be required to sign and deliver a statement to the highest regulatory body in the MDP's jurisdiction. The statement would hold, in part, that the MDP will not "interfere with a lawyer's exercise of independent professional judgment on behalf of a client;" will "establish, maintain and enforce procedures designed to protect a lawyer's exercise of independent professional judgment;" will "establish, maintain and enforce proce-

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84. See COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, HYPOTHETICALS AND MODELS (1999), available at <<http://www.abanet.org/cpr/multicomhypos.html>>.

85. See REPORTER'S NOTES, *supra* note 18.

86. *Id.*

87. COMMISSION ON MULTIDISCIPLINARY PRACTICE REPORT, AMERICAN BAR ASS'N, RECOMMENDATION Recommendation 2, available at <<http://www.abanet.org/cpr/mdprecommendation.html>> [hereinafter RECOMMENDATION].

88. *Id.* Recommendation 3.

89. *Id.* Recommendation 7.

dures to protect a lawyer's professional obligation to segregate client funds;" and 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."<sup>90</sup>

The Commission Report does often qualify these Recommendations<sup>91</sup> and it should be noted that its first item for recommendation includes this proposal: "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 allow MDPs]."<sup>92</sup> Finally, it must be noted that the Commission asked the ABA House of Delegates to approve only the Recommendation, and not the proposed rules, amendments, or commentary accompanying the Recommendation.<sup>93</sup>

#### B. REACTIONS TO THE COMMISSION AND REPORT

At its August 1999 annual meeting, the ABA postponed a vote on the proposal to permit fee sharing between lawyers and other professionals.<sup>94</sup> Amid growing concern that it was moving too quickly on the issue, the ABA's House of Delegates agreed to delay a vote at least until it meets this year, allowing time for further study on the issue.<sup>95</sup> There was little doubt among delegates that had there been a vote on the proposal it would have been defeated.<sup>96</sup>

A few influential state bar associations, in a preemptive strike against pro-MDP forces, have already passed resolutions against the acceptance of MDPs.<sup>97</sup> The bulk of the opposition

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90. *Id.* Recommendations 14, 15.

91. *See, e.g., id.* Recommendation 4 ("Nonlawyers in an MDP, or otherwise, should not be permitted to deliver legal services.").

92. *Id.* Recommendation 1.

93. *See* APPENDIX A, *supra* note 2. As a complement to the Report supporting the Recommendation, the Commission offered a draft Model Rule 5.8. *See id.* It also suggested corresponding amendments to other Model Rules consistent with the Recommendation. *See id.*

94. *See* Margaret A. Jacobs, *ABA Puts Off Vote on Nonlawyer Partnerships*, WALL ST. J., Aug. 11, 1999, at B9.

95. *See id.*

96. *See id.*

97. *See, e.g.,* Rocco Cammarere, *Multidisciplinary Practices: Gone, But Not Forgotten*, N.J. LAW. Aug. 16, 1999, at 4 (New Jersey); Gary Spencer, *Bar*

focuses on the fee-sharing element of MDP-reform. The New York State Bar Association (NYBA), for instance, has been one of the most persistent voices against MDPs and the Commission's recommendation. The NYBA, while leading the opposition to the Commission's Recommendation, emphasized that it *might* accept a recommendation after more time for study and reflection. The NYBA states that it "opposes 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 interest of clients and society and do not undermine or dilute the integrity of the delivery of legal services by the legal profession."<sup>98</sup> It is important to note that any proposal eventually approved by the ABA would still have to be adopted by the states, where local bar associations are either opposing the broad notion of MDP-reform or have yet to formally study the issue.

A prominent international law association (Union Internationale des Avocats) welcomed the news of the Commission and its recommendations. Attempting to create further international support for MDPs, the group proposed universal ethics rules which could serve as model rules for both those nations favoring MDPs and those nations currently wrestling with the issue.<sup>99</sup>

The accounting profession has generally hailed the Commission's recommendations as a positive development, and looks forward to the "merging" of the two professions.<sup>100</sup> Big Five accounting firms want the legal professions for two main reasons: one, accounting firms will not have to worry about strong, organized opposition to their recent growth, and cooperation between the professions—while allowing law firms to regain some of the market—will also allow accounting firms to further increase their overall "one-stop shopping" lead in the marketplace.<sup>101</sup>

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*Opposes Non-Lawyers Sharing Fees*, N.Y. L.J., June 29, 1999, at 1 (New York); *Ticker*, NAT'L L.J., Aug. 16, 1999, at A4 (Pennsylvania).

98. Spencer, *supra* note 97, at 1.

99. See Darryl Van Duch, *MDPs Get International Support*, NAT'L L.J., July 12, 1999, at A4.

100. *ABA Urges One-Stop Shopping*, *supra* note 4, at 16.

101. See *id.*

### C. COMMENTARY: THE COMMISSION'S METHOD OF DECISION-MAKING

The Commission was comprised of various experts from around the country, and it engaged in serious research and study of the issue of MDPs. With that said, the Commission did create certain documents for public release and examination. It is a review of those documents, and those documents only, that provide the basis for the following comments.

#### 1. Not "If" but "How": The Commission's Peculiar Bent

The Commission seemed to divide its decision into two broad issues: whether the prohibitions on MDPs should be relaxed and, if so, how the profession's values could be protected through new rules and amendments.<sup>102</sup> Another way to phrase this division is to say that the Commission initially considered what might be called business-related interests, and only then addressed ethics-related interests. After deciding MDPs were generally favorable vehicles for legal services, the Commission crafted proposals designed to protect critical aspects of the profession and the attorney-client relationship. The Commission's division of issues is in itself reasonable, but the order of consideration and the implied relationship between the issues deserve further examination.

The Commission, in determining whether MDPs should be allowed, could have adopted any one of many decision-making methods. One would have expected the Commission to use one of the following methods:

(1) Determine whether MDPs would place a burden on the profession's core values; if so, recommend a maintenance of the regulations or a strengthening of them, without further examination or balancing of interests.<sup>103</sup>

(2) Determine whether MDPs would place a burden on the profession's core values; if so, determine if MDPs would bring economic benefit to lawyers and their clients; if so, conduct a balancing test of economic benefit versus harm to core values to

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102. See REPORTER'S NOTES, *supra* note 18.

103. An obvious corollary to this method is to determine if MDPs would bring economic benefit to lawyers and their clients. If so, recommend a relaxation of regulations with no further examination or balancing of interests. But most would have considered this to be an outrageous method and so it fell outside the range of practical possibilities.

see if MDPs might be allowed with an acceptable risk of harm to the core values.

(3) Determine whether MDPs would bring economic benefit to lawyers and their clients; if so, consider whether MDPs place a burden on the profession's core values; if so, conduct a balancing tests of economic benefit versus harm to core values to see if MDPs might be allowed with an acceptable risk.

As most observers would expect the Commission to employ one of these methods, many would be surprised to learn that the Commission did not use any of them. The first method—core values as sole criterion—was not used, if at all considered, by the Commission. It surely could have been implemented, for many lawyers would argue that no interest can supercede the protection of the profession's core values. But the method was clearly not used: a brief survey of the Recommendation and the Report shows that the Commission was very interested in other factors besides potential harm to the core values of the profession.

Neither did the Commission seem to use the second or third methods. The consideration of both the core values and business benefits (beginning with one or the other), combined with a balancing test, was not put in practice by the Commission. Note here that the Commission *did* hear testimony about, discuss, and analyze information concerning both business and ethics; with that conclusion no observer would disagree. But it seems that the Commission did not put into effect a serious balancing test of concerns *before* deciding that the Model Rules should be relaxed for MDPs.

Only after deciding that various interests (e.g., clients, consumer groups, etc.) dictated a change in MDP regulations did the Commission contemplate new rules which would *best counter* new ethical problems for the profession.<sup>104</sup> There are two noteworthy issues here. First, the Commission did not seem to consider MDPs' effects on the ethics of the profession as the primary factor in deciding whether MDPs should be allowed; rather, safeguarding the ethics of the profession seems to have been a sort of post hoc consideration. Second, a related but distinct point: the Commission—in deciding how to reform

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104. The Commission says that its purpose was to "determine what changes, if any, should be made" to the Model Rules. REPORT, *supra* note 2. The wording of this description seems to suggest the Commission's response; changes will be made.

the Model Rules—apparently accepted the notion that MDPs will bring new and dangerous problems for the profession.

In an explanation of its decision-making process, the Commission's notes read: "Having heard the persuasive testimony from business clients, representatives of consumer groups, and ABA entities in support of a relaxation of Model Rule 5.4, the Commission proceeded to examine how to preserve the core values of the legal profession . . . in an MDP setting."<sup>105</sup> Disregarding unintended mistakes in writing and consequent meaning, it appears that the Commission first decided that MDPs should be allowed as proper vehicles for the distribution of legal services, and later considered how to protect the profession from negative effects.<sup>106</sup> Some might argue that this is not an especially important point. Whether the Commission balanced both issues and then made a decision involving changes to the rules, or whether the Commission made a decision based on one issue, and then proposed changes to the rules as compensation for the other issue, is not a critical difference, they would argue. But the difference may be a telling one, at least for consideration of the Commission's broad perspective and motivation.<sup>107</sup> Examination of a closely-related point might better reveal the Commission's perspective.

The Commission, after deciding that MDPs should be allowed, examined the issue of protecting the core values of the profession, and decided that "these core values were *best protected* by recommending a special set of regulatory undertakings to govern the MDP[s]" and the lawyers in them.<sup>108</sup> The Commission's use of language in its description of the decision-making process is interesting. Not only does the Commission recognize that MDPs would present problems for the core values of the profession, but its description ("best protected")

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105. REPORTER'S NOTES, *supra* note 18.

106. "Having heard" does not merely denote the hearing of testimony on the issue. These words and their context imply both hearings and a subsequent decision in favor of MDPs.

107. Here is an analogy related to federal law-making. Assume that Congress decides—based on studies showing that permit-to-carry statutes reduce violent crime—to liberalize gun-ownership laws. Congress *then* considers how to "best protect" citizens from the negative effects of its legislation. While some could argue that the result (the legislation) would most likely be the same regardless of the path to it, the particular path chosen would reveal Congress's broad perspective on the issue of gun-ownership. In this example, the good of gun-ownership carries with it a weight not shared by other concerns.

108. REPORTER'S NOTES, *supra* note 18 (emphasis added).



seems to admit that even the recommendation of a new regulatory system would not fully counter these problems. Otherwise, why use the language of "best protected" instead of the obvious alternative term "protected"?<sup>109</sup> The only answer can be that the Commission is concerned that the problems posed by MDPs will not be neutralized by its Recommendation. So why, some lawyers and others will ask, did the Commission recommend that the ABA accept MDPs?

That question brings us back to the methodology employed by the Commission in making its decision. The Commission seems to have been primarily interested in whether MDPs would bring some stability to the competition between law firms and nonlegal firms in the professional services market. In gathering evidence about nonlegal firms' threatening encroachment into legal services, lawyers' demands for MDPs, and clients' interest in MDPs, the Commission apparently came to a firm decision—lawyers and law firms need MDPs to compete in the marketplace, so the Commission must recommend that MDPs be allowed. After making that decision, the Commission then turned to what can only be described as its secondary issue—how to restructure the Model Rules so that MDPs do not cause unnecessary damage to the profession.

This methodology does not clearly contradict the Commission's formal Recommendation,<sup>110</sup> but there does appear to be significant conflict. The first recommendation, as its place in the list would suggest, was most likely meant to be the general guide for the remainder.<sup>111</sup> This recommendation points out that there are two different, though not necessarily opposed, interests to consider: *first*, the core values of the profession and, *second*, the development of MDPs.<sup>112</sup> The recommendation stresses that the profession "should adopt and maintain rules of professional conduct that protect its core values," but "should not permit existing rules to unnecessarily inhibit the development of [MDPs]."<sup>113</sup> This diplomatic recommendation offers a

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109. Here the Commission is describing its reaction to the problems presented by MDPs. The term "best" seems to necessarily imply these problems are not expected to be fully solved by the recommended protections.

110. See RECOMMENDATION, *supra* note 87, Recommendation 1.

111. See *id.*; see also REPORT, *supra* note 2 (stating that the core values were the Commission's overriding interest).

112. See RECOMMENDATION, *supra* note 87, Recommendation 1. The order of the interests' consideration seems opposite of the method actually used by the Commission.

113. *Id.*

confusing message to its readers. The key phrase in this recommendation for understanding the relationship between core values and MDPs is of course the "unnecessarily inhibit" language.<sup>114</sup>

Whether one believes that there is unnecessary inhibition of MDPs posed by the Rules of Professional Conduct depends on the value one places on the various concerns involved. If, for instance, the current regulations went beyond protecting the profession to the level of interfering with business, without giving further protection to the core values, there clearly would be "unnecessary inhibition." But this is not the case here, at least from the perspective of the Commission. The Commission tells us elsewhere that the relaxation of the current regulations will indeed pose dangers to the profession's core values, and that the recommended protections against these dangers might not succeed.<sup>115</sup> Despite its own, albeit quiet, warning about MDPs, however, the Commission saw the current regulations as an "unnecessary inhibition" of MDPs. Here, then, the Commission's perspective must be one of placing primary emphasis on the business interests of lawyers and their clients, and giving secondary consideration to the profession's core values.

## 2. The Commission's Concept of the Legal Profession: Business or Law?

Market factors are certainly an important consideration for a profession, but given the legal profession's special position in civilized society, there are clearly other interests to consider. The legal profession has a right to look after its interests as a group in the professional services market, but it also has a duty to do its best to safeguard the integrity of the provision of legal services. The dual nature of the legal profession—both business for profit and arm of the judicial system—raises an obvious but perhaps overlooked question: What was the purpose of the Commission?

The opponents of MDP are sometimes referred to as having mere "protectionist" concerns.<sup>116</sup> These opponents are faulted for stressing too strongly exclusionary business interests and for not having a concern for the larger picture of the legal pro-

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114. *Id.* This language brings up the balancing test idea mentioned earlier.

115. See REPORTER'S NOTES, *supra* note 18.

116. Richard A. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 739-41 (1994).

fession's purpose.<sup>117</sup> That is, those favoring MDPs might complain that anti-MDP forces are mistaken in treating the legal profession as any other profession. This characterization may or may not be true, but the criticism is an interesting one, for the same (or a very similar) charge can be leveled against the Commission and the rest of those favoring MDP. The Commission's attention to the business interests of the profession did not lead, as some might expect, to the opposition of MDP, but rather to the energetic advocacy of it.

The Commission devoted a great deal of its Report to expressing concern about the protection and expansion of business interests for lawyers.<sup>118</sup> The issues of clients' desires and the competition's recent activity do not seem to complement the Commission's other interests, but seem to dominate the discussion. The point here is not to condemn the Commission for being interested in the business of lawyering, but to ascertain the correct perspective one should have in reading the Commission's analysis and conclusion. For instance, the group "United Federation of Car Dealers" might establish a commission to investigate the phenomenon of internet sales, and then release a detailed report. All readers of that report would guess that the car dealers are interested in protecting their current position in the marketplace. But few would assume that the "UFCD" was strongly concerned with unethical sales practices, or the general protection of the buyer's interests. This is perhaps an extreme example of the point, but it sufficiently presents the problem of the Report's reception.

### 3. The Absence of Consideration of an Obvious Alternative

The Commission's Report states that its purpose was to "determine what changes, if any, should be made" to the Model Rules.<sup>119</sup> As has already been pointed out, the Commission determined that the business interests of lawyers and their clients demanded a relaxation of the current regulations, and then the Commission decided exactly what changes should be recommended. In making this determination, the Commission seemed to rely on the threat from nonlegal firms as background for discussion. The conclusion of the Commission, although un-

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117. *See id.* at 741-45.

118. The Commission's voiced concerns in this area are comparable to those expected from any corporate board in a strategy meeting.

119. REPORT, *supra* note 2.

stated, was that unless the current regulations are relaxed, these nonlegal firms will so advance their encroachment on the MDP market that the legal profession will become severely crippled.

While this conclusion on the part of the Commission is reasonable, it lacks force because of the Commission's limited discussion. Critics of the Commission will say that the Commission appears to have ignored an obvious alternative recommendation. Assuming that the threat from nonlegal firms is a very real and serious one, and that this threat prompted the formation of the Commission, it is odd that the Commission would not consider all serious responses to this threat. The Commission decided that changes to the Model Rules were necessary, but forgot to consider the possibility of strengthening them.

In its various discussions, the Commission cites three broad reasons for implementing the relaxation of the Model Rules: the threat from nonlegal firms, demand from lawyers' clients, and demand from lawyers themselves.<sup>120</sup> But it is probable, if not certain, that the first of these reasons (the nonlegal MDP threat) is a strong influence on, or the very cause of, the second and third reasons. If this first reason can be countered, perhaps the second and third would largely disappear. That is, the existence of nonlegal firms, both in Europe and the United States, has caught the attention of law firms and the clients of those law firms. The law firms demand the freedom to reach the same markets that the nonlegal firms are now reaching. The clients notice the disparity between nonlegal firms and those law firms with which they currently do business, and they demand the convenience exhibited in the nonlegal firm's structure. The motivations of these law firms and their clients are perhaps a bit different—the law firm might be interested in self-preservation or growth opportunity while the clients are interested in mere convenience. But the cause of both demands may very well be the same—the nonlegal firm's expansion into legal markets.

Again, assuming that the nonlegal firm is a serious threat, there are only two reasonable responses—strengthen the division between lawyers and nonlawyers or weaken that division. The Commission obviously decided that the latter course was most appropriate, and that may simply be a function of market

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120. *See id.*

realities. The Commission proposed allowing lawyers the same flexibility which nonlawyers have had for some time. It is readily imaginable that the other possibility—strengthening the division—would prove to be a poor choice after it is thoroughly discussed and debated. But why was it not given attention by the Commission?

As of right now, certain nonlegal firms are seen as threats to the legal profession because their nonlawyers are engaged in what some see as the practice of law, or these firms might employ lawyers to do the same kind of work while their lawyers are, essentially, not bound by the regulatory system designed for lawyers. In either case, it seems that if “the practice of law,” were better defined (from the perspective of the ABA), the threat from nonlegal firms would subside. This would most likely be accomplished through the legal community’s energetic lobbying of state and federal officials—a difficult task, given the average citizen’s opinion of lawyers. But the ABA and like-minded organizations do have political clout, and a well-designed lobbying effort could not only stem the tide, but soon end it for good.

The Commission does mention that the term “legal practice” is difficult to define and thus, those nonlegal firms seen as “threatening” traditional legal practice are very seldom charged with the “unauthorized practice of law” when they may be, in fact, engaging in just that.<sup>121</sup> Perhaps the Commission sees this fight as one which has already been lost. We believe that even if the battle is not already lost, it nevertheless is not worth fighting. Still, it is odd that the Commission did not devote significant attention to the alternative of strengthening the regulations on the activities involving the legal profession and the practice of law.

#### D. THE COMMISSION’S UPDATED REPORT

On December 15, 1999, the Commission issued its Updated Background and Information Report and Request for Comments (Updated Report).<sup>122</sup> The stated purposes of the Updated Report were to (1) provide information on developments since the ABA Annual Meeting in August of 1999, (2) reply to

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121. *See id.*

122. COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS’N, UPDATED BACKGROUND AND INFORMATION REPORT AND REQUEST FOR COMMENTS (1999), available at <<http://www.abanet.org/cpr/febmdp.html>>.

criticisms of the original Report, and (3) encourage further dialog.<sup>123</sup>

In the first category, the Commission noted that "[s]trategic and other alliances between law firms and Big Five accounting firms are becoming increasingly popular."<sup>124</sup> The Commission also commented on the rapidly changing legal landscape outside of the United States.<sup>125</sup>

In responding to criticism of the original report, the Commission focused on nine issues.<sup>126</sup> These ranged from including competency as a core value in structuring the regulation of MDPs to whether control of MDPs should be limited to lawyers.<sup>127</sup> In all of its responses, while the Commission showed flexibility in its approach, it did not back off its focal point that the question of not "how," but "if" ultimately "carries enough weight to [permit] a relaxation of the present prohibitions on fee sharing and partnership with nonlawyers."<sup>128</sup>

In the final section of the Updated Report, the Commission made several interesting comments. For the first time the Commission invited comments on whether "stepped-up enforcement of [unauthorized practice of law statutes] and related code of conduct provisions is in the public interest and/or an achievable objective."<sup>129</sup> Then, however, the Commission returned to its primary focus and invited comments on what type of MDP model should be used, suggesting that variations include the District of Columbia rule, a contract model allowing close affiliation of law firms with other professionals, or a fully integrated MDP model.<sup>130</sup>

#### IV. ARGUMENTS SURROUNDING THE ISSUE OF MULTIDISCIPLINARY PRACTICE

With market factors supporting relaxation of the regulation of lawyers engaging in a multidisciplinary practice, the issue then turns to whether maintenance of the current regulatory regime is necessary for the protection of clients and the integrity of the legal profession. While not attempting to be

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123. *See id.*

124. *Id.*

125. *See id.*

126. *See id.*

127. *See id.*

128. *Id.*

129. *Id.*

130. *See id.*

exhaustive, we will present and comment on the arguments used by both supporters and opponents of MDPs.

#### A. ARGUMENTS IN FAVOR OF MULTIDISCIPLINARY PRACTICE

Arguments in favor of MDP are typically based on economic considerations. Proponents argue that economic benefits to the profession and clients demand strong consideration and, ultimately, a decision to relax the prohibitions against MDPs.

##### 1. Loss of Bargaining Position in the Professional Services Marketplace

The protection of economic interests, at first glance, seems natural to an argument opposing MDPs. For example, since MDPs will allow partnerships with nonlawyers, those opposing MDPs are sometimes portrayed as economic protectionists for the legal profession.<sup>131</sup> But economic interests, and perhaps protectionist interests, are ironically strong forces for those legal factions favoring MDPs, and economic interests are most likely the motivation for spurring the current debate.

Lawyers are clearly worried about the encroachment on their profession by accounting firms and other professional services firms. Some of these firms are focused on directly giving legal or quasi-legal advice, while other nonlegal firms hire lawyers from law firms or law schools to accomplish the same thing. The result is that these nonlegal firms are providing multidisciplinary services while hiding behind the nonlegal label, and are thus threatening the traditional province of the law firm. If this trend continues and if the legal profession does not expand its ability to reach more clientele, the result will most likely be the diminution of business for lawyers.<sup>132</sup> As one lawyer put it: "We are all paranoid about driving our clients into the arms of other professionals and that's one of the reasons we are [pushing MDP reform]."<sup>133</sup>

While it perhaps was not to be expected that the Commission would publicly communicate its fears concerning the loss of business for lawyers, the Commission was surely motivated, at least in part, by the market threat to the legal profession. The Commission did highlight one aspect of economic concern,

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131. See, e.g., Andrews, *supra* note 23, at 616-22.

132. See Jacobs, *supra* note 94, at B9.

133. Elizabeth Davidson, *Keeping Clients on a Single Track*, LAWYER, Sept. 20, 1999, at 12.

saying that while there are no precise statistics on accounting firms' presence in the international legal market, "the evidence of their emergence as alternative providers is overwhelming."<sup>134</sup>

The Commission noted as well that courts have been increasingly reluctant to enforce Unauthorized Practice of Law (UPL) statutes because the term "practice of law" is vague and confusing.<sup>135</sup> The Commission's implicit conclusion is clear—with the growth of nonlawyer firms, and the inability to control the unauthorized practice of law, the legal profession is facing severe competition in the relevant marketplace.

## 2. Convenience of the Client

This is perhaps the most repeated argument from pro-MDP forces. Proponents of MDPs argue that clients of law firms have a need—a need growing with the complexity of law and business—for obtaining multiple professional services from a single provider. Instead of contacting, visiting, and contracting with various professional firms, the modern client has a significant interest in access to a single firm providing legal, financial, and other services.<sup>136</sup> Those arguing the "convenience of client" line of reasoning cite the clear pattern of convenience-shopping in the marketplace, whether the convenience be the Mall of America, satellite broadcasting for television, or the conglomeration of international professional services.<sup>137</sup> This powerful personality of the market, then, is what drives the legal profession to change—not the mere whims or selfish interests of legal or nonlegal professionals.

In the first part of its Recommendation, the Commission proposes relaxing regulations to allow "the development of new structures for the more effective delivery of services and better

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134. REPORTER'S NOTES, *supra* note 18.

135. *See id.* The Commission mentions that there have been only two recent enforcement actions against the most critical element of nonlawyer competition—Big Five accounting firms. *See id.*

136. *See generally* James M. Fischer, *Why Can't Lawyers Split Fees? Why Ask Why, Ask When!*, 6 GEO. J. LEGAL ETHICS 1 (1992).

137. One advocate for MDPs reasons:

When customers walk into one of my golf stores, I don't sell them a set of clubs, then send them to four different places for shoes, gloves, balls and a bag. So why do I have to go to different offices to find lawyers, accountants, financial planners, insurance agents and public relations experts?

Michael Paul, *Law Firms Shouldn't Be for Lawyers Only*, WALL ST. J., Aug. 9, 1999, at A18.



public access to the legal system."<sup>138</sup> The Commission seems to have found the client convenience argument the most reliable in recommending a relaxation of MDP regulations. The Commission emphasized: "The opportunity to structure a new vehicle for the delivery of legal services should be available to the lawyers who express an interest in providing those services to their clients through an MDP and to those clients who express an interest in additional choices of legal service providers."<sup>139</sup>

### 3. Changes Are Dictated by Trends in the Global Economy

In a line of reasoning similar to the "client convenience" argument, many argue that the legal profession in the United States must adapt to marketplace competition as it becomes globalized and remove those regulations that restrict its participation.<sup>140</sup> Accounting firms recognized this trend long ago and already have established a significant toe-hold in the international market of MDPs. If the legal profession cannot adapt to these natural changes in the economy, it will slowly be pushed aside.<sup>141</sup>

These larger accounting firms, taking advantage of the pro-MDP regulatory system overseas, have significant legal practices throughout Europe, with lawyers on staff or attached to the accounting firms through some variety of contractual obligations. In some European markets, these accounting firms are already among the largest providers of legal services for businesses. And this development is not likely to be curbed by the legal profession if it does not alter its regulation; the GATT treaty, which governs most international trade matters, claims jurisdiction over these professions through the World Trade Organization—an organization historically biased against self-interested regulation.<sup>142</sup>

While the Commission shied away from examining the potential impact of trade agreements and trade organizations on MDPs, it did consider the international marketplace to be a strong challenge to current regulations.<sup>143</sup> The Commission hinted at the inevitable trend of globalization by examining the

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138. RECOMMENDATION, *supra* note 87, Recommendation 1.

139. REPORT, *supra* note 2.

140. See, e.g., Doug Bandow, *Lawyers Need to Evolve with the Economy*, J. COM., Aug. 13, 1999, at 9, 9.

141. See *ABA Urges One-Stop Shopping*, *supra* note 4, at 15.

142. See Gibeaut, *supra* note 7, at 44.

143. See REPORT, *supra* note 2.

developments of pro-MDP proposals and current regulations around the world, and the participation in these friendly markets by nonlegal professional firms.<sup>144</sup>

#### 4. Access to New Capital

As it stands today, partners, or their shareholder counterparts, provide all of the equity financing for law firms, and while law firms are typically characterized as labor-intensive rather than capital-intensive, their capital needs are increasing as technology plays a larger role in the delivery of legal services. Furthermore, the notion that because law firms are labor-intensive they are thus not capital intensive fails to recognize that many law firms invest significant amounts of money training and developing young associates. Allowing law firms access to the equity markets—that is, investment by nonlawyers—is a concomitant of sanctioning MDPs and could result in law firms that are optimally capitalized and, thus, more efficient.

In short, many law firms could benefit from having access to the equity markets. The equity markets would provide law firms with necessary capital for expansion into new geographical areas, thereby better serving consumers' needs by permitting greater access to legal services and increased competition in the local marketplace. This newfound capital would also allow investment into new technologies, again resulting in better legal services for the consumer. Assuming law firms are indeed labor-intensive, law firms train a great percentage of the profession's future leaders. With greater capital, this task becomes more efficient. Moreover, law firms often serve society best in their ability to take on large and financially risky contingency fee cases. Many of these cases require enormous capital outlay years before any repayment can be expected. The capital that firms could raise in the equity markets could assist in financing these cases, serving plaintiffs who otherwise would go unrepresented.

#### B. ARGUMENTS OPPOSING MULTIDISCIPLINARY PRACTICE

Opponents of MDP usually argue on the basis of ethical considerations. They argue that the economic factors involved are connected to a short-term perspective, and that the profes-

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144. See REPORTER'S NOTES, *supra* note 18.

sion and clients are bound to suffer if MDP prohibitions are relaxed.

### 1. Professional Objectivity and Independence Threatened

A primary concern of groups opposing MDPs is the threat to a lawyer's independent judgment.<sup>145</sup> When a lawyer has intimate strategic and financial attachments to nonlegal professionals, so goes the argument, there are bound to be obstacles to independent judgment. For example, if the lawyer is a partner with a financial planner, and the financial planner has invested a great deal of money and time in creating a plan for a client, the lawyer might be pressured to give less-than-independent counsel to the client. As a former president of the New York State Bar Association had noted, "[a]bout half of the practice of a decent lawyer consists of telling would-be clients that they are damned fools and should stop."<sup>146</sup> This "half" of a proper practice, say those opposed to MDPs, would be threatened if the current regulations were relaxed.

The Commission recognized this issue as "[t]he most frequently raised concern" regarding the relaxation of ethics rules. The Commission pointed out that this is a legitimate concern, but that MDPs would not create this "problem"—it already exists:

In today's world, many lawyers routinely work in practice settings in which they are subject to management oversight by nonlawyers. The profession has a history of lawyers working in corporate law departments or government offices. Lawyers also work for organizations that provide legal services to their members or other clients (e.g. union-sponsored and prepaid legal services plans, community legal services organizations). Independence has been maintained in those settings.<sup>147</sup>

As a protection against threats to independent judgment, however, the Commission recommended that the Model Rules

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145. See Cindy Albert Carson, *Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms*, 7 GEO. J. LEGAL ETHICS 593, 611-12 (1994). According to Carson, "[a] non-lawyer partner's primary concern is likely to be a good return on his investment." *Id.*; see also Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741, 745 (1988) ("The chief characteristic that distinguishes [a business] from a profession is the motivation of business people. Business people are egoistic; their primary motivation, according to economic theory, is to maximize their self-interest.").

146. James C. Moore, *Lawyer Independence: Being Able to Tell the Client "You Are a Damned Fool!"* N.Y. ST. B.J., Jan. 1999, at 5 (quoting the words of Elihu Root, former president of the New York State Bar Association).

147. REPORT, *supra* note 2.

clearly state that a lawyer supervised by a nonlawyer may not use as a defense the fact that the lawyer merely complied with the nonlawyer's resolution of a question of professional duty.<sup>148</sup> In addition, the Commission recommended a requirement that an MDP not controlled by lawyers must supply to the appropriate regulatory court a written statement that it will not directly or indirectly interfere with a lawyer's independent judgment on behalf of a client, and that it will establish and enforce procedures designed to protect a lawyer's exercise of independent judgment.<sup>149</sup>

Moreover, the reality is that law firms are in the business of providing legal services and can succeed only by providing sound legal judgment to consumers. Indeed, the value of a firm would directly reflect the market's perception of the ability of the firm to render quality, professional legal services. To the extent that the law firm's reputation is tarnished because it provides inadequate services, the owners stand to lose. As a result, nonlawyer investors would be acting to their own detriment by interfering with the professional independence and judgment of a firm's lawyer-employees and, thus, diminishing the quality of the legal services offered.

As one commentator noted "it is puzzling that this thesis is maintained in a society in which the profit motive otherwise is thought to lead to the production of goods and services for which there is consumer demand."<sup>150</sup> It seems implausible, for example, that stockholders of an investment banking firm, would attempt to interfere, via the board of directors or upper management, with the professional judgment of the firm's professionals.<sup>151</sup> The perceived quality of that professional judgment is exactly what customers are buying and, ultimately, what stockholders are counting on for their return on investment. In short, the dynamics of the marketplace actually militate against the notion that nonlawyer investors would interfere with the lawyer's professional independence and judgment. A parallel example of the consumer backlash that this interference would spawn can be seen in the changes in attitudes toward managed care over the last several years. Over a decade

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148. See RECOMMENDATION, *supra* note 87, Recommendation 6.

149. See *id.* Recommendation 14.

150. Andrews, *supra* note 23, at 602.

151. This does not mean that other investment banking professionals might not interfere with a particular individual's professional judgment on a particular matter.

ago, doctors began feeling heavy pressures to find quicker, cheaper methods of caring for patients—often to the patient's detriment.<sup>152</sup> Presently, however, patients are speaking out and opposing such nonphysician dictated influences such as mandatory maximum hospital stays. Patients have begun to turn the tide in the health care debate and have recast the debate in a different light.<sup>153</sup>

Private firms, especially large corporate firms, are equally concerned with maximizing the bottom line as other nonlegal businesses. Indeed, "there is no reason to suppose that corporations or laymen engage in the 'sordid' business of making money any more than do traditional law firms."<sup>154</sup> Those opposing MDPs simply have not demonstrated that "nonlawyer control is more pernicious, or more efficacious, in interfering with a lawyer's professional independence, than the control by supervising or employer attorneys that is allowed currently."<sup>155</sup>

Lastly, it must be remembered that the lawyers will continue to be the persons actually providing legal services and advice directly to the clients. Practicing in an MDP will no less remove them from their ethical obligations in rendering services than practicing in a large professional corporation as in-house counsel does now.<sup>156</sup> The ABA has recognized that lawyers operating under the authority of laymen need not violate

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152. George J. Church, *Ouch! Ouch! Ouch! This Will Hurt: As Budget Cuts Loom, Yelps Are Already Being Heard*, TIME, Feb. 24, 1986, at 18 (discussing how hospitals in the mid-1980s were "discharging many Medicare patients early—'sicker and quicker,' as many doctors put it").

153. See Michael Kramer, *Road to the White House*, TIME, Fall 1996, at 14 (proposing that one reason President Clinton was able to achieve re-election after seeing his first term's national health care proposals go down in defeat was his adoption of proposals such as a bill to mandate a longer hospital stay after a woman gives birth, an issue that had grown more important as managed health care providers had been discharging women after shorter and shorter hospital stays).

154. Andrews, *supra* note 23, at 602.

155. *Id.* at 607. Andrews also made the following point:

Many lawyers work for a salary as associates for law firms in which they have no control or ownership interest. Their employers—the partners or lawyer shareholders—may be looking over the shoulders of those associates "in terms of profit" just as aggressively as would nonlawyers offering the services of these same lawyers.

*Id.* at 606.

156. Model Rule 5.4, which prohibits lawyers from practicing in a professional corporation if "a nonlawyer has the right to direct or control the professional judgment of a lawyer," need not be changed to allow law firms to go public. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(d)(3) (1983).

the Model Rules. For example, in 1970, the ABA issued an ethics opinion regarding the scope of authority which may be exercised by the board of directors of a legal aid society.<sup>157</sup> In light of these factors, those considering change should not be persuaded by the argument that allowing MDPs would inevitably result in interference with the professional judgment of lawyers.<sup>158</sup>

## 2. Client Confidentiality at Risk

Some argue that the closer integration between lawyers and other professionals will bring numerous violations of ethics rules and jeopardize client interests. Nonlegal professionals

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157. ABA Comm. on Professional Ethics, Formal Op. 324 (1970). The Opinion laid out principles to govern the relationship between the board of directors of the Legal Aid Society and the society's staff attorneys:

(1) The board's functions are limited to formulating broad goals and policies pertaining to the operation of the society.

(2) To this end, the board may establish guidelines respecting the categories or kinds of clients attorneys may represent and the types of cases they may handle.

....

(4) Staff attorneys should endeavor at all times to fulfill the broad policies formulated by the board and should insure that their conduct in representing clients or causes is in conformity with the [applicable ethical standards].

....

(6) Once the attorney has accepted a client or case of the nature and type sanctioned by board policy, the board must take special precautions not to interfere with its attorney's independent professional judgment in the handling of the matter.

*Id.*

The Committee believed that these principles would be sufficient to guide the lawyers and the board of directors in their relationships with each other and with clients. *See id.* Those legal aid societies following these principles would receive the blessings of the ABA. *See id.* The opinion was issued while the Code of Professional Responsibility was the most recent set of rules issued by the ABA, but the substance of the opinion has not been overruled. The ABA Center for Professional Responsibility noted that Rule 5.4(d) of the Model Rules does not apply to nonprofit organizations. *See* ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 460 (2d ed. 1992) [hereinafter ANNOTATED MODEL RULES].

158. In any event, a law firm wishing to issue stock to the public could state in its prospectus, as Steven Brill suggests, that "maximizing shareholder return is not the firm's sole goal or even its constant priority—and then let the marketplace decide if the shares are a good buy." Steven Brill, *Psst—Wanna Buy a Hot Stock?*, AM. LAW., Nov. 1987, at 3, 102. Brill also suggests that lawyers could retain "a separate, voting-dominant class of insider stock for the senior practicing lawyers" to avoid any potential interference from nonlawyers. *Id.*

are not bound by the same obligations which bind lawyers, and in some cases, are positively bound by potentially conflicting obligations.<sup>159</sup> For example, in the case of an MDP involving accountants and lawyers, there is a ready-made conflict of interests. Federal securities laws require accountants to disclose audit irregularities to the Securities and Exchange Commission if a company does not quickly correct the problems. By contrast, lawyers are bound by their ethics rules to maintain client confidentiality and to regard as privileged all information they learn from clients.<sup>160</sup>

Of course, holding "inviolable [the] confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance."<sup>161</sup> Only under the guarantee of confidentiality will clients seek this assistance and then communicate fully and frankly with their lawyers.<sup>162</sup>

The Commission agreed that confidentiality is a serious concern, since professions have different confidentiality standards. The Commission recommended that no change be made to the lawyer's obligation to protect confidential client information and proposed several safeguards to protect against potential conflicts.<sup>163</sup> The recommendations made by the Commission include the following: applying to MDPs all rules of professional conduct that would apply to law firms;<sup>164</sup> treating all clients of an MDP receiving legal services as the lawyer's clients for purposes of conflicts of interest and imputation in the same manner as if the MDP were a law firm and all employees, partners, shareholders or the like were lawyers;<sup>165</sup> requiring a lawyer to make reasonable efforts to ensure that the client sufficiently understands that the lawyer and nonlawyer may have different obligations with respect to disclosure of client information and that the courts may treat the client's communications to the lawyer and nonlawyer differently.<sup>166</sup>

Moreover, even without these recommended changes, concerns regarding the sanctity of client confidentiality would not

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159. See Jacobs, *supra* note 94, at B9.

160. See REPORT, *supra* note 2.

161. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 2 (1983).

162. See *id.* Rule 1.6 cmt. 4.

163. See REPORT, *supra* note 2.

164. See RECOMMENDATION, *supra* note 87, Recommendation 7.

165. See *id.* Recommendation 8.

166. See *id.* Recommendation 9.

be well placed. Model Rule 5.3 specifically addresses this argument, providing that:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

....

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved[.]<sup>167</sup>

Rule 5.3 would continue to deter lawyers in MDPs from breaching client confidentiality. In the current everyday reality, nonlawyer employees are necessarily privy to confidential client information in law firms across the country. In addition, countless nonlawyer professionals, retained by lawyers for expert help, have access to client confidences. Despite these nonlawyers' knowledge of client matters, law firms have not been plagued by nonlawyers breaking client confidences.

Even assuming that a nonlawyer manager may be able to access confidential client information, one commentator has pointed out that "even if nonlawyers do not have as broad a duty of confidentiality under traditional agency rules as is imposed under the lawyer ethics codes, nonlawyer professionals are free to agree to a broader duty of confidentiality as a contractual matter."<sup>168</sup> More convincingly, any breach of confidentiality by a nonlawyer would be to the great detriment of the firm itself. In the investment banking business, for example, maintaining client confidences is of paramount importance.<sup>169</sup> For this reason, almost all professional services agreements between investment banks and their clients include a strict confidentiality clause, binding all employees from the mail person to the highest managing director.<sup>170</sup> There is no reason why such agreements could not be made as a matter of course between MDPs and their clients. Finally, the ABA opinion regarding

167. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3 (1983).

168. Andrews, *supra* note 23, at 615-16.

169. For example, an untimely leak of a planned takeover offer could cost the bidding client millions of dollars if the market value of the target stock increases as a result of the leak.

170. Such agreements are common to litigation services providers. These companies hire nonlawyers to assist in cost-effective preparation of litigation paperwork for large law firms. Employees are required to sign confidentiality agreements because they are exposed to confidential client documents and attorney work product.



the relationship between the board of directors of legal services societies and the societies' staff attorneys discusses client confidences and places limitations on attorneys' rights to disclose these confidences to their superiors.<sup>171</sup> These limitations may be equally applied to MDPs as well as legal aid societies.

In a related vein, Model Rule 1.6 currently allows lawyers to make disclosures that are "impliedly authorized in order to carry out the representation."<sup>172</sup> Thus, disclosure to a nonlawyer would not violate the ethical rule if necessary to carry out the representation. Furthermore, if a lawyer decides it is necessary to disclose confidential information to a nonlawyer for some reason, the lawyer can also ask for the client's consent to disclose the information.<sup>173</sup> In view of the foregoing, there is no reason to believe that client confidences would be less protected within an MDP than any other law firm.

### 3. Damage to the Long-Term Reputation and Viability of the Profession

Those concerned about MDPs often mention a general concern for the profession of lawyering. If lawyers are treated more and more like any other professional interested in profits, say those so concerned, the profession is bound to lose its sense of "special purpose" in civil society. That is, allowing MDPs will denigrate the legal profession to a mere business.<sup>174</sup> These critics claim that allowing a law firm to be owned by nonlawyers will turn the focus of a law firm towards cost-cutting in an attempt to maximize shareholder value at the expense of client service.

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171. See ABA Comm. on Professional Ethics, Formal Op. 324 (1970). The pertinent provision states that "[t]he board may require staff attorneys to disclose to the board such information about their clients and cases as is reasonably necessary to determine whether the board's policies are being carried out." *Id.* This broad provision was later limited by a 1974 Formal Opinion that required client anonymity be preserved in communications with the society's board, and also require that a staff attorney receive the knowledgeable consent of the client before divulging client confidences or secrets to others. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974). Although the ABA noted that nonprofit organizations are not subject to the requirements of Rule 5.4(d), it emphasized that such organizations must comply with Rule 1.6 on client confidences. See ANNOTATED MODEL RULES, *supra* note 157, at 460.

172. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983).

173. See *id.*

174. See Carson, *supra* note 145, at 605-08.

These critics fail to see that a trend is well under way in which the practice of law is becoming more the business of law. Altering the Model Rules to allow law firms access to the public equity markets would be beneficial to the legal profession as a whole. Over the last ten years, the legal "profession" has undergone changes that arguably warrant renaming it the legal services "business."<sup>175</sup> Today, more so than at any time in the past, lawyers run their firms like traditional businesses.<sup>176</sup> The tremendous competition among law firms has forced law firm owners, their partners and their shareholders, to become more concerned with profits and efficiency. Those managing private, for-profit law firms have realized the stark reality that their law firms must be viewed as businesses in order to survive in this competitive marketplace. Indeed, one commentator bluntly stated "organizations [such as law firms] that were once synonymous with equability, professionalism and familial spirit have been molded by harsh economic forces into large, disputatious businesses."<sup>177</sup>

A rapidly changing legal economy has provided the impetus for this new focus on the business of managing law firms. The Altman Weil Pensa *Survey of Law Firm Economics* showed that per-lawyer overhead increased more than 81% over the last ten years, while per-lawyer revenues increased only

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175. *See id.* at 605. According to Carson:

The definition of the term "profession" is by no means universally agreed upon. Traditionally, a business might be defined as an entity that promotes the greatest societal good by maximizing its profit, whereas a profession might be defined as an entity that seeks to promote the greatest societal good by maximizing its service. . . .

The reality today, of course, is that very few people would choose a profession without regard to its potential profitability. The difficulty arises when professional decisions are driven solely by profitability.

*Id.* at 605-06 (footnotes omitted).

176. *See* Ward Bower, *Surviving the 1990s*, LAW PRAC. MGMT., July-Aug. 1990, at 26, 26-27. Bower suggests that:

Established law firms will shift from "fraternal" organizations, characterized by collegiality, seniority advancement and compensation and consensus decision-making, to a "business" approach, characterized by interpartner accountability, merit-based compensation and centralized management. Economic realities of law practice, combined with competitive and market pressures, will lead more lawyers to leave the profession and to seek employment in other areas.

*Id.*

177. S.S. Samuelson, *The Organizational Structure of Law Firms: Lessons from Management Theory*, 51 OHIO ST. L.J. 645, 645 (1990).

73%.<sup>178</sup> As of 1996, the United States had approximately 900,000 lawyers today, up almost 40% from ten years before.<sup>179</sup> Moreover, in 1996 the United States had 336 law firms with over 100 lawyers and over 700 more with over 60 lawyers.<sup>180</sup> Three law firms had over 1,000 lawyers, yet in 1980 those same three firms had fewer than 300 lawyers.<sup>181</sup>

Unlike other businesses, during this transformation law firms have been deprived of a favored source of capital—namely, the equity capital available from the private, passive investor. As discussed earlier, the Model Rules prohibit nonlawyers from owning any interest in a law firm. This position, however, is fraught with irony. While proponents of this traditional prohibition against nonlawyer investment claim the rule is necessary to protect the integrity of the profession, real economic pressures threaten to undermine the integrity of the profession in law offices across the country on a daily basis. These pressures could be eased if law firms had access to the public equity markets.

Additionally, law firms have been barred from meeting diverse client needs by providing ancillary services in the same firm as legal services. This has limited the growth of firms and has been a disservice to clients who must seek separate professionals to meet their varied needs.

In response to those concerned about this denigration of the legal profession to a mere business, the Commission crafted proposals to protect the critical nature of the profession. The first element of its Recommendation stressed that “[t]he 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.”<sup>182</sup>

The Commission, in addressing the issue of MDPs’ general harm to the profession, noted that it sought evidence of harm to clients in “analogous situations,” and found no such evidence.<sup>183</sup> Actions alleging malpractice or breach of fiduciary duty against

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178. See Ward Bower, *Economic Trends in the Legal Profession*, 32 ARIZ. ATT’Y, May 1996, at 16, 17.

179. See *id.* at 17.

180. See *id.* at 18.

181. See *id.*

182. RECOMMENDATION, *supra* note 87, Recommendation 1.

183. See REPORTER’S NOTES, *supra* note 18.

a law firm and an ancillary business, for example, could not be found.<sup>184</sup> The Commission also heard and addressed concerns that MDPs would tend to concentrate legal resources into giant firms, destroying small and solo providers, and thereby hurting the independence of the profession. The Commission reported that informal surveys established that most small firms and solo practitioners were interested in creating MDPs of their own.<sup>185</sup>

To protect the profession's values in an MDP *controlled by nonlawyers*, the Commission proposed that the MDP sign a written statement and deliver it to the highest regulatory body in the MDP's jurisdiction. That statement would hold that the MDP will, generally, not interfere with a lawyer's professional judgment.<sup>186</sup> As far as MDPs controlled by lawyers, the Commission requires no such statement in that case, since "the likelihood of such interference is *significantly diminished*."<sup>187</sup>

#### 4. Unauthorized Practice of Law

Another fear held by those who oppose ending the prohibition on MDPs is that it will lead to the unauthorized practice of law. Critics suggest that although such trespasses onto the protected turf of lawyers may not be purposeful, they will occur accidentally.<sup>188</sup> Critics argue that this may occur because the limits of "the practice of law" are undefined, and differ by jurisdiction.<sup>189</sup> But it is these very differences in the definition of "the practice of law" which show that this fear is unfounded.

Many states, for example, place the power to draft real estate documents solely in the hands of lawyers; however, in 1962, Arizona chose to grant real estate brokers and salesper-

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184. *See id.*

185. *See id.*

186. *See* RECOMMENDATION, *supra* note 87, Recommendation 14.

187. REPORTER'S NOTES, *supra* note 18 (emphasis added).

188. It is suggested, for example, that a real estate agent partnered with a tax or real estate lawyer may discuss the tax results of a proposed real estate transaction. If this took place in a real estate office, the client may question the validity of the advice, but if the same comment is given in a law office, it may carry more weight with the client. *See* Carson, *supra* note 145, at 615-17; *see also In re* Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344, 1345-46 (N.J. 1995) (*per curiam*) (finding residential real estate brokers and title company officers may conduct real estate transactions that involve many aspects of the practice of law, provided they warn customers of their conflicting interests and of the risk of not being represented by an attorney).

189. *See* Carson, *supra* note 145, at 615-16.

sons the concurrent authority to draft such documents.<sup>190</sup> Since then, these nonlawyers have been serving client needs, and, after almost thirty-five years, no hard evidence has shown that clients have received poor advice or service as a result of Arizona's choice.<sup>191</sup>

Additionally, the practice of law in partnerships has grown to include all manner of nonlawyers who successfully face the daily challenge of not practicing law. Law firms employ paralegals, legal secretaries, and other nonlawyer personnel who constantly deal with clients. These nonlawyers may not give legal advice to clients, and they may not take other actions that may be construed as the practice of law. If they violate this rule, the lawyer or law firm employer may be sanctioned.<sup>192</sup> If these employees and assistants of lawyers can coexist with the ethics rules, why can't nonlawyer investors and partners? The answer is, they can.

A lawyer who enters business with nonlawyers remains bound by the applicable rules of conduct. Supervising lawyers are required to ensure that the conduct of nonlawyers is "compatible with the professional obligations of the lawyer."<sup>193</sup> Compliance with these rules requires that lawyers not assist in the unauthorized practice of law,<sup>194</sup> not share client confidences with unauthorized persons,<sup>195</sup> and not allow the nonlawyer to affect the lawyer's independent professional judgment.<sup>196</sup>

One additional criticism surrounding attempts to allow lawyers to become partners with nonlawyers is that it presents those with limited legal training the opportunity to practice law without a license.<sup>197</sup> The fear is that this may be a back-door into legal practice for law school graduates who cannot pass the bar or for disbarred lawyers. The reality is that the rules re-

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190. See Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 210-11.

191. See *id.*

192. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3(c) (1983).

193. *Id.* Rule 5.3(b). A lawyer is responsible for the conduct of a nonlawyer employee if the lawyer orders or ratifies the specific conduct involved, or if the lawyer is a partner in the firm in which the nonlawyer is employed and knows in advance of inappropriate conduct, but fails to take remedial action. See *id.* Rule 5.3(c).

194. See *id.* Rule 5.5(b).

195. See *id.* Rule 1.6.

196. See *id.* Rule 5.4(c).

197. See Carson, *supra* note 145, at 617.

quiring lawyers to be responsible for such nonlawyers' actions apply in this case, just as they do for paralegals or any other nonlawyer. It is also unlikely that abuses of this nature will be common—few practicing attorneys are likely to avail themselves of the services of those found not worthy of admission to the bar or those whose ethics resulted in the removal of their license to practice.

The existing rules and standards of ethical conduct already provide for nearly all contingencies that a lawyer may face regarding the unauthorized practice of law. Allowing nonlawyers to work beside lawyers would not change this situation. Lawyers would continue to practice law, and nonlawyers would continue to not practice law. The benefits of a business association between a lawyer and a nonlawyer do not, and would not, arise through the unethical utilization of unauthorized legal work, but rather, through the provision of ancillary services and through unlimited capitalization through the financial markets.

### CONCLUSION

Multidisciplinary practice—no matter what one thinks of the issue—is certain to have an enormous impact on the provision of legal services. To cast the issue in extremes, if nothing is done to meet the competition from nonlegal professionals, lawyers and law firms will suffer great financial hardship; on the other hand, if rules of ethics are disregarded, the law firm as we know it will disappear into the swirling mass of the professional services market. The ABA Commission on Multidisciplinary Practice has done an admirable job in quickly presenting the issues and making recommendations. Implementing those recommendations is a process that will take several years, but it is a process that is inevitable and, more importantly, justifiable.



# Permitting Lawyers To Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as We Know It?

Carol A. Needham<sup>†</sup>

Consideration of changes in the permissible vehicles for delivery of legal services has been simmering for decades. The convening of the American Bar Association's Commission on Multidisciplinary Practice (MDP)<sup>1</sup> in August 1998, however, marked the first time in twenty years that the legal profession has conducted a national discussion acknowledging the changes in the entities which have been delivering legal services.<sup>2</sup> In 1980, the Kutak Commission<sup>3</sup> proposed a Model Rule that would have permitted fee sharing in certain situations.<sup>4</sup> The arguments for and against that proposed rule have been ably

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<sup>†</sup> Associate Professor of Law, Saint Louis University School of Law (e-mail: needhamc@slu.edu). B.A., Northwestern University 1979, M.A., University of Virginia 1982, J.D., Northwestern University School of Law 1985. I would like to thank Kathleen Clark, Larry Fox, and Dennis Tuchler for their thoughtful comments on earlier drafts of this Article. I am also grateful to the other participants in this Symposium, especially Charles Wolfram, whose conversations furthered my thinking on these topics. Finally, I am grateful to Irene Marusic for her superb research assistance. Copyright © 2000 by Carol A. Needham.

1. Hereinafter, referred to as the Commission.

2. See COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, REPORT (1999), available at <<http://www.abanet.org/mdpreport.html>> [hereinafter REPORT].

3. The formal title of the Kutak Commission was the ABA Commission on Evaluation of Professional Standards, chaired by Robert J. Kutak. See COMMISSION ON EVALUATION OF PROF'L STANDARDS, AMERICAN BAR ASS'N, REPORT AND RECOMMENDATIONS ON STUDY OF THE MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft, Jan. 30, 1980).

4. See COMMISSION ON EVALUATION OF PROF'L STANDARDS, AMERICAN BAR ASS'N, PROPOSED FINAL DRAFT MODEL RULES OF PROFESSIONAL CONDUCT 175-78 (1981). The requirements of the proposed rule imposed by the Commission included the following: the nonlawyer could not interfere with either the attorney's professional judgment or the relation between the attorney and the client, protection for client confidences, compliance with rules restricting advertising and solicitation, and prohibiting improper fees. See *id.* at 175.



detailed elsewhere.<sup>5</sup> What this Article addresses are the consistent themes that are again under discussion in the debate over multidisciplinary practice.<sup>6</sup>

Academics and other commentators have debated whether the practice of law is a profession<sup>7</sup> or a business. Judicial opinions<sup>8</sup> and academic articles have frequently declared law practice to be a noble profession.<sup>9</sup> Other opinions and distinguished observers just as insistently declare that the law is a business and should be treated as such.<sup>10</sup> Perhaps it is closest

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5. See generally CENTER FOR PROF'L RESPONSIBILITY, AMERICAN BAR ASS'N, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 159-64 (1987); MODEL RULES OF PROFESSIONAL CONDUCT RULE 7.5 (Discussion Draft 1980); 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, 594 (1989); Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 384-86 (1988); Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869 (2000).

6. See generally 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 (1997); Ronald A. Landen, Comment, *The Prospects of the Accountant-Lawyer Multidisciplinary Partnership in English-speaking Countries*, 13 EMORY INT'L L. REV. 763 (1999).

7. The definition of a "profession" articulated by Judge Posner is apt: The hallmark of a profession is the belief that it is an occupation of considerable public importance, the practice of which requires highly specialized, even esoteric, knowledge that can be acquired only by specialized formal education or a carefully supervised apprenticeship, hence an occupation that cannot responsibly be entered at will but only in compliance with a specified, and usually, exacting protocol and upon proof of competence.

Richard A. Posner, *Professionalisms*, 40 ARIZ. L. REV. 1, 2 (1998).

8. See, e.g., *State ex rel. Fla. Bar v. Murrell*, 74 So. 2d 221, 226 (Fla. 1954) (en banc) ("The law is not a business,—it is a profession, a noble one, with standards in certain respects different from those applicable to business, which standards it is the duty of the bar to uphold."). This opinion has been cited in the report by the "Con" Subcommittee of the Florida Bar Special Committee on Multidisciplinary Practice. See MICHAEL NACHWALTER ET AL., *FACING THE TIDE OF CHANGE: AN ANALYSIS OF THE EFFECT OF MDP'S ON THE PUBLIC IN FLORIDA* 11 (1999) [hereinafter FLORIDA CON-MDP REPORT], available at <<http://www.flabar.org/newflabar/organization/committees/conmdp.pdf>>.

9. See Neil W. Hamilton, *Are We a Profession or Merely a Business? The Erosion of Rule 5.6 and the Bar Against Restrictions on the Right to Practice*, 22 WM. MITCHELL L. REV. 1409, 1431 (1996) (arguing that lawyers should continue to be prevented from entering into noncompetition agreements, "[s]ince the monetization of professional values continues to erode the ethics of the profession").

10. See *Bates v. State Bar*, 433 U.S. 350, 368 n.19 (1977) (agreeing with

to the mark to acknowledge that law practice is simultaneously a profession and a business. While pure profit-maximization alone is not a sufficient guiding principle in a law practice, it is also true that there is no inherent disgrace in seeking to operate at a profit. Both the traditionally espoused high ideals and profit-oriented, bottom-line concerns are inseparable parts of the reality in the practice of law today.

### I. MULTIDISCIPLINARY PRACTICE

The major elements of the proposal contained in the Commission's Final Report<sup>11</sup> have been ably described elsewhere.<sup>12</sup> Three critical issues are the primary focus of this Article: first, the permitted scope of practice for multidisciplinary partnerships; second, an analysis of "holding out" and the unauthorized practice of law as applied to professionals working in multidisciplinary settings; and finally, the degree to which conflicts of interest must be imputed in a multidisciplinary partnership. In addition, whether MDPs are permitted or not, lawyers must reform the regulations that currently hamper conducting multijurisdictional practices in law firms and corporate legal departments. The restrictions on lawyers practicing in traditional settings should not be more onerous than those envisioned for lawyers practicing in MDPs.

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counsel's argument that "[w]e all know that law offices are big businesses, that they may have billion-dollar or million-dollar clients, they're run with computers, and all the rest. And so the argument may be made that to term them noncommercial is sanctimonious humbug."); Edward S. Adams & John H. Matheson, *Law Firms on the Big Board? A Proposal for Nonlawyer Investment in Law Firms*, 86 CAL. L. REV. 1, 23-24 (1998) (arguing that the risk of commercializing law practice is not a reason for banning nonlawyer ownership because law practice is already a business); see also PRO-MDP SUBCOMM. FLA. BAR SPECIAL COMM. ON MULTIDISCIPLINARY PRACTICE, FACING THE INEVITABILITY, RAPIDITY AND DYNAMICS OF CHANGE, REPORT TO THE BOARD OF GOVERNORS OF THE FLORIDA BAR 12 (2000), available at <<http://www.flabar.org/newflabar/organization/comm.Hees/promdp.pdf>>. See generally, Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1 (1993).

11. See REPORT, *supra* note 2.

12. See generally Terry, *supra* note 5.

## A. SCOPE OF PRACTICE

## 1. An MDP Firm Should Not Provide Audit Services and Legal Services to the Same Client

There is an inherent conflict of interest between the auditing function<sup>13</sup> on one hand, and consulting, the practice of law, and business valuation<sup>14</sup> on the other. The Securities and Exchange Commission (SEC), through its General Counsel and its Office of the Chief Accountant, has already declared that it considers an auditor's independence to be impaired if the auditor's firm also provides legal advice to a client.<sup>15</sup> In addition, the accounting industry's Independent Standards Board (ISB)<sup>16</sup> is currently studying the issue of whether auditor independence is compromised when other arms of the same firm provide consulting services.<sup>17</sup> Consideration of auditor independence when other members of the same accounting firm provide busi-

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13. Auditing has been defined as performing "an independent examination to determine the propriety of accounting processes, measurements, and communication." Commission on Auditors' Responsibilities, Report, Conclusions and Recommendations xiii (1978), *quoted in* 2 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 752 (3d ed. 1999).

14. The term "business valuation" refers to services provided to a buyer or seller of a business in which a financial analyst assesses the market value of the business.

15. See Letter from Harvey J. Goldschmid, General Counsel, Securities and Exchange Commission, to Philip S. Anderson, President, American Bar Association (July 12, 1999), *available at* <<http://www.abanet.org/cpr/goldschmid.html>> (stating "the SEC has long made clear that its independence rules prohibit an auditor from certifying the financial statements of a client with which his firm also has an attorney-client relationship"); Letter from Lynn E. Turner, Chief Accountant, Securities and Exchange Commission, to Sherwin P. Simmons, Chair of the Commission on Multidisciplinary Practice, American Bar Association (Jan. 22, 1999) (stating that if a firm provides legal advice to a securities registrant, the firm's independence as an auditor is impaired (citing Samuel George Greenspan, Securities Act of 1933 Release No. 6097, 49 S.E.C. Docket 1086, 1099 (Aug. 26, 1991); Samuel George Greenspan, Litig. Release No. 12862, 48 S.E.C. Docket 1690, 1691 (May 23, 1991))) [hereinafter Turner Letter].

16. The Securities and Exchange Commission established the eight-member Independence Standards Board in 1997 "for promulgating independence standards and interpretations for auditors of public entities." Division of Corporate Financing, Securities and Exch. Comm'n, *Current Accounting and Disclosure Issues* (Jan. 21, 2000), *available at* <<http://www.sec.gov/offices/corpfina/acctdisc.html>> [hereinafter *Current Accounting and Disclosure Issues*].

17. The SEC officially supported the ISB's consideration of the issue. "In a letter dated January 7, 1999, I asked the ISB to consider placing the topic of legal advisory services on its agenda and suggested that the ISB consult with your Commission." Turner Letter, *supra* note 15, at 3.

ness valuation services has also been proposed.<sup>18</sup> The likely conclusion of these studies will be that to preserve the auditor's independence, the auditing function should not be performed by professionals whose firm also provides consulting or valuation services to the audit client. There is some advantage in having the ISB announce that decision rather than the American Bar Association (ABA). However, in light of the importance of the values at issue, the legal community should also make its views known.

The most logically coherent position will require a complete financial separation between entities that provide auditing services and entities that provide business valuation, consulting, and legal services. No profits should be exchanged between the two. No expense-sharing or discounting of computer services, office space, or other overhead should be permitted. There is even a question as to whether the non-auditing firms spun off from the Big Five accounting firms<sup>19</sup> should be allowed to do business under trade names using elements of Arthur Andersen, Ernst & Young, PricewaterhouseCoopers, and the like. Those firms developed their credibility and strong name-recognition in the business community as a result of the auditing work they have historically performed. Permitting the consulting service entities to incorporate elements of those trade names<sup>20</sup> is therefore a troubling brand extension.

Publicly-listed companies must have their audits performed by one of the Big Five. The usual assumptions about the balance of power between the client and the professional are thus turned upside down—the client needs to keep the auditor happy even more than the auditor needs to retain the particular client. In this situation, the auditor who suggests using an affiliated consulting entity (or multidisciplinary firm) is exercising unseemly power over the client. Moreover, the

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18. The Independence Standards Board, working with the Independence Issues Committee, has issued discussion memoranda concerning the structure of accounting practices and appraisal and valuation services. See *Current Accounting and Disclosure Issues*, *supra* note 16.

19. The term "the Big Five" refers to the major accounting and professional service firms, which are currently known as Arthur Andersen, Deloitte & Touche LLP, Ernst & Young LLP, KPMG, and PricewaterhouseCoopers LLP.

20. See *An Of Counsel Roundtable: Branding Strategies Turn Inward in Keen Pursuit of Institutional Differentiation*, OF COUNSEL, Dec. 6, 1999 at 28, 28 (discussing the emotional value of a brand name as a basis for charging higher prices).

auditor has access to all of the audited client's financial information. This access gives the auditor significant confidential information about the audited company's operations. Consequently, the auditor should not be permitted to leverage that information and to profit from the access that the securities regulations require be given to the auditor. In a profit-seeking professional services firm, it is unlikely that the other professionals at the firm would be able to resist attempting to ascertain what consulting services the auditors have determined that the audit client might need. Indeed, selling other services to audit clients is a cornerstone of the market development plans of the Big Five.

Finally, and most importantly, an auditor has an obligation to inform the SEC's Office of the Chief Accountant if the Auditor becomes aware of a material illegal act and the company's audit committee or management fails to respond appropriately to the auditor's report.<sup>21</sup> Auditors cannot deliver a clean report if the audit uncovers fraud or other illegal acts by personnel working at a registered company.<sup>22</sup> Consultants, and those performing business valuations, have no similar obligation. Attorneys, however, have an affirmative duty to keep their clients' confidences and secrets. Some academics<sup>23</sup> are urging that attorneys be permitted, or even required, to break confidentiality in circumstances broader than those described in the current rules;<sup>24</sup> nevertheless, the rules now in effect allow less disclosure by attorneys. At present, attorneys in most states have the option of coming forward only in certain limited

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21. See Securities Exchange Act § 10A(b)(3); 2 LOSS & SELIGMAN, *supra* note 13, at 765.

22. The duty of the public accountant is "to safeguard the public interest, not that of [a] client." LOSS & SELIGMAN, *supra* note 13, at 768 (quoting *Touche, Niven, Bailey & Smart*, 37 SEC 629, 670-71 (1957)).

23. See generally Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221 (1995) (proposing that clients be able to obtain legal services from lawyers who have declared, *ex ante*, whether or not they will disclose client fraud).

24. The current language in DR 4-101 in the Model Code of Professional Responsibility and Model Rule 1.6 in the Model Rules of Professional Conduct provides a starting point for analysis. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). However, the majority of the jurisdictions in the United States have adopted alternative language describing the circumstances in which information can be revealed. See STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS, STATUTES AND STANDARDS* 75-79 (1999).

circumstances. Although Florida,<sup>25</sup> Illinois,<sup>26</sup> Massachusetts,<sup>27</sup> New Jersey,<sup>28</sup> and Virginia<sup>29</sup> require attorneys licensed in those states to disclose information in certain situations, other jurisdictions, which base their provisions more closely on the language of Model Code DR 4-101 and Model Rule 1.6, do not permit attorneys to reveal confidential information without obtaining client consent.<sup>30</sup> Accordingly, the attorney's duty of confidentiality is inconsistent with the auditor's duty to the investing public.<sup>31</sup> SEC Commissioner Norman Johnson has also expressed this view by publicly stating that representing a client as an attorney is inconsistent with the independence necessary for the auditor's role.<sup>32</sup>

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25. Florida's Rule 1.6 requires an attorney to reveal information the attorney "reasonably believes necessary (1) to prevent a client from committing a crime; or (2) to prevent a death or substantial bodily harm to another." FLA. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1994).

26. Illinois's Rule 1.6 requires the lawyer to reveal information "to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm." ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1994).

27. Massachusetts' Rule 1.6 goes farther and requires lawyers to reveal information (to the extent required by Rules 3.3 and 4.1(b)) "to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, or to prevent the wrongful execution or incarceration of another." MASS. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998).

28. New Jersey also requires a lawyer to reveal confidential information "to prevent the client from committing a criminal, illegal or fraudulent act . . . likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another," or to prevent a client from committing "a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetuate a fraud upon a tribunal." N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1984).

29. Virginia's DR 4-101(D)(1) provides that a lawyer must reveal his client's intention "as stated by the client, to commit a crime and the information necessary to prevent the crime." VA. CODE OF PROFESSIONAL RESPONSIBILITY Canon 4-101(D)(1) (1983).

30. Except for disclosures that are impliedly authorized to carry out the representation. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmts. 7, 8 (1983).

31. See *A Glimpse of Our Future: Lawyers, Accountants and Management Consultants?*, J. MGMT. CONSULTING, Nov. 1998, at 69, available at 1998 WL 12790594 (discussing the differing obligations to clients borne by attorneys and accountants).

32. Commissioner Johnson expanded on this point in the following section of his speech, discussing a letter SEC Chief Accountant Lynn Turner sent to the ISB, expressing the SEC staff's:

deep concern about press reports describing possible expansion by ac-

The MDP Commission has stated that it will recommend that a client should not be permitted to purchase both auditing services and legal services from the same MDP.<sup>33</sup> Because this recommendation does not require that auditors be employed by entities which are entirely separate from the legal service providers, it does not go far enough to eliminate the problems outlined earlier. Moreover, even if the auditing business is split off from other services offered by the MDP, indications are that the Big Five and other professional services firms would be quite content to lose the ability to offer auditing services because they see the growth of profitable business in the consulting services, rather than in auditing.<sup>34</sup> SEC Commissioner Norman Johnson called attention to these developments when he stated:

Accounting firms have found that the audit business that has been their bread and butter from the start of the profession does not allow for sufficient financial growth. So accounting firms have looked for new sources of income and have ventured into services well beyond their traditional businesses, which may conflict with their established roles as auditors. As a result of these changes, we have observed that the financial importance of the audit function to accounting firms, particularly the larger ones, is declining, the provision of non-audit services is increasing, and the business rela-

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counting firms into legal services, including representing clients before the IRS, providing advice on structuring corporate transactions and benefit plans, and providing expert witness testimony for clients . . . . In my view—and I know of no disagreement at the Commission on this issue—an accountant-attorney relationship with a client is totally inconsistent at least with the appearance of independence. Attorneys have an ethical duty to zealously represent the interests of their private clients, and it is impossible to reconcile this role as advocate with the duty accountants and auditors owe to the investing public.

Norman Johnson, SEC Commissioner, Current Regulatory and Enforcement Developments Affecting the Accounting Profession, Address at the 26th Annual Securities Regulation Institute Conference, at \*3 (Jan. 20, 1999), available at 1999 WL 77217 [hereinafter Johnson Address].

33. COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, POSTSCRIPT TO FEBRUARY 2000 MIDYEAR MEETING, available at <<http://www.abanet.org/cpr/postscript.html>> [hereinafter POSTSCRIPT].

34. See, e.g., Mike Allen, *Accountants Become Consultants in Greater Numbers*, SAN DIEGO BUS. J., Jan. 17, 2000 at 15, available at 2000 WL 10502100; Hilary Joffe, *A Strategy to Take on the Big Five*, BUSINESS DAY (South Africa), Feb. 10, 2000, at 16, available at 2000 WL 7450497 (reporting on an interview with Jim Copeland, global C.E. of Deloitte Touche Tohmatsu, where he stated that "[t]he trend away from auditing to consulting continues, as it does for all the Big Five. Auditing makes up about 40% of global revenue. . . . This is a marked shift from 15 years ago, when in the U.S. 75% to 80% of revenue came from auditing.")

tionships between auditors and their audit clients are increasing and expanding.<sup>35</sup>

In addition, the other problems posed by nonlawyers offering legal services designated as "consulting," or some term other than legal services, and by different standards for imputation of conflicts of interest still remain, even if personnel employed by the entity offering those services do not conduct audits.

## 2. Attorney-Client Contact

Attorneys who work at accounting firms and other professional services firms should not permit themselves to be stripped of their ability to exercise independent legal judgment in their role as counsel. In general, attorneys evaluate whether a particular course of action will allow the client to attain his or her larger goal. Lawyers do not simply execute transactions or determine whether or not documents constitute binding contracts. A lawyer's counseling function is extremely valuable. Lawyers should not permit their work product to be mass-produced and sent out to clients for whom the mass-produced "solution" may not be adequate. Some degree of discussion with the individual clients and tailoring of the work product for that client is the norm in legal practice.

Commodification of legal advice is objectionable when the provider presents a cookie-cutter package as though it had been specifically tailored for that particular client. As long as the legal information presented in TurboTax and other mass-marketed data-sorting products is accurate, there is a legitimate claim that distribution of the products meets a consumer need. Users of such data-sorting products can be expected to realize that the products can provide some guidance regarding basic categories of information, but that the products do not exercise professional judgment regarding the particular situation facing the user. A different situation is presented, however, when a legal service provider delivers her work product after having some direct interaction with the client. In this case, the client is likely to expect that the lawyer has specifically evaluated her situation, and that the work product represents efforts tailored to her specific situation.

Although a small number of client matters can readily be handled with a standard-issue set of forms, professional judgment must be used to determine whether those forms will ac-

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35. Johnson Address, *supra* note 32, at \*2.



tually accomplish the clients' goals. Likewise, professional judgment must be used to appropriately modify the standard forms to reflect changes in the law and variations in the clients' situations. The great majority of TurboTax users most likely have the same goals: accurately determining the tax they owe and taking advantage of all deductions legitimately available to them. In contrast, persons looking for advice when selling their family business or contemplating other transactions have a variety of different objectives. Careful client interviewing by attorneys is needed to tease out which legal categories apply to the client's situation and will best help the client accomplish his goals.

Often, thoughtful questioning by an expert is necessary to elicit information about the client's goals. Frequently, after hearing more about the alternatives available to them, clients will discover that their objectives are more likely to be attained by using a different structure for the transaction or pursuing a different course of action than they had originally envisioned. This counseling role is crucial to the attorney-client relationship. It cannot be duplicated when a person lacking legal training simply hands the client standard papers to fulfill the goal the client initially declared he wanted to accomplish.

If no attorney attempts to ascertain the client's objectives, opportunities to maximize the attainment of the client's goals are lost. This is similar to the difference between having a cobbler create individual shoes to order rather than choosing from shoes available only in size 6, 9 and 12. For some people, the shoes in the limited range will work perfectly well, while others may damage their feet trying to jam them into shoes that do not fit their situation closely enough. Over time, mass-produced clothing and shoes have become far more differentiated. Instead of small, medium and large shoes, they are now available in a variety of sizes, which change in such small increments that most people can readily find a size that has a satisfactory fit. Because it is not a tangible good, providers of legal advice will never be able to adequately serve their clients by simply displaying an array of mass-produced products, each slightly different from the next and asking the consumer to choose the one that fits his situation most closely. The consumer will need to engage in a dialogue with the provider and the provider will have to exercise judgment to tailor a legal product that suits the client's situation.

For these reasons, interposing an additional person between the client and the lawyer is troubling. The situations of

in-house counsel and lawyers providing advice to members of labor unions are not exactly analogous to that of a lawyer working in an MDP. Attorneys working in-house and for union members are free to directly communicate with their clients. In contrast, lawyers working for personal services firms that are not controlled by other attorneys may often communicate with their clients through other members of the firm who might (perhaps unintentionally) thwart the lawyer's professional judgment. For example, the other member of the firm might water down the lawyer's advice or change the lawyer's analysis as she conveys it to the client. Likewise, the client should be able to directly ask the lawyer for clarification to be certain that he understands all of his options. Direct contact between the attorney and the client who is ultimately receiving the legal advice is an important aspect of the attorney-client relationship and this aspect should be preserved in the MDP setting.

## B. ATTEMPTING TO RESTRAIN NONLAWYER PRACTICE BY MONITORING "HOLDING OUT"

### 1. Big Five Firms Are Doing Legal Work

The Big Five accounting firms currently employ professionals who are doing work that traditionally has been thought to constitute law practice. The marketing brochures may call it "practicing ERISA" or "estate planning consulting," but the work itself is indistinguishable from that performed by lawyers.<sup>36</sup> Indeed, some of the accounting firms' websites explicitly state that they offer legal services.<sup>37</sup> Partners who have

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36. In its PostScript to the February 2000 Midyear Meeting, the Commission noted that many persons "disingenuously claim to be 'practicing consulting,' . . . even though the services they are rendering to the firms' clients have been reported to the Commission as being comparable to the services being rendered on a daily basis by lawyers in law firms to the law firms' clients." POSTSCRIPT, *supra* note 33.

37. For example, KPMG Tax and Legal states on its website that the firm offers:

[A] full range of tax and legal services including corporate and individual planning and compliance, as well as global projects which involve designing and implementing tax strategies to produce sustainable long-term tax savings. We also offer advice in international specialist areas such as international corporate tax, mergers and acquisitions, transfer pricing, indirect tax and customs and International Executive Services.

KPMG Services, (visited Apr. 19, 2000) <<http://www.kpmg.com>>; see also De-

worked for years in traditional law firms have been recruited to work for the Big Five firms.<sup>38</sup> The accounting firms tell the lawyers that if they join their firm, the lawyers will be able to do the same work that they have been doing as a member of a law firm.<sup>39</sup> A number of attorneys who have joined these firms have stated that they are performing precisely the same legal analysis in their current settings as they did while they worked at law firms.<sup>40</sup> In addition, nonlawyer partners and employees at these firms are staffing mergers, acquisitions, and other transactions, which in the past were handled by attorneys. Granted, this is merely anecdotal evidence; however, in light of the confidential nature of the client relationship and the potential ramifications of admitting improper fee splitting and unauthorized practice of law, it is not surprising that empirical evidence on this point is scant.

There are several ways to look at the key question: Are the "consultants" working for Big Five firms actually practicing law? Or, is it possible that for years, lawyers have been performing work that is not fundamentally legal work? That is, have lawyers been claiming that only an attorney perform work that could just as competently be performed by a person with

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*oitte & Touche Enterprise Risk Services* (visited Apr. 18, 2000) <<http://www.dttus.com/risk/customers/services/lrc/index.htm>> (providing information about Deloitte & Touche's "Legal and Regulatory Compliance" services); *Anderson Legal* (visited Apr. 18, 2000) <<http://www.andersenlegal.com/WebsiteLegal.nsf/Content/MarketOfferingsLegalServicesApproach?OpenDocument>> (offering help in sorting through local laws by carefully stating that its legal services are provided by Andersen Legal, an international network of law firms associated with Andersen Worldwide, rather than implying that the services are performed by members of Andersen itself).

38. Partners from Debevoise & Plimpton, McDermott Will & Emery and Wilson Sonsini Goodrich have moved to provide tax services at Ernst & Young. See Rosie Murray-West, *Clients Choose Graft over Glitter*, INT'L TAX REV., Sept. 1, 1999, available at 1999 WL 13757582. Since 1996, Ernst & Young has hired about 50 tax attorneys. See *id.* Four tax partners from Baker & McKenzie moved to PricewaterhouseCoopers, and two left the firm to join Deloitte & Touche. See *id.*

39. See FLORIDA CON-MDP REPORT, *supra* note 8, at 38. "One lawyer was offered a position with an accounting firm, and was assured that the lawyer's day-to-day practice would be virtually the same as it is with the lawyer's private law firm." See *id.*

40. Partners with 30 years experience in law firms have joined several of the Big Five. See Larry Smith & Lori Tripoli, *Sleeping with the Enemy: Law Firms Forge Strategic Alliances with Big 5 Bugaboos and Get Mixed Results*, OF COUNSEL, Nov. 1, 1999, at 1, 8. A certain number of lawyers have moved back to law firms after a stint with one of the Big Five, saying that they did not like the emphasis on selling products. See *id.*

no legal training? As a profession, we must confront this issue. The status quo is not sustainable. If valuable knowledge is gained only through legal training and licensure, then only those who hold a law license should be allowed to give legal advice. Furthermore, only those who hold a law license, or those working under the direct supervision of a lawyer, should be allowed to provide legal services. People who have never earned a law license should not be permitted to perform legal work by renaming it consulting or some other term. However, if there is no reason to require that only lawyers may give certain kinds of advice related to the law, we must acknowledge that as well.

## 2. Drawing a Clear Boundary

The heart of the matter is the struggle to determine whether or not we can draw a clear boundary around work that can be performed only by persons who have passed the current competence and character evaluations to become licensed attorneys. Commentators and witnesses testifying before the Commission have stated that, aside from courtroom work and delivery of legal opinions, it is impossible to articulate a defensible definition of the practice of law.<sup>41</sup> Furthermore, they say that various Unauthorized Practice of Law (UPL) Committees and other prosecutors of UPL violations have never faced an opponent as well-financed and sophisticated as the Big Five accounting firms. The tenacity of the litigation opponent, however, is immaterial to the validity of the policy arguments. If the standards fail to hold up under scrutiny, UPL enforcement prosecutors should not apply those faulty standards. Publishers of self-help books and storefront notarias should be prosecuted only if, as a profession, UPL enforcers are also willing to prosecute well-financed entities involved in UPL. The legal profession must confront the issue squarely: Must certain activities be reserved only for attorneys? This question must be addressed. We cannot dodge the issue by only banning "holding out" while not banning the practice of law by nonlawyers.

## 3. Banning "Holding Out"

Prohibiting "holding out"<sup>42</sup> is not a way to prohibit the practice of law by nonlawyers while circumventing the difficult

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41. See *infra* text accompanying notes 100-01, 152.

42. A nonlawyer improperly holds herself out as an attorney when she makes statements or adopts symbols that would mislead a member of the gen-

task of defining the practice of law. As "holding out" has been defined by the Commission, an entity holds out a person as an attorney when the entity offers to provide services "that would be considered the practice of law, if offered by a lawyer in a law firm."<sup>43</sup> This standard necessarily involves an evaluation of the work being performed. Such an evaluation requires an analysis of the activities themselves, to determine whether the activities are included in the definition of the practice of law. Professional services firms currently perform legal work, referring to it as "consulting services." The lawyers working at the professional services firms are referred to as "a member of our team" or simply as a "consultant." As long as the professional services firm does not use terms such as "our legal expert" or "lawyer," it is more difficult to prove that they are "holding out" that person as a lawyer. A person holds himself out as an attorney when he makes an express or implied representation that he is authorized to practice law. Implied representations include using business letterhead or business cards stating that the person provides legal advice.

When clients are focusing on obtaining a workable solution for what has been defined as a "business issue," they may not realize that legal work has been provided to them. Quite a bit of legal work is now delivered to chief financial officers and other businesspersons, rather than to general counsels. When the person receiving the advice on behalf of the client does not have legal training, she is more likely to focus on the problem and the alternative solutions, rather than trying to analyze whether legal work has contributed to the work product she has received.<sup>44</sup>

Thus, we have a situation in which legal analysis blends in with other elements of the product delivered to the client. If the firm does not label it as legal work product, and the person

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eral public into thinking that she is a licensed attorney.

43. COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, REPORT APPENDIX A (1999), *available at* <<http://www.abanet.org/cpr/mdpappendixa.html>> [hereinafter APPENDIX A] (providing a revised Model Rule 5.8 cmt. 3).

44. Indeed, M. Elizabeth Wall, former corporate counsel for a company in the United Kingdom, testified before the MDP Commission that one of the Big Five firms tried to include legal services when bidding on a project, even when the request for proposals explicitly stated that legal services were not sought. *See* Hearings Before the Commission on Multidisciplinary Practice (Nov. 12, 1998) (testimony of M. Elizabeth Wall, Group Director of Legal and Regulatory Affairs at Cable & Wireless PLC), *available at* <<http://www.abanet.org/cpr/wall1198.html>>.

providing the service does not claim to be an attorney, it is much more difficult to successfully prosecute the firm for "holding out." This is an entirely different situation than that of the nonlawyer who uses business cards proclaiming that he holds a J.D. degree,<sup>45</sup> who refers to himself as "counsel" for a client,<sup>46</sup> or who otherwise takes steps to create the impression that he is an attorney.<sup>47</sup>

## II. ENFORCEMENT OF LAWYERS' PROFESSIONAL MONOPOLY

### A. PROFESSIONS COME INTO EXISTENCE WHEN CLIENTS CANNOT ADEQUATELY ASSESS QUALIFICATIONS

A key characteristic of a profession<sup>48</sup> is that clients retaining the services of the professional may not be able to accurately evaluate the skills and qualifications of the service provider.<sup>49</sup> A license serves as a way for potential clients to have some assurance that basic qualifications have been met.<sup>50</sup> But,

45. See *Florida Bar v. Martin*, 432 So. 2d 54, 54-55 (Fla. 1983) (stating that by putting "J.D." after his name on business stationery and holding himself out as able to assist with resolving legal problems, a nonlawyer was engaging in the unlicensed practice of law).

46. In *Florida Bar v. Florida First Financial Group*, 695 So. 2d 275, 276 (Fla. 1997), a nonlawyer implied that he was an attorney when he told third parties that he "represented" a client and, when late for a meeting, he stated that he had been held up in court on a case. See *id.* The court also found that a second nonlawyer who referred to himself as "counsel" clearly held himself out as an attorney. See *id.*

47. See *Florida Bar v. Fuentes*, 190 So. 2d 748, 749-52 (Fla. 1966) (finding a notary public's actions and statements led people to believe that he was authorized to practice law); *Florida Bar v. Warren*, 655 So. 2d 1131, 1132 (Fla. 1995) (holding that defendant's actions constituted unlicensed practice of law).

48. See Posner, *supra* note 7, at 2 ("[B]ecause the arcane skills of the professional make his performance difficult for outsiders to monitor and therefore facilitate exploitation, it is usually believed that the norms and working conditions of a profession should be such as to discourage the undiluted pursuit of pecuniary self-interest.")

49. The non-expert's difficulty in assessing the work has been termed "credence qualities." See Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1712-13 (1998) ("Legal services are a kind of 'credence' good whose qualities non-expert clients must take on trust."); see also Ellen R. Jordan & Paul H. Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527, 530-31 (1979) (recognizing that credence qualities are those which the non-expert consumer cannot monitor or evaluate, even after consumption, and therefore, the consumer must trust that the seller is providing the expected quality).

50. See Alan D. Wolfson et al., *Regulating the Professions: A Theoretical*

in a world in which colleges are offering literacy classes because, as a result of social promotion policies, some high school graduates are functionally illiterate,<sup>51</sup> it is dangerous to cavalierly declare that consumers should be free to select anyone to be their legal adviser—even if the person they select has no background in the law. The degree to which the bar exam actually measures competence to practice has been controversial.<sup>52</sup> Nonetheless, requiring a bar exam at least assures that individuals passing the exam can write coherent sentences and perform basic legal analysis.

Due to similar information asymmetries, members of the public encounter difficulties in evaluating the skills of persons in other professions, such as surgeons or airline pilots. Anyone who has flown in an airplane during a storm has taken some comfort in the fact that the FAA has evaluated the skills of the pilot. Although a deficiency in legal work is less dramatic than a plane crash, the consequences of improper legal work performed by a person who is not competent can be extremely costly to the client. Mistakes in drawing wills and trusts, for example, cannot be corrected once the settlor has died. Failure to correctly interpret an EPA regulation could cost a client millions of dollars. Although one can criticize it as a paternalistic stance, there are reasons to continue to require that persons providing legal advice meet the minimum standards of licensure. As many judicial opinions have observed, the protection

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*Framework*, in OCCUPATIONAL LICENSURE AND REGULATION 180, 197-212 (Simon Rottenberg ed., 1980) (assessing a variety of methods of monitoring attorney conduct, including the imposition of liability for malpractice, certification and licensure).

51. The history of the attempts to impose liability on the educational institutions that award diplomas to functionally illiterate graduates is detailed in John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349 (1992) and in Kevin P. McJessy, Comment, *Contract Law: The Proper Framework for Litigating Educational Liability Claims*, 89 NW. U. L. REV. 1768 (1995).

52. See generally Leon Green, *Why Bar Examinations?*, 33 NW. U. L. REV. 908 (1939); Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359 (1996); Susan R. Martyn, *Peer Review and Quality Assurance for Lawyers*, 20 TOLEDO L. REV. 295 (1989); Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 690 (1994) ("No showing has ever been made that performance either on bar exams or in law school correlates with performance in practice."); Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191 (1995) (favoring the elimination of the bar exam and institution of a mandatory apprenticeship).

of the public is the central concern in the regulation of the practice of law.<sup>53</sup>

If one were to read papers discussing MDPs and replace the phrase "practice of law" with the phrase "pilot an airplane" or "perform surgery" it is easy to see the value of setting some standards regarding who is permitted to undertake the practice of law. At the margins there may be areas where non-surgeons are adequately prepared to stitch up a minor cut or a paralegal can fill in the blanks on a form to adopt a child. However, we want someone whose skills have been carefully evaluated to perform open-heart surgery or to assist a corporate client in threading its way through a complex set of legal regulations when a misinterpretation of the law could force the company into bankruptcy.

## B. THE PRACTICE OF LAW BY NONLAWYERS

Although the dangers detailed in the previous section are serious, a number of respected academics have argued that these dangers are outweighed by the importance of respecting the client's choice of advisors. Professor Deborah Rhode and others have proposed that UPL regulations should be completely dismantled.<sup>54</sup> Other commentators have instead advocated limited licensure,<sup>55</sup> certification, registration, or some

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53. See, e.g., *Florida Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980) (stating that "[t]he single most important concern in th[is] Court's defining and regulating the practice of law is the protection of the public from incompetent, un-ethical, or irresponsible representation"); *Florida Bar re Advisory Opinion on Nonlawyer Representation in Sec. Arbitration*, 696 So. 2d 1178, 1183 (Fla. 1997); *Spivak v. Sachs*, 211 N.E.2d 329, 331 (N.Y. 1965) (stating that the purpose of New York's Unauthorized Practice of Law (UPL) provision is to "protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work").

54. See generally COMM'N ON NONLAWYER PRACTICE, AMERICAN BAR ASS'N, *NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS* 125 (1995) (concluding that states should change their UPL provisions to allow nonlawyers to perform certain law-related activities); Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159; Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996).

55. See Meredith Ann Munro, Note, *Deregulation of the Practice of Law: Placenta or Placebo?*, 42 HASTINGS L.J. 203, 241 (1990) (arguing in favor of licensing for nonlawyers rather than complete deregulation).



other system of oversight for nonlawyer practice.<sup>56</sup> There is a certain amount of free market appeal to the notion that client choice should be honored as a primary value and that all barriers to entry to the legal services market should be dropped. However, it is also reasonable to impose limits, which ensure that persons providing legal services are held to at least certain minimum standards.<sup>57</sup>

One can debate the precise form of those requirements.<sup>58</sup> Eventually, states may adopt certification, educational requirements, or licensing for legal technicians,<sup>59</sup> paralegals,<sup>60</sup>

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56. See generally Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581 (1999); Alan Morrison, *Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question*, 4 NOVA L.J. 363 (1980) (proposing that an independent agency balance the interests of lawyers, nonlawyer competitors and clients); Carl M. Selinger, *The Retention of Limitations on the Out-of-Court Practice of Law by Independent Paralegals*, 9 GEO. J. LEGAL ETHICS 879 (1996).

57. See Matthew A. Melone, *Income Tax Practice and Certified Public Accountants: The Case for a Status Based Exemption from State Unauthorized Practice of Law Rules*, 11 AKRON TAX J. 47, 51 (1995). Melone states that:

Restrictions placed upon the laity are justified by two broad arguments. The first argument advanced is that regulation of law practice serves to maintain judicial integrity. Proponents of this theory assert that regulation is needed to preserve courtroom decorum and as an aid in disciplining miscreant attorneys. Secondly, and more importantly, unauthorized practice restrictions are necessary in order to prevent an unfettered market for legal services from harming consumers.

See *id.* But see Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 1015-16 (1998) (arguing that adequate safeguards can be imposed when paraprofessionals are allowed to provide legal services, with states requiring that practitioners carry malpractice insurance, contribute to client security funds and observe ethical obligations in connection with confidentiality, competence and avoidance of conflicts of interest); Richard Abel, *Big Lies and Small Steps: A Critique of Deborah Rhode's Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 1019, 1025-27 (1998) (urging increased access to paraprofessional services despite concern that legal services provided by paraprofessionals would prove inferior to those provided by lawyers).

58. Several classic articles have been written on the subject. See generally Christensen, *supra* note 54; Edward V. Sparer et al., *The Lay Advocate*, 43 U. DET. L.J. 493 (1966); William P. Statsky, *Paraprofessionals: Expanding the Legal Service Delivery Team*, 24 J. LEGAL EDUC. 397 (1972); Joaquin G. Avila, Comment, *Legal Paraprofessionals and Unauthorized Practice*, 8 HARV. C.R.-C.L. L. REV. 104 (1973).

59. See Joyce Palomar, *The War Between Attorneys and Lay Conveyancers—Empirical Evidence Says “Cease Fire!”*, 31 CONN. L. REV. 423, 466-71 (1999).

social workers<sup>61</sup> or other persons deemed capable of performing certain law-related services. The arguments in favor of unbundling legal services<sup>62</sup> are persuasive, especially in light of the growing evidence of underserved<sup>63</sup> legal needs.<sup>64</sup>

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60. See Mary M. Testerman, *Bankruptcy Paralegal Regulation and the Bankruptcy Reform Act of 1994: Legitimate Legal Assistance Options for the Pro Se Bankruptcy Debtor*, 23 CAL. BANKR. J. 37, 41 (1996) ("Typing is the only activity paralegals can perform with absolute immunity."); see also A. Jay Cristol, *The Nonlawyer Provider of Bankruptcy Legal Services: Angel or Vulture?*, 2 AM. BANKR. INST. L. REV. 353, 361-65 (1994) (discussing the specific activities which bankruptcy courts have decided constituted the unlicensed practice of law); Sheryl Serreze, *The Unauthorized Practice of the Law in Bankruptcy Cases—Regulating "Petition Preparers"*, R.I. B.J., Jan. 1996, at 27-28 (concluding that nonattorneys can be certain that they are not engaged in UPL if they limit their services strictly to secretarial services, such as typing bankruptcy forms for clients and copying written information provided by the clients rather than interviewing them); Gary E. Sullivan et al., *The Thin Red Line: An Analysis of the Role of Legal Assistants in the Chapter 13 Bankruptcy Process*, 23 J. LEGAL PROF. 15, 15 (1999).

61. See generally Anthony Bertelli, *Should Social Workers Engage in the Unauthorized Practice of Law?*, 8 B.U. PUB. INT. L.J. 15 (1998).

62. See Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 295 (1997) (arguing that unbundling would allow elderly clients who do not qualify for legal aid to obtain affordable legal services); Michael Millemann et al., *Rethinking the Full-Service Legal Representational Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV. 1178, 1191 (1997) (arguing that allowing lawyers to undertake limited representations would increase the members of the public who have access to an attorney); Melody Kay Fuller, *Unbundling Family Law Practice Creates Pro Bono Opportunities*, COLO. LAW., Sept. 1998, at 29; Dianne Molvig, *Unbundling Legal Services: Similar to Ordering a la Carte, Unbundling Allows Clients to Choose from a Menu the Services Attorneys Provide*, WIS. LAW., Sept. 1997, at 10; Forrest S. Mosten, *Unbundling Legal Services: A Key Component in the Future of Access to Justice*, OR. ST. B. BULL., Jan. 1997, at 9-12 (urging that malpractice standards and ethics provisions be modified to permit unbundling); Vernetta L. Walker, *Legal Needs of the Public in the Future*, FLA. B.J., May 1997, at 42, 42-43 (concluding that a client would be better served if legal services were unbundled because if the client did not need the "full-service" package, she could select the portion of the services from the package that she actually wanted and could afford).

63. See, e.g., Rhode, *supra* note 52, at 682 (stating that clients in the top 15% of the U.S. income bracket receive, at least, one half of the time attorneys normally spend providing legal advice). In remarks given at the University of Florida Law School on September 15, 1984, Justice Rehnquist proposed abolishing or at least sharply limiting discovery in cases where the demand for a money judgment is below a set threshold in order to reduce delay and expense in simple civil litigation. See *Government Abuses Judicial Monopoly: Our Legal System's Quest for the "Correct" Results Costs Too Much*, L.A. DAILY J., at 4 (Sept. 21, 1984).

64. See *Report of the Working Group on the Use of Nonlawyers*, 67 FORDHAM L. REV. 1813, 1813 (1999), and other papers in that symposium issue, for an excellent discussion on how the use of nonlawyers could improve

Nonetheless, given the information asymmetries between the legal services provider and client,<sup>65</sup> some evaluation of providers should be retained. Until such time as those reforms are instituted,<sup>66</sup> if a person is not licensed as a lawyer, he should not be providing legal advice while renaming it consulting services. No provider of legal services should be permitted to unbundle until all providers, including licensed lawyers, are explicitly permitted to do so.

### C. "UNBUNDLING" LEGAL SERVICES

Historically, lawyers have not been permitted to "unbundle" legal services; that is, provide some legal work without undertaking a full representation of the client.<sup>67</sup> Courts have strongly condemned lawyers who, for example, ghostwrite legal briefs for persons appearing pro se. For example, in *Johnson v. Board of County Commissioners*, the court found that a lawyer had violated Rule 11 and could be sanctioned for contempt when the lawyer served as a ghostwriter for a litigant.<sup>68</sup> The court also found that a second lawyer had acted unethically when that lawyer attempted to enter a limited appearance to represent the litigant—a sheriff—only in his official capacity and not as an individual.<sup>69</sup> Other courts in California,<sup>70</sup> Kansas,<sup>71</sup> Maine,<sup>72</sup> Montana<sup>73</sup> and Virginia<sup>74</sup> have also condemned

access to justice for low-income persons.

65. See RICHARD L. ABEL, *AMERICAN LAWYERS* 112-26 (1989) (discussing restrictive practices, competition among lawyers, and market failures requiring external regulation).

66. This may be quite some time in the future because the persons with a vested interest in the current system of legal services' delivery may not uniformly welcome such a change. See, e.g., Posner, *supra* note 7, at 3 ("[T]he profession bent on maximizing its mystique will resist subspecialization—the breaking up of its constituent tasks into subtasks—because that would tend to demystify the profession's methods, to make them transparent.").

67. The term "discrete task representation" is also used to denote legal work that is less than the traditional "full-service" representation. See, e.g., Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 *DUKE L.J.* 147, 253-54 (1999).

68. 868 F. Supp. 1226, 1231-32 (D. Colo. 1994), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996).

69. See *id.* at 1229-31.

70. See *Ricotta v. California*, 4 F. Supp. 2d 961, 985-86 (S.D. Cal. 1998).

71. See *Wesley v. Don Stein Buick, Inc.*, 987 F. Supp. 884, 885-86 (D. Kan. 1997).

72. See *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971).

73. See *In re Ellingson*, 230 B.R. 426, 433-34 (Bankr. D. Mont. 1999).

74. See *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968

ghostwriting, as has the ABA.<sup>75</sup> The ethics commission in Massachusetts<sup>76</sup> issued an opinion declaring that ghostwriting pleadings is improper, while opinions in Alaska,<sup>77</sup> Iowa,<sup>78</sup> Kentucky<sup>79</sup> and New York<sup>80</sup> permit the practice, with varying restrictions. Commentators are similarly split, with some viewing ghostwriting as allowable until the point at which pleadings are filed in a lawsuit,<sup>81</sup> while others caution against the practice.<sup>82</sup>

Certainly, the prospect of unbundling legal services represents a significant change, which might be expected to encounter resistance.<sup>83</sup> However, recent scholarship, especially that which has focused on the needs of moderate and low-income clients, has suggested that some form of unbundling should be

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F. Supp. 1075, 1079 (E.D. Va. 1997).

75. See ABA Comm. on Ethics and Professional Responsibility, Informal Ethics Op. 1414 (1978) (finding "extensive undisclosed participation by a lawyer" to be improper).

76. See Massachusetts Bar Ass'n, Ethics Committee Op. 98-1 (1998) (holding that subject to an evaluation of the facts in each case, limited background advice and counseling can properly be provided to a pro se litigant, but attorneys cannot draft pleadings to be filed in court because doing so would mislead the court and the other parties).

77. See Alaska Bar Ass'n, Ethics Committee Op. 93-1 (1993) (determining that an attorney is not required to disclose his participation, since judges can determine when a pro se litigant has received help).

78. See Iowa State Bar Ass'n, Op. 96-31 (1997) (stating that lawyers must inform the court of their participation).

79. See Kentucky Bar Ass'n, Op. E-343 (1991) (finding that lawyers may limit their representation of an indigent pro se litigant to the preparation of initial pleadings as long as their name appears somewhere on the pleading, but should not continue to advise the client "behind the scenes" during the litigation).

80. See New York State Bar Ass'n, Committee on Professional Ethics Op. 613 (1990) (holding that as long as lawyers inform the court of their participation, it is not improper to draft pleadings to be filed by a pro se litigant).

81. See, e.g., George W. Overton, *Lawyers as Ghosts*, CHICAGO BAR ASS'N RECORD, Nov. 1995, at 41 (suggesting that an attorney should alert the court if the pro se litigant wants to use the attorney's services after the initial pleadings are filed).

82. See Elizabeth J. Cohen, *Afraid of Ghosts: Lawyers May Face Real Trouble When They "Sort of" Represent Someone*, 83 A.B.A. J., Dec. 1997, at 80.

83. See David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off*, 11 GEO. J. LEGAL ETHICS 959, 974-76 (1998) (permitting greater unbundling and allowing paraprofessionals to compete with lawyers in offering certain services will allow less wealthy clients to obtain representation); Posner, *supra* note 7, at 3.

permitted.<sup>84</sup> If these persons would otherwise not receive any legal advice, something less than full representation could provide valuable assistance.<sup>85</sup> Under one of the recommendations made by those attending the Fordham Conference on the Delivery of Legal Services to Low-Income Persons in December 1998, lawyers should be freed from an obligation to provide "complete assistance with respect to the individual's legal problem."<sup>86</sup> The ABA's Ethics 2000 Commission is already considering amending the text and comment of Model Rule 1.2 to explicitly permit limited representation in certain contexts.<sup>87</sup> Of course, changes must be carefully evaluated to ensure that client protection is not unnecessarily weakened in order to increase access to legal advice.<sup>88</sup>

Some empirical evidence on this issue will soon be available in Colorado. Under Opinion 101, issued in September 1999,<sup>89</sup> attorneys are permitted to provide unbundled legal

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84. See Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 933-36 (1998) (suggesting that provisions of the ethics codes skew the availability of legal services by overstating a lawyer's duties to clients who have explicitly agreed to less than full service representation and positing that if the codes were changed, poor and middle-class clients might have access to more competent lawyers than those who are now willing to accept the full service representations).

85. See generally Mary Helen McNeal, *Having One Oar or Being Without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance*, 67 FORDHAM L. REV. 2617 (1999).

86. *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 FORDHAM L. REV. 1751, 1776 (1999).

87. John S. Jenkins recommended amending Model Rule 1.2(c) to include the sentence, "Limited objectives may be particularly appropriate in the case of moderate-income clients." Hearings Before the Ethics 2000 Commission (May 29, 1998) (testimony of John S. Jenkins, ABA Standing Committee on the Delivery of Legal Service), available at <<http://www.abanet.org/cpr/jenkins.html>>. The language that he proposes adding to the comment to the rule would state: "When providing representation to moderate-income clients, and to other clients, it may be appropriate, after consultation with the client, to limit the representation to providing brief advice such as that which may be available through a bar association, other not-for-profit, or for-profit telephone hotline service." *Id.*

88. ALBERT H. CANTRIL, AMERICAN BAR ASS'N, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE, at vii-viii (1996); Lancot, *supra* note 67, at 258 (calling for additional research on the possible harms to clients receiving limited advice); Mosten, *supra* note 62, at 14 (arguing that statutory authority limiting lawyers' liability is needed to ensure that lawyers properly undertaking limited representation are not later found to have committed malpractice by refraining from providing a full-service representation).

89. See Laws. Man. on Prof. Conduct (ABA/BNA) 1101:1901-02 (Sept. 29,

services. They may do so as long as the lawyer provides competent representation<sup>90</sup> and explains the limits of the representation to the client (including the types of services not being offered to the client) and the probable effect of those limits on the client's rights and interests. This is clearly permissible under Rule 1.2(c), which allows an attorney to "limit the scope or objectives, or both, of the representation if the client consents after consultation."<sup>91</sup> The Colorado opinion lists some of the disclosures that should be made to pro se litigants,<sup>92</sup> and emphasizes the disclosures needed in certain cases, stating "[i]f it is foreseeable that the client will probably need more comprehensive services, the lawyer may not accept the representation unless the client receives an adequate explanation of the situation."<sup>93</sup> Although this opinion does explicitly permit the unbundling of legal services, it is quite likely that some Colorado lawyers will avoid providing unbundled services, simply because they cannot be certain that the explanation they are providing to their clients will satisfy the requirement of an "adequate explanation." The precise contours of the legal work, which can be unbundled or performed on a limited basis, remains an open question. However, to enhance access to the legal system, especially by clients of moderate means, the profession should address the issue.

#### D. THE PRACTICE OF LAW BY NONLAWYERS IN MDPs

Although allowing nonlawyers to freely provide legal advice arguably would enhance access to the legal system, the change would introduce too many difficulties that it should not be pursued.<sup>94</sup> The Commission's Final Report reflects current case law when it states: "It should be stressed that the Commission is not recommending that nonlawyers be permitted to deliver legal services."<sup>95</sup> One must read this statement to-

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1999) (reprinting Colo. Ethics Committee Op. 101).

90. Competent representation refers to that which is required under COLO. RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1999).

91. *Id.* Rule 1.2(c).

92. Those disclosures include: a warning that the client may encounter matters that he will not fully understand, such as the rules of evidence, the elements of substantive legal claims and defenses and the consequences of court rulings or stipulations. See *Laws. Man. on Prof. Conduct (ABA/BNA) 1101:1902* (Sept. 29, 1999) (reprinting Colo. Ethics Committee Op. 101).

93. *Id.*

94. See text accompanying notes 48-66.

95. REPORT, *supra* note 2.

gether with the cases interpreting the relevant provisions adopted in each state. The regulations with which lawyers must comply are modeled on the ABA's Model Code<sup>96</sup> and the Model Rules,<sup>97</sup> which bring forward the ideas earlier stated in Canon 47 of the ABA Canons of Professional Ethics.<sup>98</sup> Any effort to use MDPs as an opening wedge to explicitly permit persons with no legal training to practice law should not be permitted.

There is not enough evidence that clients will be well-served by permitting persons other than licensed lawyers to provide legal services. The issue has been highly controversial and marshalling evidence has been difficult for those on both sides of the question. Given the varying degrees of difficulty of the legal tasks which nonlawyers have undertaken and the range of experience which each nonlawyer possesses, crafting a single policy to be applied in every situation will inevitably result in a certain number of inequitable decisions.

In addition, both sides have strong arguments supporting their view—greater access to justice versus client protection. The merits are so closely balanced that it may well be that the determination hinges on which side has the burden of proof.<sup>99</sup> If those asserting the need for change shoulder the burden of proof, it would be difficult to demonstrate that there is no danger to clients in dismantling the assessment of qualifications of those who want to deliver legal services. Once we create a system which requires no demonstration of competence before practicing law, it will be too late to prevent the damage that

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96. The provisions relating to the unauthorized practice of law are contained in Disciplinary Rule 3-101 of the Model Code of Professional Responsibility, which provides: "(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law. (B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101 (1969).

97. Model Rule 5.5 of the Model Rules of Professional Conduct provides: "A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1983).

98. "No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate." CANONS OF PROFESSIONAL ETHICS Canon 47 (1937).

99. See Terry, *supra* note 5, at 920-25 (arguing that those defending the status quo have not carried their burden of proof).

can be wrought by persons who are not competent to provide legal services. Liability for malpractice is not an adequate substitute for regulation of admission *ex ante*. The person who gave erroneous legal advice might have disappeared or become insolvent in the years intervening between the provision of the advice and the discovery that it was inadequate. The difficulty of defining the practice of law is one of the primary obstacles to enforcing the requirement that only licensed attorneys be allowed to practice law. Nonetheless, the task of defining the practice of law must be undertaken to preclude the harms associated with permitting nonlawyers to practice law.

### III. DEFINING THE PRACTICE OF LAW AND ENFORCING UPL PROHIBITIONS

As Professor Laurel Terry has noted,<sup>100</sup> neither the witnesses testifying before the Commission nor other commentators<sup>101</sup> have been able to articulate a definition of “the practice of law” that would be acceptable in all the jurisdictions in the United States and would include transactional legal practice without being over-inclusive. Even judges who have wrestled with the issue have noted the difficulty of formulating the definition.<sup>102</sup> William Freivogel of Attorney Liability Insurance Assurance Society, Inc., (ALAS) testified before the Commission about the definition used for purposes of malpractice insurance coverage from ALAS.<sup>103</sup> The ALAS insurance contract defines the practice of law for purposes of coverage as drafting contracts; trying lawsuits, arbitration, mediation; providing alternative dispute resolution (ADR) services; acting as a notary public, agent for a title insurance company, trustee, executor,

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100. *See id.* at 872-73.

101. *See, e.g.,* Bruce Baestier, *Under One Roof: ABA Faces Arrival of Lawyer-Accountant Pairings*, N.Y. L.J., Nov. 19, 1998, at 5 (stating that the attempt to sort out the issues connected with permitting law firms to merge with accounting firms is made even more complex by “the sheer difficulty in attempting to define the practice of law in an age where many disciplines are called into play on various parts of a project”).

102. *State Bar v. Arizona Land Title & Trust Co.*, 366 P.2d 1, 8-9 (Ariz. 1961) (en banc), *modified*, 371 P.2d 1020 (Ariz. 1962) (“In the light of the historical development of the lawyer’s functions, it is impossible to lay down an exhaustive definition of the ‘practice of law’ . . .”).

103. *See* Hearings Before the Commission on Multidisciplinary Practice (Nov. 13, 1998) (testimony of William Freivogel, Loss Prevention Counsel for ALAS), available at <<http://www.abanet.org/cpr/freivogel11198.html>>.



administrator, escrow agent or expert witness.<sup>104</sup> However, this definition, developed in the context of insuring risk, is ill-suited for use as a prosecution standard because it includes activities which clearly do not constitute the practice of law.<sup>105</sup>

The one aspect of law practice that can clearly be identified is representing a client in court, but beyond the courtroom, it becomes difficult to isolate activities that constitute the practice of law. After being criticized for its proposed definition of the practice of law<sup>106</sup> modeled on the definition in effect in the District of Columbia,<sup>107</sup> the Commission backed off from attempting to frame a definition in its December 1999 Updated Background and Informational Report and Request for Comments. The Commission invited comments regarding whether it should define the practice of law in a subsequent recommen-

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104. *See id.*

105. *See id.* (recognizing that "[c]ertain of these functions do not, in fact, constitute the practice of law").

106. In Appendix A of its Final Report, the MDP Commission included an amendment to the Terminology section of the Model Rules that proposed a sample definition of the practice of law.

"Practice of Law" means the provision of professional legal advice or services where there is a client relationship of trust or reliance. One is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

(a) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect interests in real or personal property, wills, codicils, instruments intended to affect the disposition of property of decedents' estates, documents relating to business and corporate transactions, other instruments intended to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business;

(b) Preparing or expressing legal opinions;

(c) Appearing or acting as an attorney in any tribunal;

(d) Preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal;

(e) Providing advice or counsel as to how any of the activities described in subparagraph (a) through (d) might be done, or whether they were done, in accordance with applicable law;

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

APPENDIX A, *supra* note 43.

107. The Report specifically notes that the definition it proposed was based on language used in a single jurisdiction. "This definition is based in great part on District of Columbia Rule 49, which the Reporter viewed as a useful model." *Id.*

dation, and stated that it is likely to leave the task of formulating a definition to the individual jurisdictions.<sup>108</sup> Although it may be difficult to articulate a single definition to be adopted nationwide, this does not indicate that the definitions currently articulated in the various states through statutes, rules and case law are unenforceable.

The Commission need not propose a single definition of the practice of law to be adopted by all jurisdictions in the United States because each jurisdiction has already developed its own body of case law, statutes, court rule language, ethics advisory committee opinions, and UPL committee opinions. Each state will therefore define the practice of law within the context of its own prior law. The effort to ascertain that qualified lawyers are giving legal advice will be undertaken separately in each individual jurisdiction and will be based on the particular body of law which has been developed in that jurisdiction. It is unrealistic to think that the enforcement authorities in each state will uniformly adopt a new definition simply because it has been proposed by the Commission. Therefore, it is not absolutely necessary that the Commission formulate a model definition. However, writing a definition that is narrow enough to be effectively enforced would assist prosecutors and bar counsel in each state in evaluating their current standards.

The definitions currently in place typically contain the explicit statement that activities other than court appearances constitute the practice of law, but each state articulates the standard and the array of activity covered by the definition differently. The context in which a court considers the issue has some effect on the breadth of the language the court uses to articulate the standard. Situations in which courts are considering whether or not a communication occurred while an attorney was practicing law for purposes of deciding whether the

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108. The Commission stated that:

[Its] intent was to leave the definition to the individual jurisdictions. Accordingly, it did not include the definition in the Recommendation but rather provided it as an example of one possible definition. The Commission did not intend to use the term in an exclusive sense to limit non-lawyer activity. Unfortunately, the Commission's intent was not sufficiently clear. The Commission invites comment on whether it should include a definition in any subsequent Recommendation.

COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, UPDATED BACKGROUND AND INFORMATION REPORT AND REQUEST FOR COMMENTS (1999), available at <<http://www.abanet.org/cpr/febmdp.html>> [hereinafter UPDATE].

attorney-client privilege applies, the standard tends to be narrower; while in cases in which a state UPL committee is monitoring a nonlawyer's work, the definition tends to be much broader. The following section explores the current standards in two jurisdictions in which the definition of the practice of law has received significant attention—Washington and Florida.

## A. CURRENTLY ENFORCED DEFINITIONS OF THE PRACTICE OF LAW

### 1. Washington

In addition to court appearances, the definition of the practice of law announced in Washington's case law, in *Perkins v. CTX Mortgage Co.*,<sup>109</sup> and elsewhere,<sup>110</sup> includes "the selection and completion of legal instruments by which legal rights and obligations are established."<sup>111</sup> Although simply filling out forms is not the practice of law,<sup>112</sup> the determination of which legal documents (such as promissory notes and deeds of trust) are needed in a residential home financing does constitute the practice of law.<sup>113</sup> Under Washington's definition, writing the loan documents and providing content to the computer system which will then select the appropriate documents in various types of transactions is the practice of law.<sup>114</sup> The character of the work performed itself determines whether a particular activity is the practice of law,<sup>115</sup> rather than whether or not a fee is charged for that work.<sup>116</sup>

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109. 969 P.2d 93, 96 (Wash. 1998) (en banc).

110. See *Bowers v. Transamerica Title Ins. Co.*, 675 P.2d 193, 197 (Wash. 1983) (en banc); *In re Droker*, 370 P.2d 242, 248 (Wash. 1962); *State v. Hunt*, 880 P.2d 96, 99 (Wash. Ct. App. 1994); *Hecomovich v. Nielson*, 518 P.2d 1081, 1087 (Wash. Ct. App. 1974).

111. *Perkins*, 969 P.2d at 95.

112. See *Cultum v. Heritage House Realtors, Inc.*, 694 P.2d 630, 634 (Wash. 1985) (en banc) ("[A] real estate broker or salesperson is permitted to complete simple printed standardized real estate forms, which forms must be approved by a lawyer . . ."); *Washington State Bar Ass'n v. Washington Ass'n of Realtors*, 251 P.2d 619, 622 (Wash. 1952) (en banc).

113. *Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n*, 586 P.2d 870, 876 (Wash. 1978) (en banc) (holding that the selection and preparation of promissory notes and deeds of trust is the practice of law).

114. See *id.*

115. *Droker*, 370 P.2d at 248.

116. In *Bennion, Van Camp, Hagan & Ruhl v. Kassler Escrow, Inc.*, 635 P.2d 730 (1981) (en banc), a law firm sued to enjoin an escrow company from

In July 1999, the Committee to Define the Practice of Law of the Washington State Bar Association issued its report containing its definition of the practice of law, which essentially adopted the standards set out in judicial opinions in the state.<sup>117</sup> The general definition reads, “[t]he practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law.”<sup>118</sup> The definition then states that the practice of law includes (but, is not limited to) four specific activities: (1) advising or giving counsel;<sup>119</sup> (2) drafting, selecting, or completing legal documents;<sup>120</sup> (3) representing another person in court;<sup>121</sup> and (4) negotiating legal rights.<sup>122</sup> The committee identified certain activities as excluded from its definition, including: practicing under a limited license;<sup>123</sup> serving as a court-authorized facilitator; acting as a lay representative when doing so is authorized by an agency or tribunal; serving as a neutral;<sup>124</sup> participating in labor negotiations;<sup>125</sup> assisting another

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preparing earnest money agreements and other acts as the unauthorized practice of law. *See id.* at 731. The unanimous court rejected the proposition that by not charging a fee, the escrow company’s actions were authorized under *Great Western*, stating “[i]t is the nature and character of the service rendered rather than the fact of compensation for it that governs.” *Id.* at 735; *see also Perkins*, 969 P.2d at 96 (rejecting the notion that the definition of the practice of law turns on whether a fee was charged); *Great Western*, 586 P.2d at 877 (declining to consider whether preparing a deed would be the practice of law if no fee was charged).

117. COMMITTEE TO DEFINE THE PRACTICE OF LAW, WASHINGTON STATE BAR ASS’N, FINAL REPORT (1999), *available at* <<http://www.wsba.org/cdpl/report.html>>.

118. *Id.*

119. *See id.* (“Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.”).

120. *See id.* (“Selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).”).

121. *See id.* (“Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.”).

122. *See id.* (“Negotiation of legal rights or responsibilities on behalf of another entity or person(s).”).

123. This includes limited licenses available for educational purposes, in-house counsel and foreign law consultants. *See id.*

124. This exception refers to mediators, arbitrators, conciliators or facilitators serving in a neutral capacity. *See id.*

125. *See id.* (“Participation in labor negotiations, arbitrations or conciliations arising under collective bargaining agreements.”).

person completing certain forms;<sup>126</sup> acting as a lobbyist; selling legal forms; engaging in activities permitted under federal law; and whatever additional activities the state's supreme court determines is not UPL.

The difficulty with this definition is that it is vague. Stating that an activity constitutes the practice of law when the judgment exercised "require[s] the knowledge and skill of a person trained in the law" carries a flaw in the use of the phrase "trained in the law." Independent paralegals can certainly argue that they meet that requirement, especially those who have attended classes and obtained a certificate of completion in a paralegal program. Substituting the phrase "holding a license to practice law" would provide some additional specificity. Use of that wording, however, highlights a second problem—the definition does not escape the circularity of the earlier judicial opinions,<sup>127</sup> which state that the practice of law includes activities in which attorneys engage.

An additional problem is that the definition is overbroad. While an overbroad definition seeks to ensure that prosecutors or members of UPL committees will have the ability to act to enjoin any conduct that they deem objectionable, individuals trying to comply with the standard would benefit from a much narrower definition and a bright-line test. Not only should individuals working in the gray areas have notice that their actions may subject them to UPL prosecution, but also, compliance with such a standard would be much easier to police.

## 2. Florida

Florida has a history of active enforcement of its prohibition of UPL. The referees and judges' opinions generally specify the precise actions of the respondents and clearly articulate the standards being applied, with the result that opinions from Florida are among the most useful for those in other jurisdictions seeking guidance about the appropriate standards.

The classic articulation of the standard used in Florida to determine whether an activity constitutes the practice of law is

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126. See *id.* (stating that as long as no fee is charged, a person can be helped to complete forms seeking orders of protection under RCW chapter 10.14 (harassment) and 26.50 (domestic violence)).

127. See, e.g., *State v. Chamberlain*, 232 P. 337, 338 (Wash. 1925) (stating that practicing law "means doing or practicing that which an attorney or counsellor at law is authorized to do and practice").

contained in *State ex rel. Florida Bar v. Sperry*.<sup>128</sup> The *Sperry* definition focuses on the individual's activities,<sup>129</sup> rather than on the location or the title of the person engaged in the activity. As mentioned previously, representing a client in a court proceeding is clearly the practice of law. Courts have also held that representing a client in arbitration is the practice of law.<sup>130</sup> The *Sperry* standard extends the definition to include counseling clients regarding their rights and obligations under the law and preparing legal instruments whether or not any court proceedings are involved.<sup>131</sup> The touchstone suggested is whether the activity "affect[s] important rights of a person under the law" and whether client protection requires "legal skill and a knowledge of the law greater than that possessed by the average citizen."<sup>132</sup> The Florida Supreme Court has continued

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128. 140 So. 2d 587, 591 (Fla. 1962), *vacated on other grounds*, 373 U.S. 379 (1963).

129. [I]t is not the nature of the agency or body before which the acts are done, or even whether they are done before a tribunal or any sort or in the private office of an individual, that determines whether that which is done constitutes the practice of law. The best test, it seems to us, is *what is done*, not where, for the safest measure is *the character of the acts themselves*. If they constitute the practice of law the fact that they are done in the private office of the one who performs them or before a nonjudicial body in no way changes their character.

*Id.* (emphasis added).

130. See Florida Bar *re* Advisory Opinion on Nonlawyer Representation in Sec. Arbitration, 696 So. 2d 1178, 1180 (Fla. 1997). The court decided that a person is practicing law when he offers advice and represents clients in the National Association of Securities Dealers (NASD), New York Stock Exchange (NYSE), American Stock Exchange (AMEX) or other stock exchange arbitration proceedings. See *id.* at 1181.

[The] nonlawyer representatives give specific legal advice and perform the traditional tasks of the lawyer at every stage of the arbitration proceeding in an effort to protect the investor's important legal and financial interests. Because such activities—when performed by nonlawyers—are wholly unregulated and unsanctionable, we further agree with the proposed opinion that these activities must be enjoined. In these circumstances, the public faces a potential for harm from incompetent and unethical representation by compensated nonlawyers which cannot otherwise be remedied.

*Id.* at 1183.

131. "[T]he practice of law also includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away . . ." *Sperry*, 140 So. 2d at 591.

132. *Id.*

[I]n determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitutes the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a

to apply the *Sperry* standard in its opinions evaluating various activities.<sup>133</sup> The majority of those opinions address activities that are performed by nonlawyers—persons who are not licensed to practice law in any jurisdiction.

Under Florida case law, nonlawyers are not engaged in the unauthorized practice of law when they perform certain activities, such as selling sample forms, retyping written information,<sup>134</sup> or simply gathering information to be used to complete forms<sup>135</sup> in compliance with Florida Rule 10-2.1(a).<sup>136</sup> However, interviewing clients or answering their questions<sup>137</sup> to ascertain which forms to use does constitute the practice of law.<sup>138</sup> In addition, ascertaining whether forming a trust is appropriate for the client,<sup>139</sup> counseling clients about their legal rights

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person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

*Id.*; see also *Florida Bar v. Florida First Fin. Group, Inc.*, 695 So. 2d 275, 277-78.

133. See *infra* cases cited in notes 134-51.

134. See *Florida Bar v. American Senior Citizens Alliance, Inc.*, 689 So. 2d 255, 258-59 (Fla. 1997); *Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1994 (Fla. 1978) (noting that the nonlawyer could have escaped prosecution if she had simply typed forms, copying only the information given to her in writing by the clients, or had sold only sample forms, without filling them out); see also *In re Samuels*, 176 B.R. 616, 621-22 (Bankr. M.D. Fla. 1994) (“[P]ersons wanting to provide services in the bankruptcy area are limited to typing or transcribing written information provided to them by a consumer onto prepared forms.”).

135. See *American Senior Citizens Alliance*, 689 So. 2d at 258-59.

136. RULES REGULATING FLA. BAR Rule 10-2.1(a) (1997) (restricting nonlawyer oral communications solely to those eliciting factual information for the completion of forms approved by Florida’s Supreme Court.); see also *Florida Bar re Approval of Forms Pursuant to Rule 10-1.1(b) of the Rules Regulating the Florida Bar*, 591 So. 2d 594, 595 (Fla. 1991) (approving “fill-in-the-blank” forms developed by the Bar for use in “areas amenable to a forms practice”).

137. See *Florida Bar v. King*, 468 So. 2d 982, 983 (Fla. 1985) (finding that a nonlawyer had engaged in UPL when he “had direct contact in the nature of consultation, explanation, recommendations, selection and completion of forms”).

138. See *Brumbaugh*, 355 So. 2d at 1193-94 (enjoining a nonlawyer from advising clients regarding the remedies available to them, making inquiries or answering clients’ questions as to which particular forms are necessary, how best to fill out such forms, and where the forms should be filed).

139. See *American Senior Citizens Alliance*, 689 So. 2d at 259 (deeming “answer[ing] specific legal questions, determin[ing] the appropriateness of a

and remedies,<sup>140</sup> advising clients regarding whether the assets of an ex-spouse should be listed in a client's bankruptcy petition,<sup>141</sup> advising clients on the availability of exemptions for assets,<sup>142</sup> counseling clients on filing a bankruptcy petition<sup>143</sup> or forming a trust<sup>144</sup> have been found to constitute the practice of law. In fact, any conversation between a client and a nonlawyer has been viewed as so problematic that courts have suggested that a typing service should tape-record all conversations.<sup>145</sup> A lawyer, rather than a nonlawyer, must make the determination regarding whether a client needs a living trust.<sup>146</sup> And, only a lawyer is permitted to prepare and file a corporate charter,<sup>147</sup> or to represent clients in property damage claims.<sup>148</sup>

But, even with all the case law applying the *Sperry* standard, Florida's definition of the practice of law is also overbroad. The element most vulnerable to attack is "that degree of legal skill and knowledge of the law greater than that of the

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living trust based on a customer's particular needs and circumstances, assembling, draft[ing] and execut[ing] the documents, and fund[ing] the living trusts" to be the unauthorized practice of law).

140. See *Brumbaugh*, 355 So. 2d at 1189 (enjoining a nonlawyer from advising clients in marriage dissolution proceedings.); see also *Florida Bar v. Schramek*, 616 So. 2d 979, 984 (Fla. 1993); *In re Florida Bar*, 215 So. 2d 613, 613-14 (Fla. 1968).

141. See *Florida Bar v. Catarcio*, 709 So. 2d 96, 98, 100 (Fla. 1998) (finding that respondent had engaged in UPL when he advised clients regarding their legal remedies and counseled the client and his ex-wife to file a joint bankruptcy petition in violation of 11 U.S.C. § 302(a)).

142. See *Florida Bar v. Davide*, 702 So. 2d 184, 184 (Fla. 1997) (finding that nonlawyers had engaged in the unlicensed practice of law by, among other things, advising persons regarding bankruptcy exemptions).

143. See *Florida Bar v. Warren*, 655 So. 2d 1131, 1133 (Fla. 1995) (enjoining a nonlawyer from counseling persons as to "the advisability of their filing for protection under the U.S. bankruptcy laws").

144. See *Florida Bar re Advisory Opinion—Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426, 428 (Fla. 1992).

145. See *In re Calzadilla*, 151 B.R. 622, 626 (Bankr. S.D. Fla. 1993).

146. See *Nonlawyer Preparation of Living Trusts*, 613 So. 2d at 427 (deciding that the drafting, execution and funding of a living trust document constitutes the practice of law and that the person making the determination regarding a client's need for a living trust must be a licensed lawyer).

147. See, e.g., *In re Florida Bar*, 355 So. 2d 766, 769 (Fla. 1978); *Florida Bar v. Scussel*, 240 So. 2d 153, 155 (Fla. 1970); *Florida Bar v. Fuentes*, 190 So. 2d 748, 751 (Fla. 1966); *Florida Bar v. Keehley*, 190 So. 2d 173, 176 (Fla. 1966); *Florida Bar v. Town*, 174 So. 2d 395, 397 (Fla. 1965).

148. *Florida Bar v. York*, 689 So. 2d 1037, 1039 (Fla. 1996) (finding that a nonlawyer practiced law when he reviewed statutes and served as a representative to accept responses from demand letters).



average citizen.”<sup>149</sup> All people, including nonlawyers, have a First Amendment right to gain information about the operation of the law, whether through watching trials at the courthouse, viewing CourtTV or other taped trials, or reading court opinions. Unlike the reasonable person standard in tort law, it is difficult to clearly envision the amount of legal knowledge the average citizen possesses. Taken literally, this element also purports to prohibit activity that is arguably protected by the First Amendment. The argument that such an overbroad standard constitutes a lack of notice foreclosing enforcement was unsuccessfully raised in *Florida Bar v. Schramek*.<sup>150</sup> In that opinion, the Florida Supreme Court summarily rejected the argument, finding it “totally without merit given that we have specifically determined that the activities in which [the nonlawyer] engage[d] do constitute the unauthorized practice of law.”<sup>151</sup> The First Amendment and notice issues still linger, however, and remain to be fully addressed in the future.

#### B. DEFINING ONLY LITIGATION AS THE PRACTICE OF LAW

Justice Enoch, of the Texas Supreme Court, drew quite a bit of agreement from the audience after he testified before the Commission in Dallas at the ABA Midyear Meeting in February 2000. He stated that courtroom practice could clearly be defined as the practice of law, but added that including transactional work in the definition creates an unacceptable level of ambiguity.<sup>152</sup> If the definition is limited to representing another before a tribunal, the practice of law would be relatively simple to police since the presiding judge will always be in a position to ascertain whether a person representing a client in a case is, in fact, a member of the bar.

Justice Enoch’s proposal highlights the fact that one of the difficulties of enforcing UPL provisions in transactional prac-

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149. State *ex rel.* Fla. Bar v. Sperry, 140 So. 2d 587, 591 (Fla. 1962), *vacated on other grounds*, 373 U.S. 379 (1963).

150. 616 So. 2d 979, 984 (Fla. 1993) (deciding that a nonlawyer had engaged in unlicensed practice of law by providing services that “require[d] a knowledge of the law greater than that possessed by the average citizen” when he answered clients’ questions regarding who best to fill out trust documents, modified court-approved forms, prepared living trusts and deeds, and interpreted Florida law).

151. *Id.*

152. Hearings Before the Commission on Multidisciplinary Practice (Feb. 12, 2000) (testimony of Justice Craig T. Enoch, Texas Supreme Court) (notes on file with author).

tice is that the work is performed in a private setting. Although it is difficult, it is not impossible to articulate a reasonable definition of the practice of law that would include transactional legal practice. For the policy reasons stated earlier,<sup>153</sup> we in the profession ought to endeavor to articulate a definition that goes beyond the courthouse. The need to ensure that clients are receiving legal advice from a person whose basic competence has been evaluated is present in both transactional work and in litigation.

### C. A FUNCTIONAL DEFINITION OF THE PRACTICE OF LAW

One approach to defining the practice of law is to set out a conceptual framework rather than attempting to recite a laundry list of activities that are included. In the interest of furthering the discussion at this juncture, I propose the following definition of the practice of law. In addition to representing another person or entity before a court or other tribunal, the practice of law includes:

The analysis and interpretation of statutes, regulations, opinions of regulatory agencies, and judicial opinions for a client or their application to a course of action contemplated by a client. The practice of law includes drafting legal opinions and other documents which reflect that analysis and interpretation.

The core activities of legal practice are included in this definition. One might object that this definition is under-inclusive in that it does not explicitly include pretrial activities, such as evaluating whether a specific document is responsive to a document production request, or is protected by the attorney-client privilege. However, because the attorney's decisions are made in light of precedent in the relevant jurisdiction, one could also argue that in order to make those decisions, the attorney must follow precedent to the facts in the case at hand.

One additional activity, which arguably should also be included in such a definition, is "communicating that analysis and interpretation to the client." The attorney is typically the person to directly advise the client of the results of the research. The problem with including all such communication in the definition is the First Amendment right to freely discuss court decisions. Clearly, journalists and commentators must remain free to discuss judicial opinions, proposed regulations, statutes, and the like. And, just as clearly, any acquaintance of

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153. See *supra* text accompanying notes 48-66.

the client must remain free to declare his or her views regarding the client's situation. For example, a parent or friend of the client must not be deemed to be practicing law if she tells the client who has lost his job that he can go to court to try to get his alimony payments reduced. People must remain free to discuss legal issues with nonlawyers because law forms the background against which tax payments, accidents, real estate transactions, and a myriad of other topics are played out in daily life. The definition of the practice of law cannot prohibit ordinary conversations on such topics.

The key distinction between such conversations and legal work is the formation of the professional-client relationship. Social conversation is a different category of discourse from a discussion in which a person is seeking the considered advice of a professional. Similarly, the one-way flow of information from a journalist or television commentator is not a situation in which the audience member is receiving an opinion tailored to her particular situation. Legal work is performed in the context of a professional-client relationship. Nonlawyers are not able to form an attorney-client relationship with a client. Thus, they cannot give the client legal advice in the context of that relationship.

#### D. DISAGREEMENT OVER ENFORCEMENT OF UPL RESTRICTIONS

Despite the continued and growing dispute over how to define the practice of law, UPL enforcement continues to be a critical task undertaken by the organized bar. For example, on February 14, 2000, the ABA House of Delegates<sup>154</sup> passed Resolution 8-A, urging regulators throughout the United States to enforce the UPL rules more actively.<sup>155</sup> In addition, in language adopted over the objection of the ABA's Board of Governors,<sup>156</sup> the resolution also directs the ABA to establish a national clearinghouse for persons or organizations engaging in

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154. The final vote was approved by a vote of 305 in favor, and 118 against. See *ABA Reverses Itself, Adopts New Rule Banning Lawyers' "Pay to Play" Practices*, 16 *Laws. Man on Prof. Conduct (ABA/BNA)* 64, 65 (Mar. 1, 2000).

155. The resolution "urges each jurisdiction to 'establish and implement effective procedures for the discovery and investigation of any apparent violation of its laws prohibiting the unauthorized practice of law and to pursue active enforcement of those laws.'" *Id.*

156. The Board's representative took the position that accumulating, verifying, and distributing that information would impose "substantial" costs on the ABA. See *id.*

UPL in multiple jurisdictions.<sup>157</sup> In a discussion before the vote, some delegates attempted to carve out exceptions for lawyers whose practices encompass more than one state and for multidisciplinary practices.<sup>158</sup> The fact that the proponents of these changes were unsuccessful reflects the sentiment among members of the House of Delegates to leave the current system of UPL definitions and targets in place, rather than to institute nuanced changes in UPL policy. The 1999 Survey of UPL Committees, conducted by the ABA Standing Committee on Client Protection, also indicates a trend toward enforcement of the current system of UPL regulation.<sup>159</sup> Of the jurisdictions responding,<sup>160</sup> twenty-nine claimed to be actively enforcing their UPL provisions,<sup>161</sup> and the sixteen that foresaw changes

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157. The resolution instructs the ABA to "establish and support a mechanism for identifying and reporting to state, local, and territorial bar associations and designated authorities instances of persons or organizations engaging in the unauthorized practice of law in more than one jurisdiction." *Id.*

158. *See id.*

159. ABA STANDING COMM. ON CLIENT PROTECTION, AMERICAN BAR ASS'N, 1999 SURVEY OF UNAUTHORIZED PRACTICE OF LAW COMMITTEES (1999). This report was released in September 1999. *See id.*

160. The jurisdictions in which an entity responsible for enforcement responded were: Alabama (UPL Committee), Alaska (State Bar Association), Arizona (State Bar of Arizona-Ethics Director), Arkansas (Supreme Court of Arkansas Committee on Professional Conduct), California (no entity specified), Colorado (UPL Committee), Connecticut (UPL Committee), Delaware (Office of Disciplinary Counsel), District of Columbia (D.C. Court of Appeals Committee on UPL), Florida (Bar UPL Counsel), Georgia (State Bar), Hawaii (Deputy Attorney General and Consumer Protection Committee), Idaho (Bar Counsel), Illinois (State Bar Association), Indiana (UPL Committee), Iowa (Iowa Supreme Court Commission on UPL), Kansas (Bar Counsel), Kentucky (Bar Counsel), Louisiana (Bar Association), Maine (Assistant Attorney General), Maryland (Bar Counsel Attorney Grievance Commission), Massachusetts (Consumer Protection and Antitrust Division Attorney General and Bar Counsel), Michigan (State Bar), Minnesota (Lawyers' Professional Responsibility Board), Mississippi (State Bar), Missouri (Office of Chief Disciplinary Counsel), Montana (no entity specified), Nebraska (Counsel for Discipline and UPL Committee), New Hampshire (Assistant Attorney General), New Mexico (no entity specified), New Jersey (Bar Counsel and Supreme Court UPL Committee), New York (Bar Counsel), North Carolina (Bar Counsel), North Dakota (State Bar), Ohio (Supreme Court and Board of Commissioners on UPL), Oklahoma (Bar Counsel), Oregon (State Bar), Pennsylvania (Disciplinary Board, Supreme Court), Rhode Island (UPL Committee), South Carolina (State Bar), South Dakota (State Bar and Consumer Protection Committee), Tennessee (Attorney General's Office), Texas (State Bar), Utah (Bar Administrator), Vermont (Attorney General and Bar Association), Virginia (State Bar), Washington (State Bar), West Virginia (State Bar), Wyoming (State Bar), Virgin Islands (Bar Association). *See id.* at 2-3.

161. The jurisdictions reporting active enforcement were: Alabama, Arkan-

in policy all anticipated more active UPL enforcement in the year ahead.<sup>162</sup>

Any broadbrush move to "man the barricades" would be unfortunate, especially at this time. It is important to use a nuanced approach; analyzing precisely what changes need to be made and which aspects of the current system should be left in place.

#### IV. IMPUTING CONFLICTS OF INTEREST

The final critical issue to be analyzed in this Article is the degree to which conflicts of interest attributed to one member of an MDP must be imputed to the other members of the practice. If one attorney at a law firm has a conflict of interest that precludes accepting a representation, that conflict is imputed to all the other lawyers at the firm.<sup>163</sup> No lawyer at the firm can accept that representation unless the conflict is waivable, it is adequately disclosed to the client, and the client agrees to waive the conflict. The conflict is imputed because the client is thought to hire the law firm (rather than the individual attor-

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sas, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and Washington. *See id.*

162. The jurisdictions anticipating more active enforcement were: Arizona, Georgia, Indiana, Iowa, Louisiana, Maryland, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Oklahoma, Tennessee, Utah and Washington. *See id.* at 9-10.

163. Model Rule 1.10 of the Model Rules of Professional Conduct provides:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 [the general rule on conflicts], 1.8(c) [gifts], 1.9 [former clients] or 2.2 [lawyer as intermediary].

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1987).

ney),<sup>164</sup> and because of the collegiality of traditional legal practice, in which lawyers routinely “run ideas by” other lawyers at their firms. The two primary theoretical reasons supporting imputation are the presumption of shared confidences and the duty of loyalty. First, any confidential information received by an individual attorney from a client is presumed to be shared with other attorneys at the firm and, second, the attorney’s duty of loyalty is meant to ensure that the attorney remains free to assist her client in pursuing that client’s objectives. Other professions do not impute conflicts to other members of the same firm. For example, only the accountant who actually has the conflict is precluded from taking conflicting work in a professional services firm. Other members of his firm are able to take on the conflicting matter because the conflict is not imputed to them.

Recommendation 8 of the Commission’s Final Report proposes that “all clients of an MDP should be treated as the lawyer’s clients for purposes of conflicts of interest and imputation in the same manner as if the MDP were a law firm and all employees, partners, shareholders or the like were lawyers.”<sup>165</sup> In addition, the Commission in its Final Report proposed adding the following language to the comments to Rule 1.10, the Model Rule covering imputed disqualification:

[4] With respect to an MDP, imputed disqualification of a lawyer applies if the conflict in regard to the legal services the lawyer is providing is with any client of the MDP, not just a client of a legal services division of the MDP or of an individual lawyer member of the MDP.<sup>166</sup>

The proposal that conflicts of interest be imputed across the entire professional service firm is conceptually acceptable to attorneys, since attorneys would be subject to the same standards whether they work in a law firm or in a multidisciplinary practice.

Understandably, however, members of other professions have been quick to protest. The American Institute of Certified Public Accountants (AICPA) adopted a resolution stating that the Commission’s proposal to impose legal rules onto account-

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164. See generally Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869 (1990).

165. COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS’N, RECOMMENDATION Recommendation 8 (1999), available at <<http://www.abanet.org/mdprecommendation.html>> [hereinafter RECOMMENDATION].

166. See APPENDIX A, *supra* note 43.

ing firms is "clearly inappropriate and overreaching." It is clear that AICPA's view of the appropriate conflicts standards for MDPs would be to allow the current accountant's standards to govern. If this were permitted, it would ultimately lead to a situation in which a conflict would be imputed to a lawyer working in a traditional in-house legal department or law firm, when the same conflict would not be imputed to a lawyer practicing law in an MDP. This cannot be condoned. The same standards must apply to all persons providing legal advice.

In an attempt to address the objections raised by members of other professions, the Commission is considering changing its original position requiring that the rules of imputation apply to all matters in which the MDP rendered services for any client. In its PostScript to the February 2000 Midyear Meeting, the Commission stated that imputed conflicts could be limited to only those representations in which MDP clients had purchased legal services, rather than to all the clients of the MDP.<sup>167</sup> Although limiting the imputation of conflicts to legal service purchases would trigger fewer imputed conflicts, the concerns expressed by members of other professions still remain. In addition, the lawyers practicing law in Big Five firms, and other professional services firms, will continue to assert that they are "practicing estate planning" or "consulting" (in which case the conflicts will not be imputed) rather than practicing law. This continues the differential in conflict analysis as applied to lawyers practicing in MDPs and as applied to work performed by lawyers practicing in traditional law firms where all the partners are attorneys. As discussed earlier in this Article, all lawyers should be subject to the same imputation standards, wherever they are practicing.

Similarly, problems will remain if the Commission recommends that conflicts be imputed to only the attorneys in a multidisciplinary practice, rather than to all of the professionals working at the entity. Doing so would ameliorate concerns expressed by members of other professions who objected to being required to comply with lawyers' standards, but it is not an altogether satisfactory solution. Imputing conflicts to all of the lawyers in an MDP will still require the MDP to institute more elaborate structures to check conflicts. In addition, it will institute a new requirement that professionals employed by MDPs obtain client waivers in situations where previously neither cli-

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167. POSTSCRIPT, *supra* note 33.

ent consent nor waiver had been required. Moreover, the regulations under which attorneys practice provide that certain conflicts cannot be waived. An MDP employing attorneys thus would encounter situations in which certain representations could not be undertaken. Professional services firms are unlikely to welcome these additional burdens. As a result, a certain number of the many attorneys now working at MDPs will not "come into the tent" and officially rejoin the legal profession. Instead, they are likely to continue providing legal services while they declare that they are working only as consultants rather than practicing law. Therefore, the problems currently encountered in the area of the unauthorized practice of law will remain.

In addition, imputing the conflicts of interest only to the licensed lawyers at an MDP compromises the core values underlying the requirement of imputation. The lawyers in MDPs will be working as members of teams, along with accountants, engineers, business analysts and other professionals. Those nonlawyer members of the MDP will be attending meetings and included on conference calls between the attorneys and the clients. The nonlawyers will have the opportunity to learn confidential client information, strategy, and other information that the client discloses to the attorney member of the team. The reason conflicts are imputed across an entire law firm is that, as a practical matter, this is precisely the type of teamwork which is thought to occur among the members of a law firm working on a matter for a client.

The Commission's approach of attempting to identify core values of the legal profession, and to urge that states authorizing MDPs require the attorneys practicing in MDPs to honor the disciplinary and ethical standards of the legal profession is laudable. Unfortunately, it most likely will not work. If conflicts are imputed to other persons working in an MDP, the magnitude of the business lost due to the imposition of the new conflicts standards is likely to lead management at the Big Five and other large professional services firms to pressure attorneys working in those organizations to resign their law licenses. The lawyers currently working for the Big Five are thus unlikely to "come into the tent" and agree to follow the conflicts regulations applicable to lawyers practicing in other settings.



## V. REGULATIONS THAT IMPEDE LAWYERS' MULTIJURISDICTIONAL PRACTICE

Whether or not the states' disciplinary rules are changed to permit MDPs to deliver legal services, the MDP debate has brought attention to regulations that currently hamper lawyers conducting multijurisdictional practices in law firms and corporate legal departments. The restrictions on lawyers practicing in traditional settings should not be more onerous than those envisioned for lawyers practicing in MDPs. Certainly, if fully integrated MDPs are authorized, the legal profession ought to take down the barriers of unauthorized practice of law as applied to lawyers licensed in other states and reconsider the imputation of conflicts of interest across all the members of a lawyer-only law firm.

Currently, for purposes of UPL enforcement, lawyers licensed in other states are treated the same as persons who have no legal training at all. This must be changed to allow persons who have met the requirements of bar membership to practice law freely. The ABA Ethics 2000 Commission is considering revisions to Model Rule 5.5, which would broaden the scope of practice permitted for the out-of-state lawyer. If the changes are adopted, in addition to authorized appearances before a tribunal, the out-of-state lawyer would be permitted to "act[] with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's practice on behalf of a client in a jurisdiction in which the lawyer is admitted to practice."<sup>168</sup> In addition, the out-of-state lawyer would be permitted to practice law as long as an attorney admitted in the jurisdiction is associated in the matter.<sup>169</sup> Furthermore, lawyers working in corporate legal departments are deemed not to be engaged in UPL when the in-house lawyer acts on the client's behalf.<sup>170</sup> The Ethics 2000 Commission is likely to recommend the amendment of Model Rule 5.5 to create this exemption from UPL prosecution for in-house lawyers. Making such a change in the language in Model Rule 5.5 would encourage wider adoption of the authorization to practice for out-of-state in-house

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168. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5(b)(2)(ii) (proposed language), available at <<http://www.abanet.org/cpr/ethics2k.html>>.

169. See *id.* Rule 5.5(b)(2)(iii) (proposed language).

170. See *id.* Rule 5.5(b)(2)(i) (proposed language). The in-house counsel licensed in another state would also be allowed to practice on behalf of other employees or commonly owned organizational affiliates in connection with the client's matters.

counsel that is already in place in fifteen jurisdictions in the United States, including Alabama,<sup>171</sup> the District of Columbia,<sup>172</sup> Florida,<sup>173</sup> Idaho,<sup>174</sup> Kansas,<sup>175</sup> Kentucky,<sup>176</sup> Maryland,<sup>177</sup> Minnesota,<sup>178</sup> Missouri,<sup>179</sup> North Carolina,<sup>180</sup> Ohio,<sup>181</sup> Oklahoma,<sup>182</sup> South Carolina,<sup>183</sup> Virginia,<sup>184</sup> and Washington.<sup>185</sup> Such wider adoption of a license for out-of-state in-house counsel would be beneficial, but would not address the needs of lawyers working in law firms, especially those engaged in transactional practice, where *pro hac vice* admission is not available.<sup>186</sup>

All of the proposed changes to the language in Model Rule 5.5 considered by the Ethics 2000 Commission should be made.

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171. See Ala. Bar Ass'n, Ethics Committee Op. RO-86-52 (1986).

172. See RULES OF THE D.C. CT. APP. Rule 49(c)(6) (1999).

173. See RULES REGULATING THE FLA. BAR ch. 17 (1997). The in-house attorney must renew his status annually, but there is no cap on the maximum number of years it is available. See *id.* Rule 17-1.4(c).

174. See IDAHO BAR COMMISSION RULES Rule 220 (1998).

175. See KAN. SUP. CT. RULES 706(c) (1997). The permit to practice in Kansas expires if the attorney terminates his in-house employment, but it is not time-limited. See *id.*

176. See KY. SUP. CT. RULES Rule 2.111 (2000). Attorneys who receive this status are not eligible to appear in court. See *id.* Rule 2.111(4)(b).

177. See MD. CODE ANN. BUS., OCC. & PROF. CODE § 10-206(b) (1995). Attorneys practicing with this status cannot appear in court. See *id.*

178. See MINN. SUP. CT. RULES Rule 6 (1997). The temporary license available under this rule is good for only one year. See *id.*

179. See MO. SUP. CT. RULES Rule 8.105 (2000). The authorization to practice for the corporate employer can be renewed for successive five year periods. See *id.* Rule 8.105(f). The time an in-house lawyer practices under this rule cannot be used to fulfill the conditions for admission without examination under Rule 8.10. See *id.* Rule 8.105(g).

180. See N.C. GEN. STAT. § 84-4 (1995); *State v. Pledger*, 127 S.E.2d 337, 339-40 (N.C. 1962) (interpreting the North Carolina statute to permit an out-of-state in-house counsel to practice within the state).

181. See RULES GOVERNING CTS. OHIO Rule 6 § 4(A) (1999). The authorization is renewable for a series of two-year terms. See *id.*

182. See OKLA. STAT. ANN. tit. 5, app. Rule 2 § 5 (Supp. 2000) (providing that an in-house lawyer can practice under this exemption for an open-ended period of time).

183. See S.C. SUP. CT. RULES Rule 405 (1997).

184. In Virginia, the definition of the unauthorized practice of law excludes practice by in-house counsel. See Virginia UPL Comm. Op. 178 (1994).

185. WASH. CT. RULES Rule 8(f) (1999-2000). The rule creates an exception for in-house counsel, but still requires that the out-of-state lawyer pass the professional responsibility portion of the state's bar exam. See *id.*

186. For further analysis of the restrictions on multijurisdictional practice, see generally Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 U. KAN. L. REV. 453 (1997).

Once these changes are adopted in the Model Rules, a number of states should consider revising their provisions to incorporate these changes. In addition to changes in the professional responsibility provisions governing lawyers, the UPL Committees and other entities responsible for issuing advisory opinions on ethics issues in each state should also confirm that out-of-state lawyers are not committing UPL when they give legal advice in their state.

## VI. CONCLUSION

In the debate over the composition of entities permitted to deliver legal services, certain issues stand out as of fundamental importance. If MDPs are approved, an MDP firm should not be allowed to provide legal services for an audit client of the MDP. Persons who are practicing law should be held to the same standards of competence and loyalty, whether or not they acknowledge that the work they are performing constitutes the practice of law. Courts must evaluate the activities performed by all persons practicing law, rather than examining the activities of only those persons who hold themselves out as attorneys. The Commission need not propose a national definition of the unauthorized practice of law, and each state can continue to enforce the standards that have been developed in statutes, case law, and ethics advisory opinions in that state. Conflicts of interest attributed to members of an MDP should be imputed to the other professionals at the MDP on the same basis as the conflicts would be imputed to other lawyers working in a law firm. Of course, the screening measures, which in a law firm would be effective, should also be adequate if implemented in an MDP. Finally, the debate concerning MDPs has focused attention on the regulations that currently hamper lawyers conducting a multijurisdictional practice in law firms and corporate legal departments. The restrictions on lawyers practicing in traditional settings certainly should not be more onerous than those envisioned for lawyers practicing in MDPs.