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THE DELIVERY OF LEGAL SERVICES THROUGH MULTIDISCIPLINARY PRACTICES

James M. McCauley

I. UNAUTHORIZED PRACTICE OF LAW (UPL)

During the last decade, the "Big Six"³⁰⁵ accounting firms entered into the legal services market overseas by establishing, acquiring, or forming ties with law firms around the world. These entities or business relationships have been called "multidisciplinary practices" or MDPs. Unlike the United States, many European countries do not prohibit partnerships and fee splitting arrangements between lawyers and nonlawyers.³⁰⁶ The February 1998 issue of the American Bar Association Journal published an article entitled "Squeeze Play" describing a turf war between the major accounting firms and lawyers practicing law in Europe.³⁰⁷ KPMG Peat Marwick, Arthur Andersen, Ernst & Young, Price Waterhouse, and Coopers & Lybrand and other accounting firms now offer a bundle of services such as appraisals, litigation support, alternative dispute resolution,³⁰⁸ estate planning, business planning and "international tax practice."³⁰⁹ These services are often rendered by attorneys who are employees of the nonlawyer accounting firm and many argue that such activity is the "unauthorized practice of law" (UPL). A lay corporation, i.e., a corporation owned by nonlawyers, cannot employ attorneys to provide legal services to its customers without engaging in unauthorized

Ethics Counsel, Virginia State Bar.

³⁰⁵ The "Big Six" became the "Big Five" when Price Waterhouse and Coopers & Lybrand merged. The Big Six accounting firms were Arthur Andersen L.L.P. ("Andersen"), Coopers & Lybrand L.L.P. ("Coopers"), Deloitte & Touche L.L.P. ("Deloitte & Touche"), Ernst & Young L.L.P. ("Ernst & Young"), KPMG Peat Marwick L.L.P. ("KPMG"), and Price Waterhouse L.L.P. ("Price Waterhouse"). See Brad Dunn, *Accounting Today Top 100 Tax and Accounting Firms*, Acct. Today, Mar. 17-Apr. 6, 1997, at 25 (referring to the Big Six, the six accounting firms with highest revenues per year).

³⁰⁶ See *infra*, Notes 9-12, *infra*. See generally *Current Reports*, 14 Law. Man. Prof. Conduct (ABA/BNA) 542 (11/25/98); Ward Bower, *The Case for MDPs: Should Multidisciplinary Practices Be Banned or Embraced?* ABA Law Practice (July/Aug 1999) reprinted at <http://web.archive.org/web/20080508221351/http://www.abanet.org/lpm/magazine/mdp-bowe995.html>.

³⁰⁷ John Gibeaut, *Squeeze Play*, 84 A.B.A.J., 42,45 (1998).

³⁰⁸ Mediation and arbitration are not *per se* the "practice of law." VSB Comm.on Legal Ethics, Legal Ethics Op. 1368 (1990); VSB Comm. on Unauthorized Practice, UPL Op. 92 (1986). (illustrating that one need not be lawyer to serve as a mediator in Virginia) Va. Code Ann. §§ 8.01-581.21; 8.01-576.4 (Michie Repl. Vol. 1992).

³⁰⁹ Gibeaut, *supra* Note 3 at 43.

practice.³¹⁰ Some of the services offered by these big accounting firms involve the giving of legal advice and drafting of legal instruments, activities regarded by the legal profession as solely within its purview, subject to some limited exceptions. The ABA Journal article sounded a battle cry for the legal profession to address this encroachment by the accounting profession.

The ABA Journal article reported, for example, that the accounting firm of Deloitte & Touche has several hundred lawyers on staff in the United States.³¹¹ The "Big Five" accounting firms-- Arthur Andersen & Co., Deloitte & Touche, Ernst & Young, KPMG Peat Marwick, and Price Waterhouse Coopers- employ thousands of lawyers around the world to serve their clients. The "Big Five" now employ as many lawyers in the United States as they do in the rest of world combined. Offering generous salaries and benefits, the "Big Five" accounting firms are siphoning lawyers from established private practices.³¹² Although MDPs have escaped the attention of the legal community in United States for some time, the "Big Five" have already penetrated the legal services market in Europe and their market share is growing.³¹³ In 1996, Arthur Andersen acquired one of Spain's largest law firms and has also established a "captive" law firm in London.³¹⁴ Ernst and Young³¹⁵ and KPMG³¹⁶ have followed suit in France, Germany and the Netherlands.

³¹⁰ *Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond*, 167 Va. 327, 189 S.E. 153 (1937). More recent decisions have upheld the general rule that a nonlawyer corporation cannot employ staff attorneys to provide legal advice or services to its customers. See *Lawline v. American Bar Ass'n*, 738 F. Supp 288 (N.D. Ill. 1990), *aff'd* 956 F.2d 1378 (7th Cir. 1992), *cert. denied* 510 U.S. 992 (1993). A limited exception is granted to liability insurance companies permitting the employment of in-house staff counsel to defend insured in civil litigation. V.S.B. Comm. on Unauthorized Practice, U.P.L. Op. 60 (1985).

³¹¹ See generally Gibeaut, *supra* Note 3.

³¹² *Current Reports*, 14 ABA/BNA Law. Man. Prof. Conduct 542 (11/25/98).

³¹³ Gibeaut, *supra* Note 2. See also 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, 198-203 (1997) (describing legal activities of "Big Six" accounting firms in Europe)(hereinafter "Morello"); Ward Bower, *The Case for MDPs: Should Multidisciplinary Practices Be Banned or Embraced?* ABA Law Practice (July/Aug 1999) reprinted at <http://web.archive.org/web/20080508221351/http://www.abanet.org/lpm/magazine/mdp-bowe995.html>.

³¹⁴ Arthur Andersen's law firm in the United Kingdom is called Garrett & Co. ("Garrett") with offices in seven cities, including London, Reading, Leeds, and Manchester. Garrett competes with other law firms for high-profile corporate work, including banking, intellectual property, and real estate. Garrett aggressively recruits lawyers from other English law firms and competes with established law firms for sophisticated corporate work involving major transactions. Andersen has established a law practice in the Netherlands under the name Wouters Advocaten. In Spain, Andersen ALT recently merged with a Spanish law firm to form J & A Garrigues Andersen y Cia. In 1992, Andersen acquired the Paris office of the English law firm S.G. Archibald, acquiring an established corporate and intellectual property practice to complement its tax work. As a

As of 1998, the "Big Five" employed more than four hundred fifty thousand people worldwide with Price WaterhouseCoopers employing 140,000 of those. The biggest law firm in the world, Baker and McKenzie, had less than 6,000 employees. Arthur Andersen had 58,000 employees; Deloitte & Touche--72,000; Ernst and Young--more than 80,000; and KPMG employs more than 85,000 people.³¹⁷ The "Big Five" are seeking lawyers not only for tax practice but also attorneys with expertise in corporate law, securities, mergers and acquisitions, employment law, employee benefits, environmental law, intellectual property, health care, commercial real estate and regulatory law. Multidisciplinary practices (MDPs) are growing rapidly in some countries where the law permits law firms to form associations with accounting firms. In the future, competition from MDPs may emerge not only from accounting firms, but also from financial services organizations such as American Express, banks, and insurance companies.³¹⁸

What is a multidisciplinary practice? A MDP is a partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has one, but not all, of its purposes the delivery of legal services to a client (other than the MDP itself) or that holds itself out to the public as providing non-legal, as well as legal,

result of the acquisition, the firm grew from approximately fifty lawyers to over 240 attorneys as of 1996. Morello, *supra*, at 199-200.

³¹⁵ Ernst & Young L.L.P. ("Ernst & Young") has several alliances with Dutch law firms and has legal practices in Switzerland, Spain, Germany, and France. In addition, Ernst & Young has links to a Canadian law firm and would establish a MDP in Canada if the prohibition against MDPs is lifted. Ernst & Young is considering a law practice in the United Kingdom *Id.* at 202-03. Last year, the Law Society of Upper Canada recommended a prohibition of employment of lawyers by organizations owned by nonlawyers. Meanwhile, in England, Parliament has recently lifted a ban on MDPs, giving the Law Society six months to figure out how to include nonlawyers in the delivery of legal services in that country. Mary Smith Judd, *Accounting Firms are Gobbling Up Law Firms Abroad*, The Florida Bar News, Mar. 15, 1999 at 16-17.

³¹⁶ KPMG Peat Marwick L.L.P. ("KPMG") has a large legal and tax division in France named KPMG Fidal Peat International ("KPMG Fidal"). In 1991, KPMG Fidal had 760 lawyers in 130 offices throughout France, practicing a variety of legal and tax work on behalf of small and medium-sized French companies. At that time, sixty-one percent of KPMG Fidal's work was tax-related and thirty-nine percent legal. KPMG Fidal's legal work included mergers and acquisitions, restructurings, joint ventures, and routine contract work. KPMG Fidal is one of the largest law firms in Europe. KPMG also formed an alliance in Sweden with new law firm KPMG Wahlin Advokatbyra. Morello, *supra* at 201-02.

³¹⁷ Jay Foonberg, *The Feeding Frenzy*, (visited Dec. 4, 1998) <http://web.archive.org/web/20080508221351/http://foongerglaw.com/aba.hod.html>. See also David Segall, *Tax Advisers Hope to Cross a Line and Compete for Legal Clients*, Wash. Post, Nov. 12, 1998, at F1 ("Ernst and Young employs 3,300 tax lawyers worldwide, and 850 lawyers in the United States... PricewaterhouseCoopers is home to some 3,000 lawyers around the world...").

³¹⁸ *Id.*

services. The MDP is an arrangement by which a law firm joins with other professional groups to provide services, including legal services, and there is a direct or indirect sharing of profits.³¹⁹

Under the current ethics rules, MDPs are prohibited because a lawyer cannot split legal fees or form a partnership with a non-lawyer if the business entity is engaged in any activity which is the practice of law. Such practices violate Disciplinary Rules 3-102 and 3-103 of the Code of Professional Responsibility and Rules of Professional Conduct 5.4(a), (b).³²⁰ When questioned as to the ethical propriety of their practices, the accounting firms assert that they do not practice law. Instead, they claim that they are merely consulting or giving tax advice which is not the practice of law.³²¹ The accounting firms point to the legal profession's own UPL rules for support. Their position is well taken as it relates to the "tax practice" typically handled by the an accounting firm.

The giving of tax advice necessarily involves many branches of law and requires a familiarity with many non-tax legal principles on which the tax issues are based. Legal and accounting aspects of "tax practice" are interrelated and overlap, sometimes to the point they cannot be distinguished.³²² Generally speaking, tax advice or planning is not considered to be the unauthorized practice of law.³²³ Thus, under the profession's own rules and definitions, it is difficult to distinguish "tax advice" from "legal advice."

³¹⁹ ABA Comm. on Multidisciplinary Practice, Report to the House of Delegates (Jun. 1999), found at <http://web.archive.org/web/20080508221351/http://www.abanet.org/cpr/mdprecommendation.html>.

³²⁰ Model Code of Professional Responsibility DR 3-102, 3-103 (1980). Model Rules of Professional Conduct Rule 5.4(a), (b) (1992). *But see* District of Columbia Rules of Professional Conduct Rule 5.4(b) (The District of Columbia stands alone with a unique rule permitting non-lawyers to hold a financial interest or managerial position in a law firm, provided the sole purpose of the partnership is to provide legal services to clients; that the nonlawyers abide by the rules of professional conduct governing lawyers; and that lawyers accept responsibility for the actions of the nonlawyers).

³²¹ The ABA Commission on Multidisciplinary Practice observed:

Because of the restrictions imposed by most states' unauthorized practice of law statutes, many individuals who graduated from an accredited law school, hold a state license to practice to law, and are presently employed by professional services firms must disingenuously claim to be "practicing consulting" not law. They make this claim 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.

ABA Comm. on Multidisciplinary Practice, PostScript to February 2000 Midyear Meeting, found at <http://web.archive.org/web/20080508221351/http://www.abanet.org/cpr/postscript.html>.

³²² Va. R. Sup. Ct., Pt. 6 § 1, UPR 5-1.

³²³ Va. R. Sup. Ct., Pt. 6 § 1, UPR 5-4.

While the UPL rules and the definition of the "practice of law" may differ in some respects from state to state, all jurisdictions agree that the purpose of UPL enforcement - to protect the public against the rendition of services by unqualified persons.³²⁴ However, very few disciplinary or UPL complaints are made by the business clients served by these accounting firms. The accounting firms point to this as evidence that the legal profession's concern about "public protection" is purely rhetorical, and overshadowed by self-interest and "turf protection."

There is some clarity in the document preparation area. Accounting firms, for example, are prohibited from drafting articles of incorporation or wills and trusts for their clients.³²⁵ However, it is not the unauthorized practice of law to sell or distribute an unexecuted sample legal form or document, as long as the nonlawyer does not assist the member of the public in completing the document. Specimen forms for leases, wills, deeds and other legal instruments are readily available in bookstores and on the Internet and the sale of such documents to the public cannot be enjoined by UPL enforcement.³²⁶ While nonlawyer accountants may be called upon by their clients to provide specimen language for legal instruments, they customarily turn over such work to a client's legal counsel for review.³²⁷ Ronald E. Friedman, J.D., Ernst & Young, LLP, "Multidisciplinary Partnerships: Attorneys Working in Professional Service Firms" 24th National Conference on Professional Responsibility (1998). As long as the work of a nonlawyer consultant is reviewed by a licensed attorney, who determines what to pass on to the client, the activity of the nonlawyer is not UPL.³²⁸

A. Preemptive Effect of Federal Law

Many federal agencies permit nonlawyers to represent parties before that particular agency.³²⁹ The Supreme Court of Virginia's UPL rules

³²⁴ See Model Rules of Professional Conduct Rule 5.5 cmt. 1 (1992).

³²⁵ See Va. UPL Op. No. 67 (1984); Va. UPL Op. No. 73 (1985).

³²⁶ See *id.*

³²⁷ Ronald E. Friedman, J.D., Ernst & Young, LLP, "Multidisciplinary Partnerships: Attorneys Working in Professional Service Firms" 24th National Conference on Professional Responsibility (1998).

³²⁸ See Va. UPL Op. No. 107 (1987).

³²⁹ A partial list of some federal agencies allowing "qualified representatives" (non-lawyers) to act on behalf of a party before that agency includes:

- a. Department of Treasury, Internal Revenue Service and Tax Court – 31 U.S.C. § 330; 5 U.S.C. § 500; 31 C.F.R. §§ 10.32-33 (1997); IRC § 7452 and Tax Court Rule of Practice and Procedure 200.
- b. Immigration and Naturalization Service – 8 C.F.R. § 3.1(d)(3) (extremely limited).
- c. Department of Energy – 10 C.F.R. § 205.3.
- d. Social Security Administration – 20 C.F.R. § 416.1400.
- e. Drug Enforcement Agency – 21 C.F.R. § 1316.50.
- f. National Labor Relations Board – 29 C.F.R. § 102.38.
- g. Equal Employment Opportunity Commission – 29 C.F.R. § 1601.7.

expressly defer to such agencies. Nonlawyers may provide advice or services under circumstances that require the use of legal knowledge or skill in the application of any law, federal, state or local, or administrative regulation or ruling, provided the rules of such agency permit the activity and the nonlawyer is acting within the scope of his or her practice authorized by such agency. UPR 9-102. Indeed, a state bar cannot restrict or interfere with practice rights conferred under federal law.³³⁰

Thus, attorneys who work for CPA firms assert that they do not practice law, but rather practice tax. The practice of tax, they argue, is distinct from the practice of law because the federal government has mandated that capable and qualified non-lawyers be permitted to represent taxpayers, both before the IRS and the Tax Court.³³¹ CPA firms are permitted to draft opinion letters for clients which interpret and apply the Internal Revenue Code and other pertinent tax authorities.³³² In addition to the preparation of tax returns, nonlawyer practitioners may represent taxpayers and practice before the IRS in administrative matters such as tax examination and appeals. CPA firms routinely prepare private letter ruling requests, requests for 9100 relief, requests to change accounting methods and other forms of administrative relief. In many instances, accountants are better qualified and proficient to handle this work than lawyers.

Section 7452 of the Internal Revenue Code provides that taxpayers shall be represented according to the rules of practice prescribed by the Tax Court and that no person shall be denied admission to practice because he or she is not a member of any profession. Tax Court Rule 200 permits the following individuals to practice before the Tax Court: an attorney (without examination) or non-lawyers (if they pass a written and/or oral examination).

B. Back in the USA

Meanwhile, the organized bar in this country continues to enforce the UPL rules against the big accounting firms. Texas launched an UPL investigation of Arthur Andersen and Deloitte & Touche, on allegations that they are paying lawyers on their staffs to provide legal services and advice to clients in Texas.³³³ The Texas Bar also charged that the lawyers in these firms were sharing their legal fees with nonlawyer partners. But the rules are violated only if the lawyers have formed a partnership with nonlawyers for the purpose of practicing law, which the accounting firms

h. Health and Human Services – 45 C.F.R. § 205.10(a)(3)(iii).

³³⁰ See, e.g., *Sperry v. Florida*, 373 U.S. 379 (1963) (non-lawyer practitioner before Patent & Trademark Office improperly enjoined by Florida Bar).

³³¹ See 5 U.S.C. § 500; 31 U.S.C. § 330; 31 C.F.R. § 10.33; 26 U.S.C. § 7452 and Tax Court Rule of Practice and Procedure 200.

³³² See 31 C.F.R. § 10.33 (1997).

³³³ Elizabeth MacDonald, *Legal Beat: Texas Probes Andersen, Deloitte on Charges of Practicing Law*, Wall St. J., May 18, 1998, at B15.

deny. Moreover, they assert that the fees charged and collected for work performed by in-house counsel are not "legal fees." Ultimately, Texas dropped the charges that Arthur Andersen had engaged in UPL.³³⁴ The skirmish between Texas and Andersen underscored the overlap of tax-advisory services that have been offered traditionally by both lawyers and accountants.

The intent of the big accounting firms with respect to legal business in the United States seems apparent. The legislation in Congress to overhaul the IRS, which President Clinton recently signed into law, included a provision lobbied for by the accounting firms that would extend the attorney-client privilege to communications between a taxpayer and a federally authorized tax practitioner.³³⁵ This newly created privilege removes one advantage lawyers had over accountants in dealing with their respective clients. Prior to this, because attorneys working for accounting firms do not "practice law," a taxpayer/client's communications with them were not protected by the attorney-client privilege under federal law.³³⁶

UPL enforcement against this "assault" on the legal market by the accounting profession may prove quite challenging. These "multidisciplinary" professional service firms offer a blend of expertise in legal, accounting and business matters that many business clients find attractive. The dichotomy between "legal advice" and "tax advice" is vague at best, making criminal enforcement of the UPL rules all the more difficult. We live in a rule-based society where virtually every phase of our lives is government regulated and virtually all forms of advice, discussion and consultation have legal components. Vigorous UPL prosecution of other nonlawyer professionals for providing advice to clients within the scope of their expertise raises commercial speech infringement and unfair trade restraint issues.

Moreover, the "public protection" argument which favors UPL enforcement is muted by the fact that the employees of these professional service firms, lawyers and accountants alike, are professionals holding advanced degrees, are regulated and licensed by the state, subject to discipline for misconduct and typically covered under some form of malpractice or professional liability insurance. Also, because the

³³⁴ *Tax Report*, Wall St. J., July 29, 1998, at A1.

³³⁵ See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685, 750 (July 23, 1998) (Section 3411 of the Act extends the attorney-client privilege to communications between a taxpayer and a federally authorized tax practitioner).

³³⁶ See *U.S. v. Arthur Young*, 465 U.S. 805 (1984). See also *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961); and *Bernardo v. Commissioner*, 104 T.C. 677 (1995) (communications between an accountant and a client would often be treated as privileged if the accounting firm were engaged by the client's attorney, but not if the accountant was hired independent of any legal representation).

likelihood of harm caused by nonlawyer professionals dealing with legal questions within the context of their own area of professional expertise is quite remote, UPL prosecutions by the organized bar may trigger public and legislative scrutiny of the bar's motives.

II. THE ETHICAL CONSIDERATIONS OF MULTIDISCIPLINARY PRACTICES

As an alternative to enforcing the prohibition against unauthorized practice, bar officials could attempt to regulate MDPs under the Code of Professional Responsibility and the Model Rules of Professional Conduct. In addition to the ethical prohibitions against fee sharing and partnerships with nonlawyers, there are other serious ethics issues. Lawyers who participate in such professional service firms, despite arguments to the contrary, remain subject to the applicable rules of professional conduct of the jurisdiction in which they are admitted to practice law. While accounting firms are subject to their own professional regulation and rules of professional conduct, their rules concerning conflicts of interest and preservation of client confidences and secrets are substantially weaker and do not protect the client as well as the ethics rules governing lawyers. Thus, lawyers employed by these professional service firms may nevertheless find themselves subject to discipline for breaches of legal ethics, even though their conduct may have comported with applicable ethics standards for the accounting profession. In addition, lawyers employed by such firms cannot allow the influence of nonlawyers to influence or compromise their independent professional judgement.

In the United States, jurisdictions adopting either the ABA Model Code³³⁷ or Model Rules³³⁸ format prohibit MDPs. The District of Columbia is the only jurisdiction in this country that permits lawyers and nonlawyers to enter into partnerships with, or share ownership of, other entities that provide legal services, if certain requirements are satisfied.³³⁹ In the

³³⁷ The Model Code was adopted by the ABA in 1969 as a model code of regulation of the conduct of lawyers. Virginia adopted the Model Code format with its Disciplinary Rules (DRs) and Ethical Considerations (ECs) in 1971. Virginia's version of the Code of Professional Responsibility can be found online at <http://web.archive.org/web/200805082211351/http://www.vsb.org/profguides/codeprof.html>.

³³⁸ The Model Rules of Professional Conduct ("Model Rules") were adopted by the ABA in 1983 to replace the Model Code. Virginia revised its existing Code of Professional Responsibility in 1983 to embrace some of the changes made by the ABA Model Rules, but retained the old Code format. Fifteen years later, in 1998, the Virginia State Bar filed a petition with the Supreme Court of Virginia to adopt the format of the ABA Model Rules. On January 25, 1999, the Supreme Court of Virginia adopted the Virginia Rules of Professional Conduct to become effective January 1, 2000. These rules are online at <http://web.archive.org/web/200805082211351/http://www.vsb.org/profguides/modrules.html>.

³³⁹ See District of Columbia Rules of Professional Conduct Rule 5.4.

United States, the Model Rules and the Model Code prohibit nonlawyers from holding an ownership interest in law practices.³⁴⁰ The Model Code forbids a lawyer from entering into a partnership with a nonlawyer if the partnership intends to practice law. In addition, the Model Code does not permit a lawyer to practice in an organization that practices law for a profit if a nonlawyer holds a financial interest in the organization, a nonlawyer is an officer of the organization, or a nonlawyer has the right to direct a lawyer's professional judgment.³⁴¹

The provisions in the Model Rules governing the interaction between lawyers and nonlawyers are substantially identical to the applicable Model Code disciplinary rules. Rule 5.4 24 prohibits lawyers from sharing fees for legal services and forming partnerships to provide legal services with nonlawyers. In addition, Rule 5.4 forbids lawyers from practicing law in an organization practicing for profit if a nonlawyer owns an interest, is a corporate officer, or has the right to direct the lawyer's professional judgment. The Model Code Ethical Considerations ("ECs") explain that lawyers should not practice law in association with a nonlawyer because lawyers should not assist or encourage nonlawyers to practice law.³⁴² The

³⁴⁰ Model Rules of Professional Conduct Rule 5.4 (1996) [hereinafter Model Rules] (fee-sharing, lawyer-nonlawyer partnership, and independent professional judgment); Virginia Code of Professional Responsibility [hereinafter VCPR], DR 3-102(A) (fee-sharing with non-lawyers); DRs 3-103(A) (forming partnerships with non-lawyers), DR 5-106 (C) (practicing in partnership controlled by non-lawyers (lawyer-nonlawyer partnership); DR 5-106 (B) (independent professional judgment when third party pays lawyer).

³⁴¹ *See id.*

³⁴² Rule 5.4 Professional Independence of a Lawyer

- (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 time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) a lawyer who undertakes to complete unfinished legal business of a deceased, disabled, or disappeared lawyer may pay to the estate or other representative of that lawyer that portion of the total compensation that fairly represents the services rendered by the deceased, disabled, or disappeared lawyer; 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 consists 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 as provided in (a)(3) above, or except that a fiduciary representative of the estate

comment to Rule 5.4 adds that the limitations expressed in the rule serve to protect lawyers' independent professional judgment.³⁴³

In 1994, the Virginia State Bar Standing Committee on Legal Ethics issued an opinion involving D.C. Rule 5.4 and a multidisciplinary law firm in D.C. which included a non-lawyer partner and a Virginia admitted attorney.³⁴⁴ The Virginia lawyer's inquiry was whether he could ethically practice law in a partnership which included non-lawyer partners. The committee was faced with a conflict between DR 3-103(A) which prohibits lawyers from practicing law with non-lawyer partners, and D.C.'s Rule 5.4 which permitted such practice. Applying DR 1-102(B)'s choice of law provisions, the committee concluded that D.C.'s more permissive rule would enable the Virginia attorney to practice in that firm in D.C., despite DR 3-103(A)'s prohibition. However, the law firm could not practice law in Virginia, even through the Virginia licensed attorney. The Ethics Committee cited ABA Formal Opinion 91-360 (1991) which addressed this same issue, and reached the same conclusion.

A. Conflicts of Interest

Lawyers practicing in MDPs have potential conflicts of interest problems. For example, a lawyer in a MDP may be inclined to refer a client to other professionals in the same firm although the client may be better served by someone outside the firm. The Model Rules prohibit a lawyer from representing a client if the client's representation may be materially limited by the lawyer's own interests or by the lawyer's responsibilities to others, unless the client consents and the lawyer reasonably believes the representation of the client will not be adversely affected.³⁴⁵ In addition, the Model Rules forbid a lawyer from transacting business with a client or acquiring an adverse ownership, possessory, security, or other pecuniary interest to that of a client unless the

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.

Virginia Rules of Professional Conduct Rule 5.4.

³⁴³ Virginia Code of Professional Responsibility EC 3-8(1999). Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in his firm or practice may not be paid to his estate or specified persons such as his widow or heirs. In like manner, profit-sharing plans of a lawyer or law firm which include nonlawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law. Rule 12.8.6 (p. 85-86).

³⁴⁴ Model Rules of Professional Conduct, comment to Rule 5.4 (1996); *see also* Rule 12.8.6 at 85-6.

³⁴⁵ VSB Comm. on Legal Ethics, Legal Ethics Op. 1584 (1994); *see also* Rule 12.8.6 at 86.

transaction is fair and reasonable to the client and the lawyer discloses the information to the client.³⁴⁶ Similarly, the Code of Professional Responsibility forbids a lawyer from representing a client, absent full disclosure and the client's consent, if the lawyer's financial, business, property, or personal interests will or reasonably may affect the lawyer's professional judgment.³⁴⁷ In addition, the Code instructs a lawyer not to enter into a business transaction with a client if they will hold differing interests and the client expects the lawyer to represent the client in that transaction, unless the lawyer fully discloses the lawyer's position to the client and the client consents.³⁴⁸

However, the bar has permitted lawyers to cure personal interest conflicts under DR 5-101(A) with consent of the client after full and adequate disclosure of any personal, business or financial interest.³⁴⁹ Presumably, in many instances, a lawyer working in a MDP can abide by the same conflicts rules. A more difficult issue is the MDP's representation of multiple clients whose interests are potentially or actually adverse, say, for example, the target and surviving entities in a merger and acquisition. An important distinction between the multiple client conflicts rules for lawyers and the conflicts rules for CPAs is that an accountant's conflict of interest is not automatically imputed to the other members of the accounting firm.³⁵⁰

Suppose a married couple used a MDP for their financial planning and tax work, including the preparation of joint returns. Thereafter, the husband wishes to consult with an attorney member of the MDP about a divorce and division of marital assets. Should the MDP be able to represent the husband over the objection of the wife? How do the big accounting firms handle these conflicts? The VSB Committee on Legal Ethics held that a lawyer acting in the dual capacity of accountant and lawyer could not undertake the representation of husband, absent the wife's consent, before the IRS on a tax matter that would adversely affect the interests of the wife, whom the attorney had represented in the past jointly with husband in the preparation and filing of their tax returns.³⁵¹ In

³⁴⁶ Model Rules of Professional Conduct, Rule 1.7b (1996).

³⁴⁷ Model Rules of Professional Conduct, Rule 1.8a (1996).

³⁴⁸ Virginia Code of Professional Responsibility, DR 5-101A (1999).

³⁴⁹ Virginia Code of Professional Responsibility, DR 5-104A (1999).

³⁵⁰ Virginia Code of Professional Responsibility, DR 5-101A (1999).

³⁵¹ The AICPA Model Code of Professional Conduct provides in part that:

A conflict of interest may occur if a member performs a professional service for a client or employer and the member or his or her firm has a relationship with another person, entity, product or service that could, in the member's professional judgment, be viewed by the client, employer or other appropriate parties as impairing the member's objectivity. If the member believes that the professional service can be performed with objectivity, and the relationship is disclosed to and consent obtained from such client, employer or other appropriate

the opinion, the committee stated that the wife was to be treated as a "former client" for purposes of DR 5-105(D) and an attorney must be responsive to the Code of Professional Responsibility when functioning in a dual capacity as lawyer and accountant.³⁵² So, may the MDP use an "ethics screen" and assign husband's case to another member in the firm, over the former client's objection? Not under the conflict of interest rules for the legal profession.

B. Confidentiality

Multidisciplinary practices threaten confidentiality because there is a serious risk that nonlawyers will learn client confidences or that nonlawyer partners subject to confidentiality rules will inadvertently waive the attorney-client privilege. Model Rule 1.6 generally forbids lawyers from revealing client confidences unless authorized by the client or necessary for representation of the client.³⁵³ DR 4-101 of the Virginia Code of Professional Responsibility also prohibits a lawyer from revealing the client's confidences or secrets.³⁵⁴ Uncertainty exists as to the protection of communications between clients and non-lawyer partners in MDPs. Some proponents of MDPs assert, in response to arguments that they are "practicing law," that the services which MDPs provide do not constitute the "practice of law." If attorneys that work for professional service firms do not practice law, then a client's confidential communications with that attorney will not be protected by the attorney-client privilege.³⁵⁵ Moreover, Virginia has yet to recognize any "accountant-client privilege" that would protect communications between clients and employees of MDPs.³⁵⁶

The attorney-client privilege requires the creation of an attorney-client relationship, and a communication between attorney and client in which legal advice or legal services are sought or being performed. Inserting an attorney into the middle of a situation does not create an attorney-client privilege if the facts do not demonstrate the lawyer's role as a legal advisor.³⁵⁷ The attorney-client privilege does not apply when the client

parties, the rule shall not operate to prohibit the performance of the professional service. When making the disclosure, the member should consider Rule 301, *Confidential Client Information*.

AICPA Model Code of Professional Conduct, Rule 102-2 (1988).

³⁵² VSB Comm. on Legal Ethics, Legal Ethics Op. 1634 (1995).

³⁵³ *Id.*

³⁵⁴ Model Rules of Professional Conduct, Rule 1.6 (1996).

³⁵⁵ Virginia Code of Professional Responsibility, DR 4-101 (1999).

³⁵⁶ See *United States v. Arthur*, 465 U.S. 805 (1984). (holding that communications between an accountant and a client would often be treated as privileged if the accounting firm was engaged by the client's attorney, but not if the accountant was hired independent of any legal representation; see also *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961); *Bernardo v. Commissioner*, 104 T.C. 677 (1995).

³⁵⁷ Charles E. Friend, *The Law of Evidence in Virginia* § 7-6 (4th ed. 1993) (reprinted in *Cum. Supp.* 1998); Rule 3.4; 15.

consults directly with a non-lawyer for advice. Thus, if a client of a MDP goes first to a non-lawyer professional for advice, the communications between that client and non-lawyer professional are not protected under the attorney-client privilege. This would hold true even though an attorney in the MDP may later rely on such information in giving legal advice to the client. On the other hand, if a client goes first to an attorney for legal advice, the attorney-client privilege is extended to a non-lawyer accountant hired by the attorney, where the communication by the client to the non-lawyer accountant was to assist the attorney in advising the client.³⁵⁸ MDPs must consider these issues when providing law related services and disclose to their clients the potential legal ramifications. Some argue that this problem does not, however, justify prohibiting MDPs. Clients simply need to know before they reveal information that might fall into their adversaries' hands, that such information is not protected under the attorney-client privilege.

Finally, confidentiality becomes a problem if the MDP undertakes to perform an independent audit, such that it may owe duties to disclose information to a number of parties, which disclosure may hurt or embarrass an existing or former client. Though accounting firms are subject to an ethical duty to protect client confidentiality, they must also reconcile that duty with their obligations of independence and integrity in the performance of auditing functions. Independence impairments cannot be cured by disclosure and consent of the parties.³⁵⁹ It would be difficult, if not impossible, for a MDP to accept an auditing engagement while simultaneously performing a "management consultation" involving the same corporation. In its consulting role, the MDP might learn of information that must be disclosed in order to objectively and independently perform its auditing engagement. There is an inherent conflict between the MDP's duty of confidentiality in the consulting function and its duty to make required disclosures when performing the auditing function.

Other confidentiality problems may exist, for example, if a family law MDP firm composed of lawyers, social workers and health care providers were to learn of suspected child abuse by a client. The social workers and health care providers have an obligation by law to report suspected child abuse,³⁶⁰ but the lawyer would not and, in fact, must preserve the confidentiality of such information.³⁶¹

³⁵⁸ See *United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995).

³⁵⁹ See *United States v. Kovel*, 296 F. 2d 918 (2d Cir. 1961).

³⁶⁰ The following are examples, not all-inclusive, of situations that should cause a member [of a CPA firm] to consider whether or not the client, employer, or other appropriate parties could view the relationship as impairing the member's objectivity:

- A member has been asked to perform litigation services for the plaintiff in connection with a lawsuit filed against a client of the member's firm.

C. Fee-Sharing With Nonlawyers

Rules governing the sharing of fees received for legal services between lawyers and nonlawyers affect MDPs. Model Rule 5.4 generally prohibits lawyers from sharing fees for legal services with nonlawyers.³⁶² The Virginia Code of Professional Responsibility also generally prohibits a lawyer or law firm from sharing legal fees with a nonlawyer, except in specified situations.³⁶³ Lawyers today generate and share fee awards with non-lawyer public interest organizations and groups on whose behalf they successfully litigate civil rights, environmental, consumer and other public interest claims. While such arrangements are protected under the constitutional freedom of association, are lawyers in purely commercial partnerships more likely to lapse into ethical misconduct, simply because they share fees with nonlawyer members in their organization?

MDPs can probably overcome violation of the bar's rules prohibiting fee-sharing with non-lawyers without much difficulty. First, some will argue simply that the services performed by their in-house lawyer is not "legal advice" and that the services performed are not legal services. Consequently, the fees charged and collected for this work are not "legal fees." Second, the lawyers do not actually "split" the fees with the non-lawyer; rather, the MDP bills the client directly and pays the lawyer a salary out of the general revenues of the firm. This is the way lawyers pay nonlawyer staff in a traditional law firm and is not improper fee sharing with such nonlawyers. Third, the division of a MDP's profits with

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- A member has provided tax or personal financial planning (PFP) services for a married couple who are undergoing a divorce, and the member has been asked to provide the services for both parties during the divorce proceedings.
 - In connection with a PFP engagement, a member plans to suggest that the client invest in a business in which he or she has a financial interest.
 - A member provides tax or PFP services for several members of a family who may have opposing interests.
 - A member has a significant financial interest, is a member of management, or is in a position of influence in a company that is a major competitor of a client for which the member performs management consulting services.
 - A member serves on a city's board of tax appeals, which considers matters involving several of the member's tax clients.
 - A member has been approached to provide services in connection with the purchase of real estate from a client of the member's firm.
 - A member refers a PFP or tax client to an insurance broker or other service provider, which refers clients to the member under an exclusive arrangement to do so.
 - A member recommends or refers a client to a service bureau in which the member or partner(s) in the member's firm hold material financial interest(s).

The above examples are not intended to be all-inclusive.

AICPA Model Code of Professional Conduct Rule 102-2, (1988).

³⁶¹ Va. Code Ann. § 63.1-248.3 (Michie 1995 & Cum. Supp. 1999); Rule 12.3.

³⁶² Model Rules of Professional Conduct Rule 5.4 (1996).

³⁶³ Virginia Code of Professional Responsibility DR 3-102 (1999).

nonlawyer equity partners is arguably not fee-splitting in the traditional sense, since it is not client nor case specific, but merely the division of all profit in the aggregate. Existing rules, for example, authorize the sharing of profits with nonlawyer employees.³⁶⁴

D. Professional Independence and Nonlawyer Control Over the Delivery of Legal Services

Finally, ethics rules addressing the management of law firms by nonlawyers impact MDPs. Model Rule 5.4(d) forbids lawyers from practicing in organizations that have nonlawyer corporate directors or officers, or that give nonlawyers the right to direct or control lawyers' professional judgment.³⁶⁵ The ABA Code of Professional responsibility has the same restrictions as the Rules of Professional Conduct.³⁶⁶ The restrictions are designed to prevent nonlawyers from interfering with lawyers' professional judgment.

The purpose of DR 5-106 is to ensure that a lawyer's professional judgment on behalf of a client is not influenced when someone other than the client is paying the lawyer for the services. Presumably, DR 5-106 only applies to lawyers acting in their professional capacity in a lawyer-client relationship, which may or may not exist in the case of a MDP. In addition, a finder of fact would have to conclude that non-lawyers in an organization have the right to control the professional legal judgments of the lawyers who work for it. The MDP could adopt a management rule or policy that nonlawyer owners may not, directly or indirectly, control the professional legal judgment of the lawyers employed by the MDP, while permitting the nonlawyer to participate in management decision making in all other respects. If the organized bar insists that nonlawyer ownership of a MDP is a per se rule violation, then the bar should reexamine its formal opinions in regard to in-house staff attorneys employed by liability insurance companies to defend policyholders.³⁶⁷ Both opinions were approved by the Supreme Court of Virginia and implicitly trust that lawyer employed by a lay corporation will manage to exercise independent professional judgement in that environment. Shouldn't lawyers employed by a MDP be expected to do likewise? Lawyers in legal aid are governed by policies and dictates of Legal Services Corporation and governing boards which include lay members. Are legal aid lawyers violating DR 5-106?

³⁶⁴ Virginia Code of Professional Responsibility DR 3-102A(3) (1999); Model Rules of Professional Conduct Rule 5.4a(3) (1996).

³⁶⁵ Model Rules of Professional Conduct Rule 5.4d (1996).

³⁶⁶ Virginia Code of Professional Responsibility DR 5-106 (1999).

³⁶⁷ See VSB Comm. on Unauthorized Practice, UPL Op. 60 (1985); VSB Comm on Legal Ethics, Legal Ethics Op. 598 (1985) (showing both opinions were approved by the Supreme Court of Virginia and implicitly trust that lawyers employed by a lay corporation will manage to exercise independent professional judgment in that environment).

The possibility for interference with the lawyer's judgment undoubtedly exists. But our present legal system already permits some degree of nonlawyer control over the provision of legal services and yet regulators have not chosen to prohibit the activity or exclude lawyers and non-lawyers from such arrangements. Opponents of MDPs fear that nonlawyers will be driven by making profit, sacrificing professionalism for the "bottom line." However, it does not necessarily follow that the traditional law firm is less entrepreneurial or profit driven than a lay corporation. Many lawyers work as associates for law firms in which they have no control or ownership interest. Their employers, the law partners, may be just as profit motivated as a nonlawyer business owner, directing or passively encouraging the associate to bill more hours than necessary or reasonable, to the expense and detriment of the client. Despite these pressures, economic and otherwise, and recurring stories and articles about overbilling, churning, fraud and abuse, the profession expects that these associates will abide by the applicable disciplinary rules.

To support a rule banning all involvement by non-lawyers in law-related matters, those opposing non-lawyer involvement should be required to show, in that particular instance, that non-lawyer control is more pernicious, or creates a specific threat to the lawyer's independence. Many lawyers in private practice are paid or employed by one party to provide legal services to another. This happens when a parent pays a lawyer to represent a child or when corporations pay for legal counsel to defend their employees. While these arrangements undoubtedly present possible conflicts of interest, they are not prohibited altogether. The profession simply expects the lawyer in such an arrangement to comply with the rules it has adopted to address those situations. The lawyer must disclose to the client the fact that the lawyer is being compensated by another person and obtain the client's consent to that arrangement after full and adequate disclosure.³⁶⁸ Apparently the profession believes that in many cases the lawyer is in fact capable of exercising independent professional judgment. If the attorney believes he is incapable of doing so, then the rules direct the attorney to withdraw from the representation or not undertake the representation in the first place.

The United States Supreme Court upheld the right of labor unions to pay for or promote the services of particular lawyers for their members. Labor unions provided legal services to its members through lawyers employed by the unions. The organized bar opposed the arrangement asserting that the lawyers' professional judgment would be impaired by the financial control exerted by the union. They also cited the conflicting interests of the union and the individual member. The opponents of the unions' arrangements were unable, however, to demonstrate any concrete

³⁶⁸ Virginia Code of Professional Responsibility DR 5-106A (1999).

injury to clients in any of the cases and the Supreme Court rejected their argument as purely theoretical.³⁶⁹ Labor unions and prepaid legal insurance today provide for legal services to their members despite their financial control and influence.

Therefore, given the current system's allowance for nonlawyer involvement in the delivery of legal services to others, an outright ban on multidisciplinary practice using DR 5-106 or Rule 5.4 as a basis would appear to many as hypocritical and suspect.

III. ABA AND STATE BARS STUDY MULTIDISCIPLINARY PRACTICES

In August 1998, in the aftermath of news stories that the "Big Five" accounting firms were acquiring or forming partnerships with law firms in Europe, American Bar Association (ABA) President Philip Andersen appointed a Special Commission to Study Multidisciplinary Practices (MDPs). The commission represents a diverse cross-section of the legal community. The commission submitted its report to the ABA House of Delegates at the August 1999 meeting of the American Bar Association in Atlanta. The commission recommended that the Rules of Professional Conduct prohibiting fee sharing and partnerships with nonlawyers³⁷⁰ be amended to allow lawyers to share legal fees with nonlawyers and deliver legal services through a multidisciplinary practice (MDP).³⁷¹

In August, 1999, approximately two-thirds of the ABA delegates were opposed to adopting the recommendations of the MDP commission. Instead, by a vote of 3 to 1, the House adopted a substitute motion offered by the Florida delegation, a succinct resolution providing:

RESOLVED, that the American Bar Association to make no change or amendment to the Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until further study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer

³⁶⁹ See *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 580 (1971); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 8 (1964); cf. *NAACP v. Button*, 371 U.S. 415 (1963) (establishing same principle for political organization).

³⁷⁰ Virginia Rules of Professional Conduct Rule 5.4a-b (2000) (prohibiting lawyers from sharing legal fees and forming partnerships with nonlawyers).

³⁷¹ *ABA Multidisciplinary Practice Commission Recommends Amending Rules to Allow MDPs*, 15 *Laws. Man. on Prof. Conduct (ABA/BNA)* No. 10, at 250 (June 9, 1999); *Vocal Debate of MDP Report Continues As Both Sides Prepare for Delegates' Vote*, 15 *Laws. Man. on Prof. Conduct (ABA/BNA)* No. 12, at 323 (July 7, 1999). Janet L. Conley, *ABA Postpones its Decision on Multidisciplinary Practices*, 222 *N.Y.L.J.* 1 (1999) (voting was 304 to 98 in favor of the Florida proposal); Rule 18 Table 15.

independence and the legal profession's tradition of loyalty to clients.³⁷²

Illinois State Bar Association President Cheryl Niro testified before the MDP Commission on February 12, 2000, that the majority of the state bar organizations still remain opposed to MDPs and would call for enforcement of existing ethical and UPL rules prohibiting such practices.³⁷³ More than 40 different bar organizations are studying the issue, concerned about whether the legal profession's core values (confidentiality, loyalty and independence) could survive in a MDP environment. The commission has, for the time being, concluded its public hearings, having collected oral and/or written statements from 76 witnesses over the course of eight full days. These witnesses included lawyers from big and small firms, tax lawyers, CPAs, consumer advocates, small business owners, state bar officials, international lawyers, antitrust lawyers, European lawyers, corporate counsel, representatives of the "Big Five" accounting firms and public interest groups.

The ABA's Commission on Multidisciplinary Practices has concluded that the legal profession cannot simply ignore this development nor can the organized bar rely upon existing ethics and unauthorized practice rules to stop this new, consumer-driven paradigm that has emerged. Key elements of the commission's proposal include:

- All rules of professional conduct which apply to law firms should apply to MDPs.
- MDPs should be regulated by the highest court in each state through an agency responsible for monitoring each MDP for assurance that the lawyers in a MDP comply with the Rules of Professional Conduct.
- Lawyers working in MDPs would be bound by the Rules of Professional Conduct, especially those rules concerning conflicts, confidentiality and professional independence.

³⁷² *ABA Refuses to Change Ethics Rules Unless Studies of MDPs Dispel Concerns*, 15 Law. Man. Prof. Conduct (ABA/BNA) No. 15, at 396 (Aug. 18, 1999).

³⁷³ *Commission on Multidisciplinary Practice, Updated Background and Informational Report* (posted Dec. 15, 1999) http://web.archive.org/web/20080508221351/http://law.richmond.edu/rjolpi/Issues_archived/2000_Spring_Issue/%3Chttp://www.abanet.org/cpr/fedmdp.html. Ms. Niro based her conclusion on a consensus that developed during the Meeting of the State Bar Presidents held in Dallas in conjunction with the ABA Mid-Year Meeting in February 2000, during which an informal poll was taken. About 25 to 30 state bars were represented at that meeting. The Ohio State Bar Association circulated to other state bars its Recommendation and Report for consideration by the House of Delegates a resolution calling for each jurisdiction "to establish and implement effective procedures for the discovery and investigation" of violations of UPL statutes and "to pursue active enforcement of those laws."; Rule 17.3.3.

- Fee-sharing and partnering with nonlawyers would only be permitted in the context of a MDP which is properly registered with the supreme court in each state, and certifying that its lawyers are bound by the Rules of Professional Conduct.
- Allowing lawyers to deliver legal services through MDPs would not otherwise change the prohibition against nonlawyers practicing law.
- All MDP clients would be treated as clients of the lawyers for purposes of conflicts of interest.³⁷⁴

At its hearing on February 12, 2000, the commission observed that approximately 5,000 lawyers work in accounting firms, seemingly outside the regulatory tent of the state bars which admitted them to practice. Risking discipline for ethical violations, these lawyers are denying that they are practicing law, when it is obvious that they are doing.³⁷⁵ Paul Sax of San Francisco, chairman of the ABA's Taxation Section, asserts that lawyers practice law at accounting firms, unnoticed by the state bars and free from the more stringent confidentiality and conflict-of-interest rules adhered to by licensed tax lawyers in traditional practice.³⁷⁶

The individual state bars must decide, among other things, whether they have the resolve and resources to prosecute these lawyers and the accounting firms that employ them. Most bars are at peak capacity in terms of prosecuting attorney misconduct in traditional practice settings. Moreover, they are thinly budgeted or have no funds for prosecuting UPL. Texas, one of the more aggressive bars in terms of prosecuting UPL,³⁷⁷

³⁷⁴ 15. ABA Commission on Multidisciplinary Practice, Report to the House of Delegates (June 1999) at 1, found at <http://www.abanet.org/cpr/mdprecommendation.html>.

³⁷⁵ ABA Commission on Multidisciplinary Practice, *PostScript to February 2000 Midyear Meeting* at 1 <http://www.abanet.org/cpr/postscript.html>.

³⁷⁶ Nathan Koppel, *Rift on MDP Shows at ABA's Midyear Meeting*, Texas Lawyer, February 15, 2000, <http://www.lawnewsnetwork.com/stories/A16148-2000Feb14.html>.

³⁷⁷ In addition to Arthur Andersen, the Texas UPL Committee has waged war with Parsons Technology, publishers of Quicken Family Lawyer; Nolo Press, publishers of legal self-help books; and Nationwide Insurance Company for owning and operating "captive" law firms which defend their insureds. In one of its more ambitious efforts, the Texas UPL Committee obtained a federal court injunction against Parsons Technology, publisher of "Quicken Family Lawyer" a legal software program that includes legal document preparation. *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.* 1999 WL 47235 (N.D. Tex. 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999). However, after Parsons Technology appealed this decision and while the case was pending, the Texas legislature enacted an amendment to Tex. Gov't Code Ann. § 81.101 (a) (1998). The amendment provided that "the 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney." H.B. 1507, 76th Leg., Reg. Sess. (Tex. 1999).

has the luxury of a \$100,000 budget for UPL enforcement.³⁷⁸ However, even the Texas bar's resources are inadequate to litigate against the big accounting firms and the law firms that will represent them. According to William D. Elliott, the Texas lawyer who drafted the complaint against Arthur Andersen:

In vigorously denying it practiced law, Arthur Andersen hired Weil, Gotshal & Manges, along with two other law firms, which took aggressive measures against the investigation and narrowly interpreted document requests. The volunteer lawyer running the UPL investigation was a private practitioner with a family, who had to handle the investigation virtually by himself; he was overwhelmed. Only two subpoenas to Dallas-based corporate clients of the accounting firm issued and then the Texas UPL committee decided to terminate its investigation because it did not have sufficient proof of UPL violations. Mr. Elliott maintained that it was a lack of will, not a lack of proof, which thwarted the investigation; that the State Bar is not equipped to take on the big cases.³⁷⁹

After eleven months of investigation, the Texas Bar decided not to prosecute UPL charges against Arthur Andersen.³⁸⁰ The reason for that decision might be monetarily driven. A successful campaign could require state bars to raise members dues considerably which is a situation that would not be met with much support. Even after such monumental expenditures and success in the courtroom, the "Big Five" accounting firms can turn to the legislature to overrule adverse decisions, just as Parsons Technology did with the Texas legislature.³⁸¹

On the other hand, if the legal profession amends its ethics rules to allow fully integrated MDPs, it is doubtful that the "Big Five" accounting firms will agree to be regulated by the bar, subject to the ethics rules that

Parson Technology's product already had a conspicuous disclaimer even before the Texas UPL Committee took action against the company.

According to Nolo Press, a publisher of self-help legal books, on September 21, 1999, Texas dropped its two-year old UPL investigation of its activities following the passage of H.B. 1507, *supra*. Nolo Press Website http://web.archive.org/web/20080508221351/http://law.richmond.edu/rjolpi/Issues_Archived/2000_Spring_Issue/%3Chttp://www.nolo.com/texas/fromUPL.html reprinting letter dated September 21, 1999 from the Texas UPL Committee to Peter D. Kennedy, Esquire, Counsel for Nolo Press.

³⁷⁸ Presentation by James D. Blume, Esquire, former Chairman, Texas Unauthorized Practice of Law Committee at the National Organization of Bar Counsel, Mid-Year Meeting, Dallas Texas, February 10, 2000.

³⁷⁹ Testimony of William D. Elliott before the ABA Commission on Multidisciplinary Practice, November 13, 1998, summarized at <http://web.archive.org/web/20080508221351/http://www.abanet.org/cpr/elliott1198.html>.

³⁸⁰ Blume, *supra*.

³⁸¹ *Id.*

apply to a traditional law firm. There are reasons to be skeptical. Harvard Professor Bernard Wolfman told the ABA commission on February 12, 2000:

We know from the SEC and from undisputed press accounts, those in the Wall Street Journal and the New York Times, for example, that PwC [PriceWaterhouseCoopers], the largest of the Big five, is in gross, flagrant violation of the SEC rule in effect since 1933 that prohibits the accountants in a firm that certifies a client's financial statement to own stock in that company. The SEC reports that 85% of PwC's partners were in violation of that prohibition. The immediate response from a PwC spokesman and from a Deloitte & Touche commentator as well was that the report shows that the rules need to be changed. After all, a Big Five spokesman said that the rules had been rejected when put to the AICPA for adoption; they're merely rules of the SEC. These immediate responses, if nothing more, should give serious pause to entrusting the care and control of our profession to those who have demonstrated such indifference to the law and such lack of fidelity to long established ethical norms and values as the Big Five have. To be sure, just days ago the AICPA announced that the SEC's rules on the subject of ownership of client stock will now be its rules, an acknowledgment almost 70 years late in coming. And one can only wonder whether the AICPA has been stimulated by the fact that this Commission is sitting, here and now, and that the SEC is conducting investigations of the practices of the other Big five firms, PwC having only been the first.³⁸²

Can we expect nonlawyer controlled MDPs to safeguard the legal profession's core values? As stated above, much attention has been directed to the growth of non-lawyer controlled MDPs in Europe. The CCBE (the consultive organization of the bar organizations of the European Union and other European states) submitted its report in December to the ABA commission, with some rather negative statements regarding the presence of MDPs in Europe:

CCBE . . . concludes that, in the jurisdictions with which it is familiar, the problems inherent to integrated co-operation between lawyers and non-lawyers with substantially differing professional duties and

³⁸² Written Statement of Professor Bernard Wolfman, submitted to the ABA Commission on Multidisciplinary Practice, February 12, 2000 at 4 ("Wolfman") posted at http://web.archive.org/web/20080508221351/http://law.richmond.edu/rjolpi/Issues_Archived/2000_Spring_Issue/%3Chttp://www.abanet.org/cpr/wolfman4.html.

corresponding different rules of conduct, present obstacles which cannot be adequately overcome in such a manner that the essential conditions for lawyer independence and client confidentiality are sufficiently safeguarded, and that inroads upon both, as a result of exposure to conflicting interests served within the relevant organization, are adequately avoided. . . .

The legal profession is a crucial and indispensable element in the administration of justice and in the protection available to citizens under the law. Safeguarding the efficacy and integrity of this factor within a democratic society, is a matter of the highest concern and priority. It is part of CCBE's mission to ensure that both are given their due.

CCBE consequently advises that there are overriding reasons for not permitting forms of integrated co-operation between lawyers and non-lawyers with relevantly different professional duties and correspondingly different rules of conduct. In those countries where such forms are nevertheless permitted, lawyer independence, client confidentiality and disciplinary supervision of conflicts-of-interests rules must be safeguarded.³⁸³

As a compromise, some lawyers propose that MDPs be permitted, provided that lawyers are majority or super-majority owners of the practice. However, Professor Wolfman warned the commission that if an MDP composed of accountants and lawyers were to be formed, at least 51% of the firm would have to be owned by the CPAs. The AICPA is lobbying the state legislatures to impose such a requirement by law. According to Professor Wolfman, about 20 states have now adopted such a requirement.³⁸⁴ There is a bill pending in the Virginia House of Delegates, SB 136, having already passed through the Senate, amending Virginia Code § 13.1-549.1 to provide that: " A corporation rendering the services of accounting shall issue not less than fifty-one percent of its capital stock to individuals duly licensed or otherwise legally authorized to render the services of accounting, and the remainder of said stock may be issued only to and held by individuals who are employees of the corporation, whether or not such employees are licensed or otherwise authorized to render professional services."

³⁸³ Wolfman, *supra* at 6-7.

³⁸⁴ *Id.* at 8.

IV. PUBLIC OR CONSUMER DEMAND FOR "ONE STOP SHOPPING?"

Are MDPs in the public interest or simply in the financial interest of their supporters? Obviously the "Big Five" accounting firms think there is a market for MDPs. Much has been said about their growth in Europe. Most recently, the ABA commission observed that PriceWaterhouseCoopers employs over sixteen hundred lawyers in forty-two different countries, in pursuit of its announced intention of being one of the world's largest law firms by the year 2004.³⁸⁵ The accounting firm has named its network of law firms "Landwell."³⁸⁶ Even in the United States, the "Big Five" accounting firms have already established a market for "consulting services" which, in addition to taxation, includes areas such as mergers and acquisitions, telecommunications, energy, environmental issues, health care, banking, business management, litigation support, intellectual property and other complex law-related matters.

Quoting the Senior Vice President and General Counsel at Hildebrand, Inc., a legal consulting firm, a legal newspaper reported: The Big Six are recruiting at the major law schools, and not only tax lawyers. They are telling students that if they come with them, they will be doing M&A, litigation and other kinds of work that goes well beyond tax counseling.³⁸⁷

In November 1999, five lawyers left the Atlanta and Washington D.C. offices of King & Spalding and formed a separate law firm in Washington D.C. 52 The law firm has entered into a relationship with Ernst & Young in which the latter has agreed to furnish a significant amount of start up capital to the firm and to lease it space in a building it owns. In exchange, the law firm holds itself out as McKee Nelson Ernst & Young. District of Columbia's Rule 5.4 permits partnering of, and fee sharing between, lawyers and nonlawyers, but the firm's sole purpose must be the practice of law. The firm name, McKee Nelson Ernst & Young, according to D.C. ethics rules, is lawful as a trade name.³⁸⁸ Presumably, Ernst & Young refers its clients to the new law firm for legal services. The two firms

³⁸⁵ *Id.*, citing Jean Eagleshaw, *PwC Reorganizes Global Network of Legal Firms*, Fin. Times (London), Oct. 11, 1999, at 8; Konstantin Richeter, *Managers & Managing: Pricewaterhouse Renames Legal Unit, Adopting Landwell as Brand*, Wall St. J. Eur., Oct. 12, 1999, at 30, 1999 WL-WSJE 27641212.

³⁸⁶ *Id.*

³⁸⁷ David Rubenstein, *Accounting Firm Legal Practices Expand Rapidly. How the Big Six Firms Are Practicing Law in Europe: Europe First, Then the World?*, Corp. Leg. Times, Nov. 1997, at 1.

³⁸⁸ Ian Doddington, *Ernst & Young Will Finance Launch of Law Firm in Special Arrangement*, Press Release by Ernst & Young, posted at <http://web.archive.org/web/20080508221351/http://www.abanet.org/lpm/mdp/doddingt.html>.

assert that they are separate entities, but some observers are suspicious of the affiliation. They view this action as an attempt by the accounting firm to establish a multidisciplinary partnership that includes legal services. As Professor Bernard Wolfman told the commission on February 12, 2000, neither Ernst & Young nor the law firm has been willing to make public their formation or underlying documents. Professor Wolfman charged the commission to conduct a factual investigation of the purported debt arrangement, to rule out the possibility that Ernst & Young is in reality an equity partner as opposed to a lender, as it claims. The commission chair, Sherwin P. Simmons, responded that the commission does not have such investigative authority.

Considerable debate continues over whether clients actually want "one-stop shopping" for legal and affiliated services. Professor Wolfman has called the MDP commission's attention to a survey of the 350 largest corporations in Britain, published in London's Commercial Lawyer on June 21, 1998, indicating that 88 percent want their accounting and legal firms to be separate. The commission cited a less comprehensive survey conducted by the Financial Times (London) of one hundred senior executives at large companies and financial institutions in the United States and the United Kingdom. This survey showed that the corporate executives preferred the option of choosing legal services from MDPs, if they could lawfully offer such services.

To date, with few exceptions, most purchasers of legal services that have appeared before the commission say they would prefer the option of choosing MDPs over traditional law firms for the delivery of legal services. A small business owner³⁸⁹ told the commission that the debate among lawyers over whether the practice of law is a "business" or a "profession" exists solely within the legal profession and is not a public issue. As far as the public is concerned, he said, the practice of law is a business and legal services are a product or commodity. The consumer wants choice, convenience and effectiveness. Moreover, the small business owner wants an advisor he can trust. Small business owners need advice from a number of professionals to start up and operate a business, including accountants, lawyers, financial advisors, bankers, insurance agents, human resource specialists, Internet and telecommunications advisors, etc. The small business owner's most valuable asset is his time, and time spent consulting with separate professionals, bringing each up to speed, is not an efficient nor coordinated usage of his time. Some small business owners would prefer a business consulting firm with integrated services that can develop a coordinated business plan. Presently no one firm can provide this. While trust is important, so is competence and

³⁸⁹ *Id.* Kathryn A. Oberly, Ernst & Young's vice chairman and general counsel said that launching the firm in Washington was "particularly attractive" because of D.C. bar rules allowing the use of a trade name within a law firm's name.

effectiveness. A "team approach" to problem solving may be of more practical benefit to a small business owner than the client protections of confidentiality and avoidance of conflicts.

Nonlawyers already provide a number of law-related services which could expand the growth of a traditional law firm. These services include: title insurance, financial planning, accounting, mediation, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax return preparation and patent, medical or environmental consulting.

MDP adversaries have asked the commission for an empirical study to ascertain whether the consumer of legal services in fact wants "one-stop shopping." The commission's response is logical and well-reasoned:

First, in a society where people are free to make choices about the goods and services they purchase, there is no sure way of accurately estimating whether the market will favor a new type of service until it is available. Second, the criticism ignores all the positive support for MDPs from general counsels, consumer groups, and two Sections of the ABA.³⁹⁰

Testimony by individuals and consumer groups provided support for integrated professional services. An AARP advocate explained that senior citizens confront diverse issues including dealing with Medicare benefits, coordinating with or seeking other health insurance coverage, sorting out prescription drug claims, planning for retirement and the future needs of their children, and finding affordable housing and living situations. These people would benefit from different professionals working together in one firm.³⁹¹ A family law practitioner saw the desirability of integrated teams of lawyers, psychologists, social workers, accountants, appraisers, financial planners and other professionals to work through child custody and equitable distribution matters.³⁹²

At its most recent hearing on February 12, 2000, the commission received even more evidence from non-lawyers that integrated services are sought after and desirable. Ted Debro, an executive officer for Affordable Consumer Services of Alabama testified that low and middle income persons need choice, fairness and affordability in purchasing legal

³⁹⁰ Statement of George Abbott, Omaha, Nebraska, testifying before the commission on February 12, 2000 posted at <http://web.archive.org/web/20080508221351/http://www.abanet.org/cpr/abbott.html>.

³⁹¹ Commission on Multidisciplinary Practice, Updated Background and Informational Report, *supra*.

³⁹² Comments of Wayne Moore, Director, Legal Advocacy Group, AARP, July 27, 1999, posted at <http://www.abanet.org/cpr/aarp.html>.

and other related services. An injured worker and his family, for example, in addition to needing medical and legal services, could use the advice of a psychologist for his emotional trauma, an insurance specialist to help him file for benefits, a social worker to counsel the family and perhaps some financial counseling. Team approaches are used in the public sector already where district attorneys, health workers, social workers and psychologists work together on child and spousal abuse cases. Poor people, he said, lack the means and resources to travel to different offices to consult with the different professionals that may be of help. They are often intimidated by lawyers, he said, and the informal, casual setting of a multidisciplinary practice may prove helpful.³⁹³

Melinda Merk, a tax planning manager in the Washington, D.C. office of Ernst & Young, has a law degree from Duke University and an L.L.M. in Taxation from Georgetown Law Center. She holds an active license to practice law. She gave an example to the commission about a client who consults with her about an estate plan which involves annual gifting and the transfer of real estate. Despite the client's request that she do so, the Ernst & Young attorney cannot prepare any legal instruments to implement her client's estate plan. Instead, the client must be referred to an attorney practicing in a traditional law firm. Moreover, Ms. Merck claims, Ernst & Young requires that its attorneys not hold themselves out as attorneys and they may not even place the designation "J.D." on their business cards or letterhead stationery.³⁹⁴

However, the MDP issue is not just about the Big Five in competition with large law firms. To be sure, this is what is driving the debate for the most part. However, MDPs have the potential to change entirely the landscape of the practice of law. As one commentator notes:

For both large and small firms, MDP could increase opportunities for cross-selling and the ability to provide more services to clients at a lower cost, says Larry Ramirez, chairman of the ABA's General Practice, Solo and Small Firm Section and a sole practitioner in Las Cruces, N.M. Potentially, the combination of professionals and services is unlimited, he says. He lists a few: engineers, doctors and physical therapists. Gaynes, the lawyer-accountant, sees the potential for law firms to become part of an overall financial package involving financial planners, estate planners, insurance agents and banks.³⁹⁵

³⁹³ Comments of Marna S. Tucker, April 7, 1999, posted at <http://web.archive.org/web/20080508221351/http://www.abanet.org/cpr/tucker3.html> at 1-3.

³⁹⁴ Statement of Theodore Debro, February 12, 2000, posted at <http://web.archive.org/web/20080508221351/http://www.abanet.org/cpr/debro2.html>.

³⁹⁵ Testimony of Melinda S. Merk before the ABA Commission on Multidisciplinary Practices on February 12, 2000.

VI. CONCLUSION

The rules of professional conduct are intended to protect the public by requiring licensed practitioners to meet minimum educational and ethical requirements and make lawyers accountable to their clients. The lawyer's failure to discharge these professional obligations may lead to discipline and/or malpractice claims. The accounting firms similarly are subject to ethics rules and discipline for breaching ethical duties to their clients.³⁹⁶ To a large extent, albeit not completely, the clients and general public are protected because the work of lawyers and accountants are regulated. Whatever differences may exist in how lawyers and accountants are regulated, the lawyers employed by a MDP remain subject to the rules of the legal profession. For example, MDP lawyers must decline employment by clients if required under the legal profession's conflicts of interest rules. Whether the accounting profession's conflicts rules will permit the engagement is irrelevant.

In the context of MDPs, the bar will find it extremely difficult to justify the continued prohibition of lawyers joining forces with nonlawyers. Lawyers today are permitted in certain instances to work for entities controlled by non-lawyers and few complaints are made about lawyers functioning in that environment. Lawyers in MDPs must be held accountable for breaches of ethics by non-lawyer staff under their supervision, just as lawyers are responsible for non-lawyer staff in the traditional law firm. MDPs must be required to train non-lawyer staff to perform their tasks professionally and ethically. The organized bar and the accounting profession need to work together and agree on ethical standards that would permit lawyers hired by MDPs to operate without being placed at risk of violating client-protective ethical rules that apply to lawyers. The focus should be on confidentiality and conflicts rules that will serve and protect the client. The public needs assurance from the organized bar that professional responsibility follows a lawyer wherever he or she goes, including non-traditional employment in a MDP. The bar needs to reevaluate the current rules that prohibit these two professions from combining their skills and talents. Current opposition to MDPs is based more on the fear that the "Big Five" will wrestle control of the legal services market from established law firms rather than client protection.³⁹⁷

³⁹⁶ Janet Conley, *MDPs: Collision or Harmony*, Fulton County Daily Report, Aug. 4, 1999.

³⁹⁷ In the United States the public accounting profession is regulated along state lines. In order to become a Certified Public Accountant (CPA) an individual must meet the requirements established by the laws of a particular state. The laws of the states are similar in that each state requires a certain minimum level of education and passage of the Uniform CPA Examination, which is prepared and graded by the American Institute of CPAs (AICPA). In addition to the educational pre-requisites and passage of the

MDPs are here and ultimately the current rules which prohibit them will be tested. The sophisticated consumer of legal services will likely resent the organized bar's current resistance to MDPs and demand the right to choose between MDPs and traditional law firms. The organized bar should consider how clients will be harmed or benefitted by permitting lawyers to form partnerships with nonlawyers and entering into fee sharing relationships with nonlawyers. With the growth of MDPs in Europe, can any specific instances of harm to clients be cited that would justify retention of the current rules prohibiting MDPs in the United States? Are the differences in the manner in which the accounting and legal professions handle conflicts and confidentiality merely theoretical and abstract, or are there, in fact, practical consequences? These questions need to be answered soon.

The organized bar essentially has three alternatives: (1) do nothing and allow MDPs to be wholly unregulated; (2) enforce the UPL and ethics rules as they currently exist; or (3) develop a regulatory scheme by which it can monitor lawyers practicing in the MDP setting to ensure that those lawyers are adhering to the same core ethical standards governing lawyers in traditional practice. As of this writing, the majority of bar regulators seem to support enforcement of existing ethics and UPL rules. However, unless bar regulators can demonstrate that the public is at risk if lawyers are permitted to form partnerships and share legal fees with nonlawyers,

Uniform CPA Examination, most states also require a certain minimum period of practice experience under the supervision of a licensed CPA. AICPA Web Page, CPA Requirements by State < <http://www.aicpa.org/> >. This period of experience may range from zero to two years depending on the state. Once an individual has been granted a license as a CPA, as long as the license is maintained, the person is deemed fully qualified to practice as a CPA. Each state also has a board of accountancy (or other similar agency) as part of the state government for the purpose of regulating the public accounting profession. Most of the state boards of accountancy have adopted codes of professional conduct to which a licensed public accountant must adhere under penalty of being disciplined or having the license revoked.

A second form of regulation of the public accounting profession in the United States is embodied in the AICPA, a nationwide, voluntary association of CPAs. As stated above, the AICPA is the preparer and grader of the Uniform CPA Examination, therefore, the AICPA plays an important role in determining the minimum level of technical competence that CPAs must possess. In addition, the AICPA has established a Code of Professional Conduct which members of the AICPA must observe upon penalty of suspension or expulsion from the AICPA. Although expulsion from the AICPA would generate a certain degree of stigma, it would not prevent a CPA from practicing. Only revocation of the license to practice by the state which granted the license would cause forfeiture of the right to practice as a CPA. In most states there are also voluntary societies of CPAs. Many of the state CPA societies work closely with the state boards of accountancy and may in fact control such boards. The regulatory structures of the state boards of accountancy and those of the state CPA societies thus may be parallel or even overlap in some cases. The AICPA also coordinates with the state boards of accountancy and the state societies of CPAs in regulating CPAs

disciplinary and UPL enforcement may be perceived as merely economic protectionism rather than an attempt to preserve core values.