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# UNAUTHORIZED PRACTICE OF LAW AND CPAS: A LAW OF THE LAWYERS, BY THE LAWYERS, FOR THE LAWYERS

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## INTRODUCTION

Unauthorized Practice of Law (UPL) rules, which prohibit nonlawyers from providing legal services, date back to a royal

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ordinance that King Edward I of England enacted in 1292.[1] In 1402, the British Parliament established the foundation for modern UPL rules by enacting 4 Henry IV, Chapter 18.[2] Pursuant to that statute, the justices authorized to practice law only those learned individuals who demonstrated virtuosity and who swore to their professional duties.[3] The state bars that regulate the American legal profession have followed suit by enacting and enforcing similar UPL rules.[4] Though deeply engrained in our legal system, these UPL rules undermine the U.S. economy's fundamental free-market principles[5] by reserving for attorneys the exclusive right to provide services that other licensed professionals may prove more qualified to render.[6] Consequently, American UPL rules have provoked intense debate[7]—particularly with respect to nonlawyers' ability to offer professional services that relate only tangentially to law.[8]

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1. Gardner v. Conway, 48 N.W.2d 788, 794 (Minn. 1951). The *Gardner* Court noted that King Edward I, by royal ordinance, enacted what was probably the first statute regulating the practice of law, the Statute of Westminster, the First. *Id.* This statute limited the practice of law to those deemed "the most lawful and the most teachable" to ensure that "the king and people . . . be well served." *Id.* (citations omitted).

2. R.I. Bar Ass'n v. Auto. Servs. Ass'n, 179 A. 139, 144 (R.I. 1935).

3. *Id.*

4. *See* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 7 (1981) (citing Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159 (providing a comprehensive historical account of UPL)).

5. The U.S. Department of Justice and Federal Trade Commission have recognized that the ABA's overbroad UPL rules "could restrain competition between lawyers and nonlawyers to provide similar services to American consumers," which would "likely raise costs for consumers and limit their competitive choices." Letter from Department of Justice & Federal Trade Commission, to the Task Force on the Model Definition of the Practice of Law (Dec. 20, 2002), *available at* http://www.ftc.gov/opa/2002/12/lettertoaba.shtm [hereinafter *DOJ/FTC Joint Letter to ABA*].

6. *See* Anthony J. Luppino, *Multidisciplinary Business Planning Firms: Expanding the Regulatory Tent Without Creating a Circus*, 35 SETON HALL L. REV. 109, 145 (2004); *see also* Catherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney-Accountant Tax Turf War*, 36 ST. MARY'S L.J. 1, 92 (2004) (concluding, based on an extensive analysis of the intricacies of tax law, that "[a]n attorney with nothing more than the ABA required courses is not qualified to practice tax"); *see also* George C. Nnona, *Situating Multidisciplinary Practice Within Social History: A Systemic Analysis of Inter-Professional Competition*, 80 ST. JOHN'S L. REV. 849, 898 (2006) (stating that "most CPAs know something about the federal income tax; many if not most lawyers do not").

7. Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 1 J. INST. STUD. LEGAL ETHICS 197, 197 (1996); *see* Nnona, *supra* note 6, at 853 (noting that UPL has become the subject of intense debate among legal scholars).

8. Rhode, *supra* note 7, at 197. *See, e.g.*, *In re* N.Y. County Lawyers Ass'n, 78 N.Y.S.2d 209 (N.Y. App. Div. 1948), *aff'd*, *In re* Bercu, 299 N.Y. 728, 87 N.E.2d 451 (N.Y. 1949) (holding that advice as to the deduction related to the client's payment of backed N.Y.

Proponents of strict UPL rules claim that the rules are necessary to protect the public from individuals who lack the requisite technical and ethical training to provide competent legal services.[9] Nevertheless, the overbroad drafting and unpredictable application of these rules has led many to challenge their propriety.[10] Opponents of strict UPL rules argue that the rules secure for attorneys a monopoly over practically any service that is even remotely legal in nature.[11] The enforcement of UPL rules against professional service providers is a serious concern not only because it carries harsh penalties, such as contempt, injunction, criminal liability, and fines;[12] but also because clients can assert UPL to avoid paying professional fees.[13] Because accounting services are inextricably intertwined with the law,[14] Certified Public Accountants[15] (CPAs) are

City excise taxes constituted UPL).

9. *See* Palmer v. Ernst & Young, LLP, No. 97747, 2007 Mass. Super. LEXIS 109, at *9 (Mass. Super. Ct. Apr. 11, 2007) (explaining that the justification for UPL is "not in the protection of the bar from competition, but in the protection of the public from being advised and represented in legal matters by incompetent and unreliable persons, over whom the judicial department could exercise little control") (quoting Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27, 31 (1943) (internal quotations omitted)).

10. *See, e.g.*, Black & Black, *supra* note 6, at 97; *see also* 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 (1995); Luppino, *supra* note 6, at 133 (stating that the ABA's extremely broad definition of the "practice of law" has drawn much criticism by government agencies and constituents who engage in law-related work).

11. *See generally* Ippolito v. Florida, 824 F. Supp. 1562 (M.D. Fla. 1993) (involving allegations that the Florida Bar engaged in racketeering); *see also* John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and The American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in The Twenty-First Century*, 69 FORDHAM L. REV. 83, 92 (2000) (stating that "the unauthorized-practice-of-law rules give lawyers a monopoly over the way in which the need for legal services is satisfied in this country.").

12. Michael J. Herzog, Note and Comment, *Tax Dispute Representation: The Time is Ripe to Allow Certified Public Accountants Access to the Tribunal*, 18 J.L. & COM. 355, 356 (1999); *see generally* Miami County Bar Ass'n v. Wyandt & Silvers, Inc., 838 N.E.2d 655 (Ohio 2005) (upholding a $20,000 civil penalty against an accountant for UPL because the accountant advised clients on incorporation and assisted with the filing of corporate documents).

13. *See, e.g.*, Ranta v. McCarney, 391 N.W.2d 161, 166 (N.D. 1986) (allowing a client to avoid paying his lawyer's fees because the lawyer was not licensed to practice in the state where the lawyer performed the services); *see also* Agran v. Shapiro, 273 P.2d 619, 623 (Cal. App. Dep't Super. Ct. 1954) (denying a CPA recovery of his fees because the CPA provided services that constituted UPL).

14. *See Agran*, 273 P.2d at 623 (stating that "in the field of taxation [] questions of law and accounting are frequently inextricably intermingled as a result of which doubt arises as to where the functions of one profession end and those of the other begin."); *see also Lowell Bar Ass'n*, 52 N.E.2d 27 at 32 (stating that "[t]he work of an accountant necessarily brings him into touch with rules of law which he must understand if his computations and conclusions are to stand the test of possible litigation."); *see also* Nnona, *supra* note 6, at 891 (explaining that accounting's foundation draws on a wide array of disciplines, including law, bookkeeping, economics, and statistics).

among the professionals most profoundly affected by UPL rules.[16] Consequently, CPAs have fervently attacked these rules, urging the American Bar Association (ABA) and state bars to exempt CPAs from UPL rules based on their licensed status (status-based exemption) and approve the offering of integrated accounting, tax, legal, and business services through multidisciplinary practices (MDPs).[17]

Despite the oppressive constraints that UPL rules impose on CPAs, several mechanisms have emerged through which CPAs have successfully circumvented the rules. First, the federal government has passed legislation and promulgated regulations that expressly authorize CPAs to provide a wide array of tax services.[18] The federal preemption doctrine operates to override the applicability to these services of state UPL rules.[19] In addition, the U.S. Tax Court permits nonlawyer CPAs who pass an exam to litigate tax cases in the Tax Court.[20] Finally, Congress has granted CPAs substantially the same protections over client communications that attorneys have traditionally enjoyed.[21] Ultimately, the federal government has recognized through its actions that the stringent licensure requirements and regulatory oversight of CPAs makes them uniquely qualified to perform certain legal services.[22]

This Article's purpose is to analyze the effect of current UPL rules on CPAs and assess whether the enforcement of UPL rules against CPAs promotes the underlying policy of protecting the public. Part I examines the source, policy, and operation of UPL rules. Using seminal UPL cases, Part II illustrates how regulators and courts have failed to develop a workable definition or test for determining which activities constitute the practice of law. Part III discusses the legal mechanisms

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15. "Certified Public Accountant" is the statutory title of qualified accountants in the United States who have passed the Uniform CPA Exam and who have met other educational and experience requirements imposed by state boards of accountancy. *See infra* Part VI (discussing the requirements to become a CPA). In the late 1890's, accounting became the first profession officially recognized in the United States. York County Bar Ass'n v. Kirk, No. 99-SU-00772-07, 2002 Pa. Dist. & Cnty. Dec. LEXIS 111 (Pa. County Ct. Dec. 20, 2002).

16. *See generally* Elijah D. Farrell, *Accounting Firms and the Unauthorized Practice of Law: Who Is the Bar Really Trying to Protect?*, 33 IND. L. REV. 599, 602-05 (2000) (discussing the impact of UPL rules on the largest global accounting firms).

17. *See DOJ/FTC Joint Letter to ABA*, *supra* note 5; *see also* Kimberly E. Frank et al., *CPAs' Perceptions of the Emerging Multidisciplinary Accounting/Legal Practice*, J. ACCT. HORIZONS, Mar. 2001; *see also* Marc N. Biamonte, Note, *Multidisciplinary Practices: Must a Change to Model Rule 5.4 Apply to All Law Firms Uniformly?*, 42 B.C. L. REV. 1161, 1162 (2001) (noting that the major accounting firms are mobilizing a powerful lobby to change the laws in the United States, enabling them to directly compete with law firms).

18. *See infra* Part III.A.

19. *See infra* Part III.A

20. *See infra* Part III.B.

21. *See infra* Part III.B.

22. *See infra* Part V.

through which nonlawyer CPAs have overridden traditional UPL restrictions and engaged in federally-authorized practice of law. Part IV describes the ABA's unwillingness to fulfill an overwhelming demand for MDP firms that provide integrated legal and non-legal services. Finally, Part V demonstrates that CPAs, by virtue of their licensure, possess more than adequate technical proficiency, competence, and ethical values to protect the public. The Article concludes that the ABA and state bars should modify existing UPL rules to both grant CPAs a status-based exemption from UPL enforcement and accommodate MDPs. These changes would advance the underlying policy of protecting the public by increasing access to integrated professional services, while preserving the core values of the legal profession.

## I. UNAUTHORIZED PRACTICE OF LAW: REGULATION AND POLICY

Courts possess the inherent power to regulate professionals who practice before them[23] and exercise that power by punishing those who engage in UPL.[24] The premise of UPL rules is consumer protection,[25] and their objective is to ensure that individuals who render legal advice possess competence, integrity, and allegiance to clients' interests.[26] Three rationales underscore the policy of consumer protection: competence, motivation, and remediation.[27]

The competence rationale, which suggests that nonlawyers lack the requisite training and skills to provide legal services, is the most prevalent justification for UPL actions against CPAs.[28] Part V of this Article disproves the competence rationale's applicability to CPAs by highlighting CPAs' unparalleled academic, technical, ethical, and practical qualifications. The motivation rationale suggests that lawyers, unlike other professional service providers, are motivated by public

23. *In re* Lerner, 197 P.3d 1067, 1071 (Nev. 2008) (citing Marfisi v. Fourth Judicial Dist. Court, 456 P.2d 443,444 (Nev. 1969)).

24. *See* Melone, *supra* note 10, at 47.

25. *See, e.g.*, Cambiano v. Neal, 35 S.W.3d 792, 798 (Ark. 2000) (noting that Arkansas' UPL rules directly advance the important governmental interests of consumer protection); *see also* MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. (2011) (stating that "limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.").

26. *In re Lerner*, 197 P.3d at 1071 (citing Pioneer Title Ins. Co., 326 P.2d 406, 410 (Nev. 1958)).

27. *See* Melone, *supra* note 10, at 51-53 (citations omitted).

28. *See, e.g.*, Gardner v. Conway, 48 N.W.2d 788, 794 (Minn. 1951) (reasoning that UPL rules are necessary to protect the public from the harm that persons who practice law without the proper qualifications cause); *see also In re* N.Y. Cnty. Lawyers Ass'n, 78 N.Y.S.2d 209, 218-19 (N.Y. App. Div. 1948) (holding that accountants do not have "the orientation" to handle legal matters such as whether a common law spouse is eligible for married filing joint status).

service rather than profit.[29] Academics have largely discredited this rationale, noting that even professionals with the best intentions cannot act with exclusive fidelity to the public when their livelihoods are at stake.[30] Moreover, academic literature strongly suggests that the legal profession's primary incentive for enforcing UPL rules is economic protection.[31] Finally, the remediation rationale posits that lawyers are the only professionals qualified to perform legal services because lawyers are subject to unique standards of professional conduct, court supervision, and sanctions for noncompliance.[32] However, the validity of this rationale rests on numerous assumptions. First, it assumes that lawyers in fact abide by the standards of professional conduct, that courts actively monitor lawyers' conduct, and that courts punish those who violate the standards.[33] Additionally, this rationale assumes that other professions' codes of conduct are inadequate to protect clients' interests.[34] Serious doubt exists as to the validity of these assumptions.[35] The first assumption overlooks the abundance of cases involving lawyers who misrepresent their abilities and exploit unsophisticated clients.[36] Part V of this Article invalidates the second assumption by highlighting the congruence between the code of professional conduct that governs CPAs and the ABA's Model Rules of Professional Conduct.[37]

Practically every jurisdiction within the United States[38] has

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29. *See* Melone, *supra* note 10, at 52 (citations omitted).

30. Rhode, *supra* note 7, at 203.

31. *See* Susan B. Schwab, Note, *Bringing Down the Bar: Accountants Challenge Meaning of Unauthorized Practice*, 21 CARDOZO L. REV. 1425, 1432 n.37 (2000) (citing numerous academic works that conclude that UPL rules are a product self-preservation rather than public demand). A recent article in the *Wall Street Journal* that questioned American UPL rules sarcastically pointed out that "[t]he legal profession's notion that law isn't a commercial enterprise may come as a surprise, since some lawyers now charge more than $1,000 per hour." Jennifer Smith, *Law Firms Split Over Nonlawyer Investors*, WALL ST. J., Apr. 2, 2012, at B1 (discussing the American legal profession's refusal to follow the lead of its British and Australian counterparts and relax UPL rules in order to "expand consumers' access to legal services and spur competition").

32. *See* Melone, *supra* note 10, at 52 (citations omitted).

33. *See id.*

34. *Id.* at 98-99.

35. *See* RICHARD L. ABEL, AMERICAN LAWYERS 147-50 (1989) (noting the prevalence of lawyers' noncompliance with the standards of professional conduct and the infrequent imposition of sanctions); *see* Melone, *supra* note 10, at 99 (noting the elaborate body of rules of professional conduct that govern CPAs).

36. *See* Rhode, *supra* note 7, at 205 (1996) (citing REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASSOCIATION (1992), *available at* http://www.americanbar.org/groups/professionnal_responsibility/resources/report_archive/mckay_report. html).

37. *See* discussion *infra* Part V.

38. As of April 2, 2012, every U.S. jurisdiction except the District of Columbia retains

prohibited UPL by enacting rules similar to Rule 5.4 of the ABA Model Rules of Professional Conduct (MRPCs). Rule 5.4 prohibits a lawyer from (1) partnering with a nonlawyer to perform any activity that constitutes the practice of law, (2) sharing fees with a nonlawyer, and (3) permitting a person who recommends, employs, or pays the lawyer to direct or regulate the lawyer's professional judgment.[39] These rules have devastated nonlawyer professionals' practices for several reasons. First, neither the rule-makers nor the courts have been able to provide a workable definition of the practice of law.[40] Courts' vague and inconsistent interpretations of the meaning of the practice of law make it nearly impossible for nonlawyer professionals to conform their practices to UPL rules. Second, federal laws and federal court rules that expressly authorize nonlawyer practice in certain areas of the law patently conflict with the laws and court rules of states.[41] Where such conflicts exist, federal law preempts state law and renders state UPL rules inapplicable.[42] Finally, by rejecting proposals to modify existing rules and accommodate MDP, the ABA and state bars have utterly failed to respond to an overwhelming market demand for integrated

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rules similar to Rule 5.4 of the Model Rules of Professional Conduct, which precludes nonlawyers from partnering with lawyers to provide legal services and prohibits nonlawyer ownership of firms that provide any legal services. Smith, *supra* note 31, at B1.

39. Biamonte, *supra* note 17, at 1163; Smith, *supra* note 31, at 600 (citing David Rubenstein, *Big Six Poised to Enter Legal Market, Privilege, Professional Rules and Conflicts Are a Barrier*, MERRILL'S ILL. LEGAL TIMES, Oct. 1997, at 1 (col. 1)); MODEL RULES OF PROF'L CONDUCT R. 5.4 (2011). Rule 5.4 also prohibits a lawyer from practicing with or in the form of a for profit professional corporation or association in which corporation or association a nonlawyer owns an interest, serves as a director or officer, or has the right to control or direct the lawyer's professional judgment. *Id.*

40. *See In re* Maloney, 249 B.R. 71, 76 (M.D. Pa. 2000) (citing Shortz v. Farrell, 193 A. 20, 21 (Pa. 1937) (noting the obscure boundaries of the practice of law)); David S. Caudill, *Sports and Entertainment Agents and Agent-Attorneys: Discourses and Conventions Concerning Crossing Jurisdictional and Professional Borders*, 43 AKRON L. REV. 697, 705 (2010) (citing Kenneth L. Shropshire & Timothy Davis, *The Business of Sports Agents* 98, 104 (2d ed. 2008) (discussing cases that circularly define the practice of law)). *See also* Memorandum from the American Institute of Certified Public Accountants to the Task Force on the Model Definition of the Practice of Law (Dec. 20, 2002), http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/aicpa.authcheckdam.pdf (criticizing the vagueness of the ABA's definition of the practice of law, which definition several states have adopted in their respective rules of professional conduct).

41. *See* Melone, *supra* note 10, at 54-59 (discussing how under the U.S. Supreme Court's 1963 decision in *Sperry v. Florida*, I.R.S. Circular 230 preempts state UPL rules that would otherwise preclude CPAs from providing certain tax services); *see also* Florida Bar v. Sperry, 140 So. 2d 587 (Fla. 1962); *see also* 31 U.S.C. § 330 (2012) (authorizing the Secretary of the Treasury to promulgate regulations governing admission of representatives to practice before it); 31 C.F.R. § 10.3 (2012) (expressly authorizing CPAs to practice before the I.R.S.); Rules of Practice and Procedure of the U.S. Tax Court, Rule 200(a) (1998) (authorizing CPAs who pass an exam to represent clients before the U.S. Tax Court).

42. *See* Melone, *supra* note 10, at 54-59.

legal, tax, accounting, and business services.[43] In sum, current UPL rules unreasonably confine contemporary nonlawyer professional practices and impede the fulfillment of public needs. As a consequence, the legal profession has contravened the underlying policy of its own rules of professional conduct—protection of the public.[44]

## II. FUTILE ATTEMPTS TO DEFINE THE PRACTICE OF LAW

Although regulators of the legal profession readily sanction those deemed to have engaged in UPL, statutory definitions of the practice of law are inconsistent and lack substantive value.[45] After surveying these statutes, Deborah Rhode classified them into three general categories:[46] (1) statutes that altogether avoid defining the practice of law;[47] (2) statutes containing circular definitions that categorize as the practice of law anything that lawyers do;[48] and (3) statutes that simply list, without clarity or precision, activities that constitute the practice of law.[49] As a result of these elusive statutory definitions, courts have faced the daunting task of determining, on a case-by-case basis, which activities constitute the practice of law.[50]

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43. Dzienkowski & Peroni, *supra* note 11, at 83-90 (discussing the ABA's refusal to accommodate the multidisciplinary practice and positing that the bar "must set aside the financial interests of the profession and ensure that the public interest is served").

44. *Id.* at 89.

45. Melone, *supra* note 10, at 52-54.

46. *See* Rhode, *supra* note 4, at 45.

47. The ABA Model Rules do not attempt to define the practice of law. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. (2011) ("The definition of the practice of law is established by law and varies from one jurisdiction to another.").

48. *See* Gary G. Sackett, *An Analytic Approach to Defining the "Practice of Law" – Utah's New Definition*, UTAH B.J., Jan. 20, 2006, http://webster.utahbar.org/barjournal/2006/01/an_analytic_approach_to_defini.html (explaining that most legislatures, courts, bar associations, and committees' attempts to define the practice of law are "circular because they define a concept in terms of the very term 'law' or its derivatives such as 'lawyer' and 'legal.'").

49. Melone, *supra* note 10, at 53; *see also* Ronald A. Landen, Comment, *The Prospects of the Accountant-Lawyer Multidisciplinary Partnership in English-Speaking Countries*, 13 EMORY INT'L L. REV. 763, 774-90 (1999) (providing descriptions of how various U.S. and international jurisdictions define the practice of law).

50. *See, e.g.*, *In re* Lerner, 197 P.3d 1067, 1072 (Nev. 2008).

> [T]he "practice of law" must be determined on a case-by-case basis, in light of the "touchstone" principle that the practice of law includes activities calling for the exercise of trained judgment in applying the general body of legal knowledge to the specific problem of a client and recommending a course of action.

*Id. See, e.g.*, Taub v. Weber, 366 F.3d 966, 969 (9th Cir. 2004). On June 24, 2011, the Florida Bar's Standing Committee on Unlicensed Practice of Law voted to decline to issue a formal

A broad spectrum of vague court opinions underscores courts' constant struggle to define the practice of law.[51] This uncertainty poses a serious problem for contemporary CPAs because, without further guidance, they cannot possibly conform their expanding practices to UPL rules.[52] In addition to the lack of clarity and the inconsistency with which courts have defined the practice of law, most of the cases interpreting UPL rules are antiquated. These cases, which modern courts readily cite in their decisions, date back to the 1950s and 1960s when an entirely different economic, legal, regulatory, and business environment existed.[53]

To ascertain whether a nonlawyer professional has engaged in UPL, courts have historically applied tests that focus on (1) the difficulty of the services rendered, (2) whether those services are incidental in form, or (3) the services' impact on the recipient's legal rights.[54] Under the first test,[55] courts evaluate whether the service requires "professional judgment" concerning a "difficult or doubtful legal question[]."[56] For example, in the 1951 case *Gardner v. Conway*, the Minnesota Supreme

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advisory opinion on activities which may constitute the unlicensed practice of law and voted to continue the existing policy and review matters on a case-by-case basis. The Florida Bar Formal Advisory Opinions *available at* http://www.floridabar.org/tfb/TFBLawReg.nsf/9dad7bbda218afe885257002004833c5/34fac28eda9ca382852579ac006aff21!OpenDocument (last modified Feb. 22, 2012). The Supreme Court of South Carolina has also rejected proposed rules regarding the proper scope of CPAs' services in favor of a case-by-case approach. *See In re* Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 422 S.E.2d 123 (S.C. 1992).

51. *See, e.g.*, Barbanti v. Quality Loan Serv. Corp., No. CV-06-0065-EFS, 2006 WL 3692638, at *4 (E.D. Wash. Dec. 11, 2006) ("The line between those activities included within the definition of the practice of law and those that are not is oftentimes difficult to define.") (quoting Bennion v. Kassler Escrow, 635 P.2d 730, 732 (Wash. 1981)).

52. *See* Schwab, *supra* note 31, at 1447 (noting that under the professional judgment test for UPL, nonlawyers cannot avoid inadvertently engaging in UPL because the determination of whether a difficult legal question is involved turns on the specific facts of each situation).

53. Susan Poser, *Symposium, Multijurisdictional Practice For A Multijurisdictional Profession*, 81 NEB. L. REV. 1379, 1381 (2003) (noting that in the area of UPL, "lawyers must acknowledge the fact 'keeping antiquated laws on the books breeds public disrespect for the law,' and that this is 'especially so where the laws relate to the conduct of lawyers, for whom there is a professional imperative to uphold the law.'")

54. Melone, *supra* note 10, at 59 (identifying two tests; one based on the difficulty of the services and the other based on the form); *see also* Carol A. Needham, *The Future of the Profession: A Symposium on Multidisciplinary Practice: Permitting Lawyers to Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as We Know It?*, 84 MINN. L. REV. 1315, 1344-46 (2000) (discussing Florida Supreme Courts' continued application of the *Sperry* standard, which focuses on whether the activity affects the client's legal rights).

55. *See* Schwab, *supra* note 31, at 1444 (indicating that the professional judgment approach is the most widely-accepted method for evaluating whether a service constitutes UPL).

56. Khan v. BDO Seidman, LLP, 935 N.E.2d 1174, 1196 (Ill. App. Ct. 2010) (citing *In re* Application of N.J. Soc. of Certified Pub. Accountants, 507 A.2d 711, 717 (N.J. 1986)); Agran v. Shapiro, 273 P.2d 619, 623 (Cal. App. Dep't Super. Ct. 1954); Gardner v. Conway, 48 N.W.2d 788, 796 (Minn. 1951); Schwab, *supra* note 31, at 1444.

Court ruled that a businessman who held himself out as a "tax consultant" and advised clients on filing status, eligibility for exemptions, and deductibility of certain expenses, engaged in UPL because resolving these questions "obviously required legal training" on the interpretation or application of statutes, administrative regulations and rulings, court decisions, and general law.[57]

Relying on *Gardner*, a California appellate court in the 1954 case *Agran v. Shapiro* denied a CPA recovery of fees because the CPA's advice, which concerned the client's ability to carry-back a net operating loss, constituted UPL.[58] The *Agran* Court reasoned that, pursuant to the Internal Revenue Code (I.R.C.), this question rested on whether the loss was attributable to the client's trade or business, a difficult and doubtful question of law.[59] Courts have, as recently as 2010, continued to apply the *Gardner* test in UPL cases against CPAs, urging that "an accountant should recommend the services of an attorney whenever it is necessary to resolve difficult or doubtful legal questions."[60]

The *Gardner* test is extremely problematic and yields absurd results for contemporary CPAs. Although most courts have recognized that the preparation of a "simple" income tax return is not the practice of law,[61] practically every tax return that a CPA prepares involves interpretation and application of arguably the most complex body of law in existence.[62] For example, even the most elementary business tax return often requires a depreciation calculation that calls for the exercise of professional judgment.[63] The preparer must determine whether I.R.C. § 263A mandates capitalization of the expense, whether to elect I.R.C. § 179 and deduct the expense currently, and within which I.R.C. § 168(e) class the asset falls.[64] Nevertheless, because courts continue to misconceive the nature and scope of the tax return preparation process, their continued use of the antiquated *Gardner* test will deem as UPL the preparation of practically every business tax return.[65]

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57. *Gardner*, 48 N.W.2d at 798.

58. *Agran*, 273 P.2d at 619.

59. *Id.* at 627.

60. *See Khan*, 935 N.E.2d at 1196 (citing *Gardner*, 48 N.W.2d at 796).

61. *Gardner*, 48 N.W.2d at 798 (stating "the preparation of the income tax return was not of itself the practice of law"); *see also Agran*, 273 P.2d at 627 (indicating that services involved in the preparation of income tax returns did not constitute the practice of law).

62. *See* Black & Black, *supra* note 6, at 3 (discussing the complexity of federal taxation in the United States); *see also* Melone, *supra* note 10, at 83-98 (providing a detailed explanation of the tax return preparation process and the difficult legal issues that inevitably arise during tax return preparation).

63. *Id.* at 87-88.

64. *Id.* at 88-89.

65. *Id.* at 83-84.

The second test that courts employ to determine whether an activity constitutes UPL is the "incidental services" test,[66] which the New York Appellate Division pronounced in its 1948 decision *In re New York County Lawyers Ass'n* (commonly referred to as *Bercu*).[67] In *Bercu*, the court held that an accountant, who neither prepared the client's tax return nor audited its books, engaged in UPL when he advised the client on the timing of a federal income tax deduction.[68] The court explained that an accountant can advise clients on incidental questions of law that arise in connection with auditing books or preparing tax returns, but cannot act as a consultant to render legal advice when that advice is independent of audit or tax return preparation services.[69] Astonishingly, the *Bercu* Court actually admitted that "[a]n accountant may know more about the tax law than some law practitioners," but proceeded to hold that the accountant "may not . . . set himself up as a public consultant on the law of his specialty."[70] After a lengthy and perplexing discussion of the nature of tax services, the *Bercu* Court refused to recognize that accountants who qualify to practice before the U.S. Department of the Treasury are also qualified to perform legal research and advise clients on general tax law.[71]

Courts and academics alike have vehemently criticized the incidental services test as unworkable.[72] While courts consistently point out that the principal concern of UPL is protection of the public,[73] the operation of the incidental services test in no way addresses that concern. Under the incidental services test, a CPA's delivery of a particular advisory service may or may not qualify as UPL, depending on whether he also provides related tax return preparation or accounting services.[74] For

66. *Id.* at 60; *see also* Schwab, *supra* note 31, at 1447-48 (discussing the incidental services test).

67. Melone, *supra* note 10, at 60.

68. *In re* N.Y. Cnty. Lawyers Ass'n, 78 N.Y.S.2d 209, 215, 221 (N.Y. App. Div. 1948), *aff'd*, *In re* Bercu, 87 N.E.2d 451 (N.Y. 1949). The deduction related to the client's payment of backed N.Y. City excise taxes. *Id.*

69. *Id.* at 220-21.

70. *Id.* at 217-18.

71. *Id.* at 217-20.

72. Melone, *supra* note 10, at 64. The *Agran* court expressly rejected the "incidental services" test set out in *In re N.Y. Cnty. Lawyers Ass'n*, 78 N.Y.S.2d at 216, *aff'd*, *In re Bercu*, 87 N.E.2d 451 (1949), stating "[t]he incidental test has no value except in the negative sense that if the furnishing of the legal service is the primary business of the actor such activity is the practice of law, even though such service is of an elementary nature." *Id.* at 625. The *Agran* court further highlighted that the incidental services test yields an illogical result when a layman provides any service that is remotely legal in nature and not incidental to his regular calling, and thus "ignores the interest of the public as the controlling determinant." *Id.*

73. *See* Herzog, *supra* note 12, at 358.

74. *See* Melone, *supra* note 10, at 64 (illustrating the illogical results that the incidental services test produces).

example, a CPA who researches and opines on whether his client can deduct as a business expense the cost of lawn maintenance, but does not prepare the client's tax return, engages in UPL. If, however, the CPA also prepares the client's tax return and, based on his research, takes a tax position by deducting that expense, the CPA has not, under the incidental services test, engaged in UPL. These divergent results illustrate how the incidental services test elevates the form of services over their substance and does nothing to ensure a practitioner's competence to render the services in question.[75]

A third test that courts utilize in UPL cases looks to whether the service "affects important rights of a person under the law" and whether an "average citizen" lacks sufficient "legal skill and knowledge of the law" to protect those rights.[76] The Supreme Court of Florida first pronounced this test in the 1962 case *Florida Bar v. Sperry*.[77] Twenty-eight years later, in the 1990 case *Florida Bar re Advisory Opinion-Nonlawyer Preparation of Pension Plans*, the Supreme Court of Florida reaffirmed the applicability of this test, holding that tax advice concerning whether the I.R.C. will treat a pension plan as "qualified" for federal income tax purposes constitutes the practice of law and thus requires an attorney to handle or supervise the matter.[78] The court reasoned that an improper submittal of a pension plan to the I.R.S. could deprive an employer of valuable aid in determining how to proceed with its pension plan, or even disqualify the plan altogether.[79]

The *Sperry* test, like other UPL tests, is unrealistic. First, the "average citizen" standard for determining whether protection of a person's legal rights requires a lawyer is preposterously overbroad. As some academics have pointed out, ascertaining the amount of legal knowledge that an "average citizen" possesses is practically

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75. *Id.*

76. *See* Needham, *supra* note 54, at 1345 (citing Sperry v. Florida, 373 U.S. 379, 591 (U.S. 1963)).

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

> [I]f the giving of such advice and performance of such services affect important rights of a 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.

*Sperry*, 140 So. 2d at 591.

78. Fla. Bar *Re* Advisory Op.-Nonlawyer Preparation of Pension Plans, 571 So. 2d 430, 441 (Fla. 1990).

79. *Id.*

impossible.[80] Moreover, the federal tax regulations, which expressly authorize nonlawyer CPAs to practice before the I.R.S.,[81] provide that such authorized practice includes "all matters connected with a presentation to the [I.R.S.] . . . relating to a client's rights, privileges, or liabilities under laws or regulations administered by the [I.R.S.]"[82] In sum, misconceptions of the nature and scope of tax and accounting services have led the Supreme Court of Florida to develop yet another unworkable test for UPL claims against CPAs. Virtually any accounting or tax service clearly affects a client's important legal rights, the protection of which certainly requires knowledge beyond that of an average citizen. For example, Congress has granted taxpayers who meet certain requirements the legal right to deductions to arrive at, and credits against, their U.S. tax liabilities.[83] To determine whether a taxpayer is entitled to a deduction or credit, a tax return preparer must ascertain the legal standard that qualifies the taxpayer for the deduction or credit, assess any potential limitation on the deduction or credit amount, and assess whether the taxpayer, based on his circumstances, has met that legal standard. The mere fact that most sophisticated taxpayers engage CPAs to perform this analysis evidences that an average citizen lacks the requisite knowledge to make such determinations.

Unfortunately, modern courts' continued application of these antiquated tests has led to results that are incommensurate with the purported policy of UPL rules. For example, in the 2010 case *Kahn v. BDO Seidman, LLP*, an Illinois appellate court applied the *Gardner* professional judgment test to conclude that tax advice concerning certain tax avoidance strategies and the related preparation of the client's income tax returns constituted the practice of law.[84] The court

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80. *See, e.g.*, Needham, *supra* note 54, at 1347-48.

81. *See* 31 C.F.R. § 10.3 (2012) (authorizing nonlawyer CPAs, enrolled agents, and enrolled actuaries to practice before the I.R.S.).

82. 31 C.F.R. § 10.2(a) (2012) (emphasis added). Under this broad regulation, preparation of federal tax returns constitutes "practice before the I.R.S." Herzog, *supra* note 12, at 369. In addition, tax planning advice likely satisfies the "connected with presentations before the I.R.S." requirement because the taxpayer will eventually report the proposed transaction on his tax return. *See id.*

83. *See, e.g.*, I.R.C. § 162 (authorizing a deduction for "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business"); *see also* I.R.C. § 901 (authorizing a foreign tax credit against a taxpayer's U.S. Income tax liability, subject to the complex limitations imposed by I.R.C. § 904, for "any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States.").

84. *See* Khan v. BDO Seidman, LLP, 935 N.E.2d 1174, 1196-97 (Ill. App. Ct. 2010). In *Kahn*, the court actually found for the CPA firm because the firm had disclaimed that "the preparation of the client's income-tax returns will raise difficult or doubtful legal questions and that the legal evaluations inherent in the proposed tax returns that [the CPA firm] prepares for

reasoned that the preparation of these returns raised difficult or doubtful legal questions that required review and approval of a qualified lawyer.[85] Although reported decisions like *Kahn* often provide extreme examples of CPAs pushing the limits of UPL rules,[86] courts' application of antiquated and overbroad tests deters CPAs from offering certain services for which they are arguably more qualified than attorneys to render.[87] For instance, a survey of reported case law suggests that most courts have held that a CPA who renders tax advice independent of other tax or accounting services engages in UPL.[88] Thus, unless the ABA and state bars revise the current UPL rules, the rules will continue to impose an unwarranted restraint on contemporary CPAs' practices.

## III. MECHANISMS TO OVERRIDE STATE UPL RULES

Courts have provided CPAs with some relief from troublesome state UPL rules through the doctrine of federal preemption, the U.S. Tax Court's Rules of Practice and Procedure, and the extension to CPAs of the tax practitioner-client privilege. The following discussion addresses how these mechanisms prevent unreasonable results by overriding state UPL rules in cases that involve CPAs. The practical outcomes that result from federal preemption, the operation of the U.S. Tax Court Rules, and extension to CPAs of the practitioner-client privilege support granting CPAs a status-based exemption from state UPL rules.

### A. *Federal Preemption: CPAs' Representation of Clients Before the I.R.S.*

Grounded in constitutional jurisprudence, the doctrine of federal preemption provides CPAs with a limited status-based exemption from overbroad state UPL rules. The Constitution of the United States

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the client are merely tentative or provisional until they are validated by a law firm." *Id.* The disclaimer effectively removed the services from the arbitration provision's coverage, which arbitration provision the clients sought to invoke. *Id.*

85. *Id.*

86. Other courts have recently applied these same tests to prohibit CPAs from advising clients on choice of entity decisions, *Columbus Bar Ass'n v. Verne*, 788 N.E.2d 1064 (Ohio 2003), filing standard incorporation documents, *N.Y. Cnty. Bar Ass'n v. Kirk*, No. 99-SU-00772-07, 2002 Pa. Dist. & Cnty. Dec. LEXIS 111 (Pa. County Ct. Dec. 20, 2002), and drafting estate planning documents, such as wills and trust agreements, *In re Estep*, 933 A.2d 763, 766 (Del. 2007).

87. Farrell, *supra* note 16, at 603 (noting that the value of the rules of professional conduct is dependent upon their interpretation); *see also infra* Part V.

88. Black & Black, *supra* note 6, at 30-31 (2004) (discussing various cases in which courts held that tax advice, which was not incidental to other services, constituted the practice of law).

fashioned a legal system premised on federalism by vesting in two distinct levels of government, the federal government and the government of each of the several states,[89] overlapping authority to legislate.[90] When the federal government acts in an area of the law in which state governments have previously legislated, or *vice versa*, conflicts inevitably arise.[91] Anticipating these conflicts, the framers of the Constitution included in Article VI the Supremacy Clause, which dictates that federal law "shall be the supreme law of the land."[92] Thus, if a state law conflicts with federal law, federal law controls and renders the state law inoperative.[93] Although Congress may expressly preempt state law, the preemption doctrine also applies if the federal government's actions impliedly preempt state law. Implied federal preemption can exist in two circumstances: when a direct conflict exists between state and federal law (conflict preemption), and when, within a particular field, federal regulation is so pervasive that no room remains for states to regulate (field preemption).[94] Under the Supreme Court's preemption jurisprudence, conflict preemption exists when "it is impossible for a private party to comply with both state and federal requirements."[95] Alternatively, field preemption exists when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[96] Thus, a state law can survive federal preemption only if "both [the state and federal] regulations can be enforced without impairing the federal superintendence of the field."[97]

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89. For the purpose of the following discussion, this Note includes in any reference to state law, the law of any U.S. territory or possession.

90. Courtney Gaughan, Note, *Some More Watters, Please: The Dodd-Frank Act's New Preemption Standards Lighten Consumers' Wallets*, 63 FLA. L. REV. 1459, 1463-64 (2011) (citing Mary J. Davis, *On Preemption, Congressional Intent, and Conflict of Laws*, 66 U. PITT. L. REV. 181, 182 (2004)); *see also* U.S. CONST. amend. X.

91. Davis, *supra* note 90, at 182.

92. *Id.* (citing U.S. CONST. art. VI, cl. 2). The Supremacy Clause states: "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

93. David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CALIF. L. REV. 1125, 1132-33 (1999) (discussing Gibbons v. Ogden, 22 U.S. 1, 38 (1824)).

94. *See* Gaughan, *supra* note 90, at 1464-65 (discussing the various tests for conflict and field preemption).

95. English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) and quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

96. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (quoting *Hines*, 312 U.S. at 67) (internal quotations omitted).

97. John P.C. Duncan, *The Course of Federal Pre-Emption of State Banking Law*, 18

The Supreme Court of the United States applied the federal preemption doctrine in the context of nonlawyers practicing before federal agencies in its 1963 landmark decision *Sperry v. Florida.*[98] In *Sperry*, the Florida Bar initiated proceedings to enjoin from preparing and prosecuting patent applications a nonlawyer patent practitioner who was registered to practice before the U.S. Patent Office (USPO).[99] On certiorari, the U.S. Supreme Court held that, although the State of Florida had a substantial interest in regulating the practice of law, state UPL laws must yield to federal statutes that authorize nonlawyers to perform particular functions.[100] The Court reasoned that, despite the Florida Bar's determination that the practitioner's patent services constituted UPL, the Supremacy Clause of the U.S. Constitution prohibited the state from denying the practitioner his federally-granted right to perform those patent services.[101]

Like the federal statutes and regulations that granted the patent practitioner in *Sperry* the right to prepare and prosecute patent applications before the USPO, 5 U.S.C. § 500(c) expressly authorizes CPAs to represent clients before the I.R.S.[102] Additionally 31 U.S.C. § 330 empowers the Treasury to regulate those who practice before it.[103] Exercising its regulatory power, the Treasury promulgated Circular 230 to interpret and generally govern practice before the I.R.S.[104] Circular 230 broadly defines "practice before the I.R.S." to include many of the tax services that state courts have,[105] as illustrated in Part II of this Article, held to constitute UPL.[106] Under the regulation, the term "practice" means "all matters connected with a presentation" to the I.R.S.[107] and "presentations" include "preparing documents; filing documents; corresponding and communicating with the [I.R.S.]; rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax

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ANN. REV. BANKING L. 221, 232 (1999) (quoting *Fla. Lime*, 373 U.S. at 142) (internal quotations omitted).

98. Sperry v. Florida, 373 U.S. 379 (U.S. 1963).

99. *Id.* at 381-82.

100. *Id.* at 383-84.

101. *Id.* at 385. The Court explained that Congress authorized the Commissioner of Patents to "prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office, 35 U.S.C. § 31, and the Commissioner, pursuant to § 31, has provided by regulation that 'an applicant for patent . . . *may be represented by an* attorney or *agent* authorized to practice before the Patent Office in patent cases.'" *Id.* (citing 37 C.F.R. § 1.31 (2011) (emphasis added)).

102. 5 U.S.C. § 500(c) (2006).

103. 31 U.S.C. § 330 (2006). This statute also references 5 U.S.C. § 500(c). *Id.*

104. *See* 31 C.F.R. § 10.0(a) (2011).

105. *Id.* § 10.2(a)(4).

106. *See* discussion *supra* Part II.

107. 31 C.F.R. § 10.2(a)(4) (2011).

avoidance or evasion; and representing a client at conferences, hearings, and meetings."[108]

Although Circular 230 does not distinguish between attorneys and CPAs,[109] it does state that "[n]othing in the regulations in this part may be construed as authorizing persons not members of the bar to practice law."[110] Some academics and courts have interpreted this provision as reserving for states the power to enforce their UPL rules and prohibit nonlawyers from providing certain tax advisory services.[111] However, Circular 230 deliberately provides a broad, non-exclusive list of authorized tax services that include "rendering written advice with respect to any entity, transaction, plan or arrangement."[112] In addition, tax advice on future transactions likely qualifies as a service "connected with presentations before the I.R.S." because the taxpayer will eventually report the proposed transaction on his tax return.[113] Therefore, the more rational view is that, through the application of *Sperry*, federal statutes and regulations[114] completely preempt states from regulating the provision of tax services by CPAs.[115]

The Judicial Court of Massachusetts adopted this broad view on

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108. *Id.*

109. *Id.* § 10.3(d).

110. *Id.* § 10.32.

111. *See* Black & Black, *supra* note 6, at 4 (suggesting that the Secretary of the Treasury has not given CPAs the right to "practice" before the I.R.S., but only the right to "practice accounting" before the I.R.S. (*e.g.*, to explain the financial statements they had prepared)). Black interpreted the provision that "nothing contained in the Code of Federal Regulations was to be construed to allow a nonlawyer to practice law" to literally negate the rest of the authority mentioned in the text above, which authority clearly and unequivocally grants CPAs the right to practice before the I.R.S. *Id.* In *Agran v. Shapiro*, the court held that the Treasury intended this provision of Circular 230 to prevent federal preemption of state UPL law, concluding that an accountant who was admitted to practice as an enrolled agent before the I.R.S. engaged in UPL when he advised his client on the deductibility of a net operating loss. Agran v. Shapiro, 273 P.2d 619 at 630; *see also* Petition of Kearney, 63 So. 2d 630 (Fla. 1953) (denying an attorney's petition to engage in the practice of law as federal tax counsel, limiting his appearances to cases before the federal court even though the attorney was a member in good standing of the bar of the U.S. Supreme Court and the U.S. Tax Court, and was authorized to practice before the U.S. Treasury Department).

112. 31 C.F.R. § 10.2(a)(4) (2011).

113. *See* Herzog, *supra* note 12, at 369 (citing Melone, *supra* note 10, at 57).

114. 5 U.S.C. § 500(c) (2011); 31 U.S.C. § 330 (2011); 31 C.F.R. § 10.2(a)(4) (2011).

115. 5 U.S.C. § 500(c) (2011); 31 U.S.C. § 330 (2011); 31 C.F.R. § 10.2(a)(4) (2011); *see* Sperry v. Florida, 373 U.S. 379, 383 (1963) (holding that federal statutes and regulations admitting nonlawyers to practice before the U.S. Patent Office preempt state laws forbidding unauthorized practice of law); *see* Black & Black, *supra* note 6, at 53 (stating that Circular 230 grants a privilege to "tax practitioners" when they are providing tax advice); *see* Nnona, *supra* note 6, at 898 (noting that Congress, by enacting 5 U.S.C. § 500, authorized CPAs to represent clients in tax matters and that this federal statute, which remains the law, preempts any contrary state law).

federal preemption in the 1980 case *Joffe v. Wilson.*[116] In *Joffe*, the court held that a CPA who represented his client to dispute with the I.R.S. a deficiency assessment during the settlement and administrative appeal processes did not engage in UPL because the CPA was entitled, pursuant to Circular 230, to "practice before the I.R.S."[117] Explaining the logic behind this position, the Massachusetts Superior Court in *Palmer v. Ernst & Young, LLP* stated:

> It would make little sense to find that a CPA or tax planner who was authorized to practice before the IRS was not engaged in the unauthorized practice of law when he argued with the IRS (and litigated administratively within the IRS) on behalf of his client about the legal interpretation of the Internal Revenue Code, but was engaged in the unauthorized practice of law when he gave the tax advice to the client that became the subject of the dispute with the IRS. For all practical purposes, a CPA or tax planner authorized to practice before the IRS may provide advice to a client regarding tax law, even as to arcane matters of tax law, without engaging in the unauthorized practice of law, provided he does not hold himself out as an attorney.[118]

In sum, the logical results that flow from a broad application of *Sperry* to UPL cases that involve tax services strongly support the reality that CPAs deserve a status-based exemption from UPL rules.

### B. *Tax Litigation: CPAs' Representation of Clients Before the U.S. Tax Court and Tax Practitioner-Client Privilege*

The federal statutes and regulations discussed above expressly authorize CPAs to practice before the I.R.S., a federal administrative agency. The federal government has also allowed CPAs to represent clients in the U.S. Tax Court (Tax Court)[119] and has extended to CPAs the practitioner-client privilege, a privilege traditionally confined to attorneys.[120] A brief history of the Tax Court's evolution is helpful in

116. Joffe v. Wilson, 407 N.E.2d 342, 345-46 (Mass. 1980).

117. *Id.* The court also noted that, when the time came to commence an action in Federal District Court, the CPA appropriately engaged an attorney whom the CPA assisted during the Federal District Court proceedings. *Id.*

118. Palmer v. Ernst & Young, LLP, No. 97747, 2007 Mass. Super. LEXIS 109, at *15-16 (Mass. Super. Ct. 2007).

119. Practice before the I.R.S. is distinct from practice before the U.S. Tax Court. Matthew Bender & Co., Inc., 1-4 TAX CONTROVERSIES: AUDITS, INVESTIGATIONS, TRIALS § 4.06 (2000).

120. *See* Michael Wilson, Note, *Careful What You Wish For: The Tax Practitioner-Client Privilege Established by the Internal Revenue Service Restructuring and Reform Act of 1998*, 51 FLA. L. REV. 319, 320-22 (1999) (providing a history of the attorney-client privilege).

understanding how the federal government has recognized CPAs' unique role in tax litigation.

Congress established the U.S. Board of Tax Appeals (Board), the predecessor to the Tax Court, when it passed the Revenue Act of 1924.[121] In doing so, Congress recognized the need for an independent agency within the executive branch that consisted of "Members" who possessed the specialized knowledge to handle increasingly complex tax issues.[122] In 1942, Congress renamed the Board "The Tax Court" and changed the title of each Member to Judge.[123] Finally, Congress passed the Tax Reform Act of 1969, converting the Tax Court from an administrative agency into a judicial court of record under Article I of the U.S. Constitution.[124] By converting the Tax Court from an administrative agency into an Article I judicial court, Congress opened the door for CPAs to litigate tax cases in trial court.[125] Nevertheless, under any of the tests discussed in Part II of this Article, a CPA who represents a client before a judicial tribunal such as the Tax Court most certainly engages in the practice of law.[126]

The U.S. Supreme Court first addressed whether nonlawyer CPAs could represent clients before the Tax Court's predecessor in the 1926 case *Goldsmith v. U.S. Board of Tax Appeals*.[127] In *Goldsmith*, the Board rejected a New York CPA's application for admission to practice before it because the CPA had allegedly rendered improper advice to his clients.[128] The CPA filed a writ of mandamus to compel the Board to enroll him as an attorney with the right to practice and to enjoin the Board from interfering with his representation of clients.[129] The Supreme Court held that, because the Board properly prescribed rules granting licensed CPAs the legal right to practice before it, constitutional due process entitled the CPA to notice and an opportunity to contest denial of his admission.[130] In summary, the *Goldsmith* Court

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121. *See* Revenue Act of 1924, ch. 234, § 900(a), 43 Stat. 253, 336.

122. *See id.*; *see also* USTaxCourt.gov, About the Court, http://www.ustaxcourt.gov/about htm (last visited Mar. 17, 2012) (explaining that Tax Court judges "have expertise in the tax laws and apply that expertise in a manner to ensure that taxpayers are assessed only what they owe . . .").

123. *See* Revenue Act of 1942, ch. 619, § 504(a), 56 Stat. 798, 957.

124. *See* I.R.C. § 7441 (2012); *see also* USTaxCourt.gov, *supra* note 122.

125. *See* Schwab, *supra* note 31, at 1450 (classifying representing clients in appearances before tribunals as an "act . . . commonly understood to be the practice of law").

126. *See supra* Part II.

127. *See* Herzog *supra* note 12, at 363-64 (discussing permissible activities by CPAs that do not constitute the practice of law).

128. Goldsmith v. U.S. Bd. of Tax Appeals, 270 U.S. 117, 119-20 (1926).

129. *Id.* at 119.

130. *Id.* at 122-24. The Court ultimately denied the CPAs writ of mandamus because he never sought a hearing after the Board denied his admission. *Id.* at 124.

recognized that, pursuant to the Board's rules of procedure, licensed CPAs were qualified and had the legal right to represent clients before the Board.[131]

Similar to the rules that granted CPAs a status-based right to practice before the Board,[132] Rule 200(a) of the U.S. Tax Court Rules of Practice and Procedure (Tax Court Rules) authorizes nonlawyers who pass an admission exam to practice before the Tax Court.[133] Therefore, a nonlawyer CPA admitted to practice before the Tax Court can represent a taxpayer at trial if the taxpayer chooses to litigate in Tax Court.[134] Interestingly, at the trial level, a taxpayer may litigate a tax controversy against the I.R.S. in one of three fora: the Tax Court, the U.S. Court of Federal Claims, or Federal District Court.[135] The procedure for litigating in Tax Court allows a taxpayer to contest a tax liability at trial without first paying any of the asserted deficiency.[136] In contrast, both the Federal District Courts and the Court of Federal Claims require the taxpayer to first pay a portion of the alleged deficiency, and then sue for a refund.[137] Although a CPA may represent a taxpayer in Tax Court,[138]

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131. *See id.* at 122. Significantly, the Court noted that, although at the time of the case, the Board was an administrative agency rather than a "court," the reasoning behind the opinion and the holding would also apply to courts that admit individuals to practice before them. *Id.* at 122-23 ("The fact that in the *Manning Case* the body was called a Court and that here the Board is an executive tribunal does not make the decision inapplicable.").

132. *Id.* at 119.

133. Tax Ct. R. 200(a)(3). The Tax Court will admit nonlawyers who file an application, pass the Tax Court's examination, and pay the appropriate fee. David M. Fogel, *Non-lawyers' Handbook for Assisting Clients with their Tax Court* Cases, J. TAX PRAC. & PROC., June-July 2005, at 55-61. The Tax Court examination is offered once every other year and covers the following subjects: the Tax Court rules (25%), the Federal Rules of Evidence (25%), Federal Tax Law (40%), and Legal Ethics (10%). *Id.*

134. *See* Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 253-54 (1998) (citing I.R.C. § 7452 (stating that "[n]o qualified person shall be denied admission to practice before the Tax Court because of his failure to be a member of any profession or calling.")).

135. BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 115.1 (3d ed. 1999). The author notes that in some limited circumstances, a taxpayer may litigate tax issues against the IRS in federal Bankruptcy Court. 11 U.S.C. § 505. *See, e.g.*, *In re* Premo, 116 B.R. 515 (Bankr. E.D. Mich. 1990). Because the taxpayer may litigate a tax issue in Bankruptcy Court only if he is involved in bankruptcy proceedings, Bankruptcy Court is not truly an alternative forum. *See* Shu-Yi Oei, *Rethinking the Jurisdiction of Bankruptcy Courts Over Post-Confirmation Federal Tax Liabilities: Towards a New Jurisprudence of 11 U.S.C. § 505*, 19 AKRON TAX J. 49, 49-50 (2004) (providing a detailed discussion of the Bankruptcy Court's jurisdiction over federal tax liabilities). Thus, this Note's discussion of alternative fora for tax litigation is limited to the Tax Court, the U.S. Court of Federal Claims, and Federal District Court.

136. BITTKER & LOKKEN, *supra* note 135.

137. *Id.*; Flora v. United States, 357 U.S. 63, 78 S. Ct. 1064, 1079, 2 L. Ed. 2d 1165 (1958), *aff'd on reh'g*, 362 U.S. 145, 80 S. Ct. 630, 4 L. Ed. 2d 623 (190). Shore v. United

he cannot, under the current rules, represent a taxpayer in Federal District Court or the Court of Federal Claims.[139]

The inconsistency of authorizing CPAs to represent clients in tax matters before both the I.R.S. and the Tax Court, but not before the Court of Federal Claims or the U.S. District Courts, yields illogical results. First, during its proceedings, the Tax Court applies the same Federal Rules of Evidence as any other federal court.[140] Hence, both the substantive law and the rules of evidence are identical regardless of which court a taxpayer chooses. Nonetheless, because a CPA may represent a tax litigation client only in Tax Court, a client who chooses to engage a CPA rather than an attorney is limited in his choice of forum. Moreover, notwithstanding the Tax Court Rules, UPL rules deny clients continuity in representation. Because any representation at the trial court level would, under the tests described in Part II, constitute UPL,[141] a CPA who has represented a client during an administrative proceeding, such as an appeals conference, cannot continue to represent that client if the case proceeds to trial. Finally, once admitted to practice before the Tax Court, the Tax Court Rules require a practitioner to "carry on [his] practice in accordance with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association."[142] However, a CPA who is authorized to and in fact practices before the Tax Court cannot possibly comply with both the MRPCs and the Tax Court Rules because the MRPCs prohibit nonlawyers from practicing law, sharing fees with lawyers, and owning an interest in any entity that engages in the practice of law.[143]

A final example of Congress's recognition that CPAs play a distinct role in the litigation arena is its recent extension to CPAs of the tax practitioner-client evidentiary privilege. This privilege mirrors the attorney-client privilege, which protects communications between an attorney and his client by prohibiting disclosure both during discovery and at trial of matters that a client conveys to the attorney for the

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States, 9 F.3d 1524 (Fed. Cir. 1993).

138. TAX CT. R. 200(a).

139. *See* R.C.F.C. § 83.1 (requiring that an attorney represent a client before the Court of Federal Claims); *see generally* 28 U.S.C. § 1654 (2012) (providing the general rule that either the party or their "counsel" appear before a federal court).

140. I.R.C. § 7453; Am. Police & Fire Found. v. Comm'r, 81 T.C. 699, 707 n.3 (1983); Malinowski v. Comm'r, 71 T.C. 1120, 1125 (1979).

141. *See* Joffe v. Wilson, 407 N.E.2d 342, 343-45 (Mass. 1980) (holding that a CPA, who represented his client through the administrative tax controversy process, properly relinquished to an attorney complete control over the matter when the time came to commence an action in the Federal District Court because the CPA "acknowledged that he was not qualified to appear, and that an attorney must be retained to handle the proceedings").

142. TAX CT. R. 201(a).

143. *See* Daly, *supra* note 133, at 254.

purpose of obtaining legal advice.[144] In 1998, Congress recognized the critical role that CPAs play in tax litigation by enacting I.R.C. § 7525.[145] This statute created the new practitioner-client privilege for those tax professionals admitted to practice before the I.R.S. (*i.e.*, CPAs).[146] Prior to the statute's enactment, courts avoided extending privilege to accountant-client communications by holding, in stark contrast to UPL cases, that CPAs' professional advice did not constitute "legal advice."[147] With I.R.C. § 7525 in place, federal law now affords CPAs, by virtue of their licensure, essentially the same protections over client communications that that common law historically granted only to attorneys.[148]

In summary, Circular 230 authorizes CPAs to practice before the I.R.S. In addition, a clear trend of allowing CPAs to provide traditional legal services, such as representation before judicial tribunals, has

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144. Wilson, *supra* note 120, at 321.

145. *See* Dzienkowski & Peroni, *supra* note 11, at 110 (citing 26 U.S.C. § 7525 (1998) (amended 2004)) (noting congressional recognition of the key role that accountants and nonlawyers who practice before the I.R.S. play in tax controversy work).

146. *Id.*

147. *See* Lee A. Sheppard, *News Analysis: What Tax Advice Privilege?*, 98 TAX NOTES TODAY 128-33 (1998); *see In re* Grand Jury Investigation, 842 F.2d 1223, 1225 (11th Cir. 1987) ("[I]nformation . . . transmitted . . . for the purpose of preparing . . . tax returns . . . is not privileged information."); *see* United States v. Gurtner, 474 F.2d 297, 298-99 (9th Cir. 1973) (holding that tax return preparation is not the rendering of legal advice); *see* Canaday v. United States, 354 F.2d 849, 857 n.7 (8th Cir. 1966). However, some courts have held that tax return preparation involves some legal advice, but the privilege was vitiated because there was either no expectation of confidentiality or there had been a waiver of the privilege. *See* United States v. Lawless, 709 F.2d 485, 487-88 (7th Cir. 1983) (holding that information transmitted for use on a tax return has no expectation of confidentiality); *see also* Dorokee Co. v. United States, 697 F.2d 277, 279-80 (10th Cir. 1983).

> Even those courts holding that the attorney-client privilege can arise from the preparation of income tax returns do not apply the privilege to documents given by a client to an attorney for inclusion in the client's income tax return, because such information is obviously not intended to remain confidential.

*Id.* at 280. *See also* United States v. Cote, 456 F.2d 142, 145 n.4 (8th Cir. 1972) (holding the client taxpayer waived privilege not only as to the information on the tax return but also as to the details underlying the information because taxpayer's accountant transcribed the information from work papers onto amended tax returns).

148. *See* Dzienkowski & Peroni, *supra* note 11, at 110 (citing 26 U.S.C. § 7525(a)(1) (1998) (amended 2004)). The author acknowledges that some limitations that do not apply to ordinary attorney-client privilege apply to the practitioner-client privilege. In addition, a deep body of law has developed on the intricacies of accountant-client privilege. However, these topics are beyond the scope of this Article. Rather, the purpose of introducing the tax practitioner-client privilege is to illustrate Congress's recognition of CPAs vital role in contemporary tax planning and civil litigation. For a detailed discourse on the tax practitioner-client privilege, see Wilson, *supra* note 120.

developed at the federal level. Finally, Congress's recent extension to CPAs of the practitioner-client privilege evidences the federal government's recognition that CPAs are uniquely qualified to provide certain legal services and deserve similar protections that the law has traditionally afforded attorneys. As such, the ABA and state regulators should align UPL rules with existing federal law, enabling CPAs to render comprehensive tax services without fear of engaging in UPL.[149]

## IV. MULTIDISCIPLINARY PRACTICE

Legal scholars suggest that multidisciplinary practice, commonly referred to as MDP, is one of the most important issues that the legal profession faces today.[150] MDP is the joint practice between lawyers and nonlawyer professionals in which the two integrate their respective fields of expertise to offer comprehensive advice on multifaceted matters.[151] In the United States, UPL rules that prohibit partnerships and profit-sharing arrangements between lawyers and nonlawyers have historically prevented the formation of MDPs.[152] However it is difficult to ignore the benefits that MDPs offer.

The modern business environment is extremely dynamic and continues to experience rapid globalization.[153] Despite this reality, U.S. law firms, under their current structure, arguably lack the capacity to

149. *See* Herzog, *supra* note 12, at 369 (suggesting that the time is ripe to grant CPAs access to represent clients in tax disputes before local tribunals).

150. *See* Nnona, *supra* note 6, at 853; *see also* John H. Matheson, *The Future of the Profession: A Symposium On Multidisciplinary Practice: Not "If" but "How": Reflecting on the ABA Commission's Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269, 1269 (2000).

151. *See* Nnona, *supra* note 6, at 852 n.3 (defining the term "multidisciplinary practice"); *see also* Luppino, *supra* note 6, at 110-12 (describing the nature of MDPs). The Commission on Multidisciplinary Practice defined MDP as:

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

Carol McLean Brewer et al., *Con: Facing the Tide of Change*, 74 FLA. B.J. 13, 39 n.4 (2000).

152. Luppino, *supra* note 6, at 119. The primary impediment to MDPs is most states' adoption of rules similar to Rule 5.4 of the ABA Model Rules of Professional conduct. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4 (2011).

153. Biamonte, *supra* note 17, at 1165-66 (2001).

address the broad spectrum of issues that clients face.[154] MDPs operate as "one-stop-shops" to provide clients with integrated accounting, business, tax, and legal services at a lower cost than other alternatives.[155] These firms can minimize the cost of providing services by delegating functions internally rather than paying market prices, and by taking advantage of economies of scale and scope.[156] Furthermore, professionals' diverse expertise enables MDP teams to identify both legal and non-legal issues that affect the client.[157] Finally, MDPs minimize the risk that lawyers will render incompetent advice in areas that require specialized knowledge and skill.[158]

Beginning in the late 1980s, the Big Four[159] accounting firms identified the global market for legal services as a promising business opportunity and sought to expand their service lines into areas "remarkably similar to those traditionally offered by law firms."[160] Their strategy was clear: "carve a niche in the legal services area that compliments [their] existing core business . . . ," namely corporate law, finance, labor law, estate planning for high net-worth individuals, mergers and acquisitions, corporate restructuring, intellectual property, and employment law.[161] Because global accounting firms offer clients this expansive range of expertise, they have been largely successful in penetrating the European and Australian legal markets where professional regulators have welcomed the formation of MDPs.[162] For

154. *Id.*

155. *See* Dzienkowski & Peroni, *supra* note 11, at 117-27 (discussing at length the benefits of and demand for MDPs).

156. *See id.* at 120.

157. *See id.* at 121.

158. *See id.* at 122.

159. Although many sources refer to these as the "Big Five" or "Big Six," only four of these multinational accounting firms survive today, KPMG, Ernst & Young, PricewaterhouseCoopers, and Deloitte. *See* Katherine S. Pell, *The New Enforcement Paradigm for Big Four Accounting Firms*, 78 TEMP L. REV. 775, 775 n.1 (2005).

160. *See* John H. Matheson, *Governance Issues in the Multidisciplinary Corporate Practice Firm*, 69 U. CIN. L. REV. 1107, 1109 (2001); *see also* Daly, *supra* note 134, at 219-20.

161. *See id.* at 234-35 (quoting the lead partner of KPMG's International Tax Centre in Amsterdam and providing the strategic perspective of partners from Arthur Anderson and PricewaterhouseCoopers).

162. *See* Daly, *supra* note 134, at 219 (noting the extraordinary growth of MDPs in Europe); *see also* Nnona, *supra* note 6, at 918 (discussing the liberalized regulatory scheme in Europe); *see* Matheson, *supra* note 150, at 1300 ("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."). In addition, PricewaterhouseCoopers has successfully become Australia's largest multi-disciplinary partnership (MDP). PWC Australia Legal Services, http://www.pwc.com.au/legal/ (last visited Apr. 16, 2012).

example, as of 2000, Big Four accounting firm PricewaterhouseCoopers (PWC) employed more than 1600 non-tax lawyers who served its clients on integrated teams, making PWC, at that time, the third largest law practice in the world.[163] PWC currently boasts its status as Australia's largest MDP, "provid[ing] . . . clients with seamless access to specialist legal and non-legal expertise across a broad spectrum of commercial disciplines."[164]

Like its European and Australian counterparts, the U.S. professional services market has an extraordinary demand for MDPs. A survey that the U.S. Chamber of Commerce and the American Corporate Counsel Association released indicated that seventy percent of Americans favor changing legal professional rules to allow lawyers and other professionals to work together in the same firm.[165] Despite a strong push by accounting firms and the market,[166] and the ABA's own acknowledgment that nonlawyers are already providing integrated services that are practically impossible to categorize under current UPL rules,[167] the ABA and state bars have continuously refused to accommodate MDPs.[168]

In August 1999, the ABA House of Delegates rejected a general recommendation of the Commission on Multidisciplinary Practice that the legal profession allow lawyers and nonlawyers to offer services

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163. *See* Matheson, *supra* note 150, at 1274. The American Lawyer reported in November 1998 that PWC employed 1663 nontax lawyers in 39 countries; Arthur Andersen employed 1500 in 27 countries; KPMG employed 988 in an unidentified number of countries; Ernst & Young employed 851 in 32 countries; and Deloitte Touche Tohmatsu employed 586 in 14 countries. Daly, *supra* note 134, at 232.

164. PWC Australia Legal Services, *supra* note 162.

165. Diane Hartman, *Give Us Your Opinion on Multidisciplinary Practice ("MDP")*, 29 COLORADO LAW. 31 (2000), *available at* http://www.cobar.org/tcl/tcl_articles.cfm?articleid=929.

166. Attractive employment opportunities for attorneys abroad, and the availability of comprehensive integrated business and legal services abroad could shift the labor market for attorneys and the professional services market away from the United States and into more liberal countries. Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2193, 2198 (2010), *available at* http://ir.lawnet.fordham.edu/flr/vol78/iss5/4. *See, e.g.*, Working Overseas—A Reality Check, Ernest Schaal (Oct. 2008), http://apps.americanbar.org/lpm/lpt/articles/mkt10081.shtml.

167. *See* Luppino, *supra* note 6, at 132-33 (quoting the then President of the ABA, Alfred P. Carlton, who stated, "the revelation that there are an increasing number of situations where nonlawyers are providing services that are difficult to categorize under current statutes and case law as being, or not being, the delivery of legal services").

168. *See* Dzienkowski & Peroni, *supra* note 11, at 149 (describing the ABA's rejection of proposals to facilitate MDPs and explaining that the ABA's action "will benefit large multinational corporations who will continue to receive multidisciplinary services, and disadvantage low- and middle-income clients who will be unable to readily gain access to such services.").

through MDPs.[169] Instead, the ABA House of Delegates opted to defer changing the rules until additional study demonstrated that MDPs would serve the public interest.[170] Meanwhile, flying in the face of any progress toward more flexible rules, in February 2000, the House of Delegates adopted a resolution to encourage state and local bars to investigate and prosecute UPL.[171] In May 2000, the Commission on Ethics issued a second recommendation that authorized MDPs and other fee-sharing arrangements, scaling back the prior recommendation,[172] but adding measures to preserve the profession's core values.[173] The House of Delegates voted in July 2000 by a resounding margin to reject the recommendation and discharge the Commission from any further activities.[174] As a consequence, all efforts at the national level to accommodate MDPs in the United States came to an abrupt halt.[175]

In 2009, ABA President Carolyn B. Lamm created the ABA Commission on Ethics 20/20 to "perform a thorough review of the [MRPCs] and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments."[176] However, the Commission's most recent Discussion Paper on Alternative Law Practice Structures clearly indicates that the Commission has completely "ruled out" even proposing an amendment to the model rules that would facilitate MDPs.[177] The 20/20 Commission's refusal to act represents the third occasion on which the ABA has turned its back on the MDP issue and reaffirmed its complacency with the status quo.[178]

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169. *See* Dzienkowski & Peroni, *supra* note 11, at 85 (citing ABA Commission on Multidisciplinary Practice, Recommendations, Report, and Reporter's Notes on the ABA Commission on Multidisciplinary Practice, Appendix A, *available at* http://www.abanet.org/cpr/mdpfinalreport.html).

170. *Id.* at 86.

171. *See* Sheryl Stratton, *ABA Rattles Unauthorized Practice of Law Saber While Debating MDPs*, 86 TAX NOTES 1057 (1999).

172. *See* Biamonte, *supra* note 17, at 1174.

173. *See* Dzienkowski & Peroni, *supra* note 11, at 85-86.

174. *Id.* at 86-87; *see also* Sheryl Stratton & Lee A. Sheppard, *American Bar Association Says No to Multidisciplinary Practice*, 88 TAX NOTES 311 (2000).

175. *See* Dzienkowski & Peroni, *supra* note 11, at 89.

176. *ABA Commission on Ethics 20/20*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Mar. 19, 2012).

177. Jamie S. Gorelick & Michael Traynor, *ABA Commission on Ethics 20/20 Discussion Paper on Alternative Law Practice Structures*, Dec. 2, 2011, *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf ("The Commission has ruled out certain forms of nonlawyer ownership that currently exist in other countries. In particular, the Commission rejected: . . . (c) multidisciplinary practices (i.e. law firms that offer both legal and non-legal services separately in a single entity.)").

178. *See* Matheson, *supra* note 150, at 1130 (noting that the ABA has backed off revision of the Model Rules of Professional Conduct twice; once with the rejection by the ABA House of

States are not bound by the ABA's MRPCs and are free to adopt their own rules of professional conduct.[179] Nevertheless, most states rely heavily on the MRPCs as a guidepost for promulgating their rules.[180] In fact, while many jurisdictions have strongly considered authorizing MDPs,[181] only one jurisdiction, the District of Columbia, has actually adopted rules that clearly accommodate them.[182] The adoption of rules authorizing MDPs will likely promote partnerships between qualified professional services firms and law firms. For example, in 1999 two prominent tax attorneys took advantage of Washington D.C.'s more lenient rules and formed an interdisciplinary alliance with Big Four Accounting Firm Ernst & Young.[183] The newly-formed MDP firm,

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Delegates of the recommendations of the Commission on Multidisciplinary Practice, and once with the failure of the Ethics 2000 Commission to propose any significant revisions to the Model Rules that would affect multidisciplinary practice).

179. Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CALIF. L. REV. 1, 11 (1998).

180. *Id.*

181. *See Transcript, House of Delegates Annual Meeting*, A.B.A. (July 11, 2000) *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdp_hod_transc.html. In the July 11, 2000 meeting of the House of Delegates on MDPs, the President of the Colorado Bar Association argued that the ABA should continue debate on the subject of MDPs in part because almost every state and metropolitan bar had undertook to form a commission or committee to investigate the issue, but that work was incomplete. *Id.*

182. Matheson, *supra* note 150, at 1283-84. In the 1980s, the District of Columbia voted in Rule 5.4(b) of the D.C. Rules of Professional Conduct, which states:

> (b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:
> (1) The partnership or organization has as its sole purpose providing legal services to clients;
> (2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;
> (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;
> (4) The foregoing conditions are set forth in writing.

D.C. MODEL RULES OF PROF'L CONDUCT R. 5.4(b) (2011); Smith, *supra* note 31, at B1 (noting that D.C. is the only jurisdiction in the United States that currently authorizes MDPs).

183. Susan Beck, *Bingham McCutchen to Acquire McKee Nelson*, AMLAW DAILY, July 6, 2009, http://amlawdaily.typepad.com/amlawdaily/2009/07/my-entry.html. 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. that had as partners both a nonlawyer and an attorney who was a member of the Virginia Bar. VSB Comm. on Legal Ethics, Legal Ethics Op. 1584 (1994). The committee concluded that D.C.'s rule enabled Virginia attorney to practice in that firm in

McKee Nelson Ernst & Young, offered integrated legal and accounting services.[184] Although the success of experimental U.S.-based MDPs like McKee Nelson Ernst & Young remains unproven,[185] the immense growth of MDPs throughout Europe and Australia strongly suggests that they will thrive in the U.S. market if given the opportunity to do so.

MDPs offer a practical solution to the UPL problem. However, the American legal profession's regulators continue to reject them based on exaggerated arguments, unfounded fears of eroding the profession's ethical obligations, form over substance reasoning, and, most significantly, ignorance of clients' needs.[186] In doing so, regulatory bodies engage in economic protectionism[187] and contravene the underlying policy of legal ethics—protecting the public. The U.S. Supreme Court has recognized that "ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'"[188]

Two prominent federal governmental agencies, the U.S. Department of Justice and the Federal Trade Commission, have highlighted the dangers of the legal profession's protectionist stance.[189] In 2002, these two agencies submitted to the ABA Task Force a joint letter, warning that the ABA's overbroad application of UPL rules "could restrain competition between lawyers and nonlawyers to provide similar services to American consumers."[190] The letter further explained that an overbroad definition of the practice of law "is not in the public interest because the harms it imposes on consumers by limiting competition are likely much greater than any consumer harm that it prevents."[191] Nevertheless, as Jennifer Smith sarcastically pointed out in her recent *Wall Street Journal* article, "[t]he legal profession's notion that law isn't a commercial enterprise may come as a surprise, since some lawyers now charge more than $1,000 an hour."[192] If the true policy behind regulating the practice of law is to protect the public, the ABA and state

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D.C., despite Virginia DR 3-103(A)'s prohibition of nonlawyers owning an interest in a firm that practices law. *Id.*

184. Beck, *supra* note 183.

185. Smith, *supra* note 31, at B5 (noting that the number of firms which have taken advantage of D.C.'s more lenient rules remains unclear).

186. Luppino, *supra* note 6, at 122.

187. *See id.*

188. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) (quoting Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1950)); *accord* FTC v. Super. Ct. Trial Lawyers Ass'n, 493 U.S. 411, 423 (1990).

189. Luppino, *supra* note 6, at 134-35 (citing *DOJ/FTC Joint Letter to ABA*, *supra* note 5).

190. *Id.*

191. *Id.* at 135.

192. Smith, *supra* note 31, at B1.

bars should seriously reconsider their outright rejection of MDPs.

## V. CPA SELF-REGULATION: MORE THAN ADEQUATE PROTECTION OF THE PUBLIC

Opponents of relaxing the UPL rules for CPAs argue that nonlawyer professionals who either advise clients on peripheral legal matters or serve clients through MDP firms undermine the core values of the profession: competence, independent judgment, confidentiality, and loyalty.[193] This view simply highlights the opponents' sheer ignorance of other professions' ethical regulations.

CPAs, by virtue of their professional licensure, have already exhibited the requisite technical proficiency and ethical prowess necessary to protect the public.[194] Additionally, the American Institute of Certified Public Accountants (AICPA) Code of Professional Conduct (CPC), in conjunction with its enforcement mechanisms, alleviates the need for state bars to monitor CPAs' practices.[195] Similar to state bars, state boards of accountancy regulate CPAs who practice within their jurisdiction.[196] Most states require as a prerequisite to sit for the CPA exam completion of at least 150 credit hours of college and graduate-level coursework (approximately 5 academic years of study).[197] The 150 credit hour requirement typically includes 39 combined credit hours in taxation, auditing, financial, cost, and managerial accounting, accounting information systems, and a minimum of 5 hours of business law.[198]

In addition to the academic requirements, a candidate must pass all 4 sections of the rigorous Uniform CPA Examination (CPA Exam) within 18 months of each other.[199] Each section of the CPA exam had between

193. *See* Dzienkowski & Peroni, *supra* note 11, at 174.

194. Melone, *supra* note 10, at 48.

195. *See id.* at 48-49.

196. *See id.* at 99.

197. *See Licensure Educational Requirements*, AMERICAN INSTITUTE OF CPAS, http://www.aicpa.org/BECOMEACPA/LICENSURE/REQUIREMENTS/Pages/default.aspx#states (last visited Apr. 16, 2012).

198. *Id.*; *see, e.g.*, FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, http://www.myfloridalicense.com/dbpr/cpa/licensure.html (last visited Mar. 21, 2012). Florida's licensure requirements are typical of most states and require at least two courses in business law, only one of which may be lower than a junior-level course. *See id.* Many of the remaining states' 150 hour requirements became effective in 2012. *See, e.g.*, *State of Delaware Department of State: Division of Professional Regulation: Board of Accountancy, Frequently Asked Questions*, http://dpr.delaware.gov/boards/accountancy/faqs.shtml#Q6 (last visited Apr. 16, 2012).

199. *CPA Exam Pass Rates*, AMERICAN INSTITUTE OF CPAS, http://www.aicpa.org/BecomeACPA/CPAExam/PsychometricsandScoring/PassingRates/DownloadableDocuments/PassRates

a 44% and 47% average pass rate in 2011.[200] In comparison, the July 2011 Florida Bar Exam's pass rate was 82%.[201] Moreover, the CPA Exam covers a significantly broad spectrum of complicated legal topics, most of which topics are not covered in required courses of accredited law school curricula. The CPA Exam's legal subjects range from basic contract law to the complex topics of secured transactions, choice of entity, and taxation.[202]

Finally, unlike the legal profession, most state boards of accountancy have added a one-year experience requirement for CPA licensure.[203] This requirement provides further assurance that a licensed CPA has gained sufficient on-the-job training to render competent advice. As to lawyers' proficiency in taxation, *Juris Doctor* curricula generally do not require even a single tax course, and bar examinations almost uniformly lack coverage of any federal tax law.[204] Because most attorneys lack training in the area of taxation, some academics have proposed adding a requirement that "tax practitioners" meet a higher standard of proficiency than merely obtaining a *Juris Doctor* and passing a bar examination.[205] These proposals would introduce separate certification, experience, and continuing education requirements for attorneys who

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2011.pdf (last visited Apr. 16, 2012).

200. *Id.*

201. Florida News Archive – Bar Admissions, *Florida Bar Exam Results*, SUNETHICS, http://www.sunethics.com/ba-results.htm (last visited Mar. 21, 2012). The author acknowledges that the different prerequisites to sit for these exams (*i.e.*, the completion of a J.D. versus the completion, in most states, of 150 hours of combined undergraduate and graduate coursework) may contribute to the variance in these pass rates, however their comparison is intended only to emphasize the rigorous licensure requirements for CPAs and CPAs unique qualification for a status-based exemption from UPL enforcement.

202. The Regulation Section of the Uniform CPA Exam covers the following areas of substantive law: professional responsibility, I.R.S. Circular 230, federal securities law, contracts, sales, commercial paper, secured transactions, bankruptcy, debtor-creditor relationships, agency, employment and environmental regulation, property, and insurance, federal tax process, procedures, accounting, and planning, as well as federal taxation of property transactions, individuals, and entities (which include sole proprietorships, partnerships, limited liability entities, C corporations, S corporations, joint ventures, trusts, estates, and tax-exempt organizations). *Content and Skill Specifications for the Uniform CPA Examination*, AM. INST. OF CPAS, http://www.aicpa.org/BecomeACPA/CPAExam/ExaminationContent/ContentAndSkills/DownloadableDocuments/CSOs-SSOs-Effective.7-1-11.pdf (July 1, 2011). In addition, the exam requires candidates to perform tax research, evaluate the tax implications of different legal structures for business entities, and apply analytical reasoning tools to assess how taxes affect economic decisions related to the timing of income/expense recognition and property transactions. *Id.*

203. *See, e.g.*, FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, *supra* note 198.

204. *See* Black & Black, *supra* note 6, at 79-80 (noting the lack of tax knowledge of most attorneys, including "tax lawyers").

205. *Id.* at 96-97.

hold themselves out as tax practitioners in order to ensure competency in the diverse and complex areas of tax law.[206]

In addition to the rigorous CPA licensure requirements, the AICPA Code of Professional Conduct includes rules that are substantially similar to the rules of professional conduct governing lawyers. Thus, the AICPA CPC provides adequate protection for the public. As a threshold matter, the CPC mandates that CPAs "commit themselves to honor the public trust."[207] The CPC also addresses the legal profession's core values of independent judgment, confidentiality, and loyalty. As to independent professional judgment, the CPC specifically provides that, "[r]egardless of service or capacity, members should protect the integrity of their work, maintain objectivity, and avoid any subordination of their judgment."[208] The CPC also requires CPAs to maintain client confidentiality, stating that "[a] member in public practice shall not disclose any confidential client information without the specific consent of the client."[209] This requirement is practically identical to MRPC Rule 1.6(a), which states that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."[210] Finally, when a CPA provides consulting services to a client, AICPA Standards for Consulting Services ensure that the CPA acts with loyalty to the client. Section seven of these rules requires the CPA to "[s]erve the client interest by seeking to accomplish the objectives established by the understanding with the client while maintaining integrity and objectivity."[211]

Similar to state bar enforcement mechanisms, the Professional Ethics Division investigates potential violations of the CPC by AICPA members and may expel or suspend a member from practice.[212] Additionally, state boards of accountancy, like state bars, can take

206. *Id.*

207. AICPA CODE OF PROF'L CONDUCT, § 53.04 (2012), *available at* http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/et_section_53_article_ii_the_public_interest.aspx.

208. *Compare id.* § 55.02, *with* MODEL RULES OF PROF'L CONDUCT R. 5.4(c) (2011).

209. *Compare* AICPA CODE OF PROF'L CONDUCT § 301.01, *with* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2011).

210. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2011).

211. *Compare Statement on Standards for Consulting Services No. 1, Am. Inst. of CPAs*, at 7, http://www.aicpa.org/Interest/Areas/ForensicAndValuation/Resources/Standards/Pages/Statement%20on%20Standards%20for%20Consulting%20Services%20No.aspx (last visited Apr. 16, 2012), *with* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (2011).

212. *See AICPA Definitions of Ethics Sanctions*, AM. INST. OF CPAS, http://www.aicpa.org/interestAreas/forensicandvaluation/resources/standards/pages/statement%20on%20standards%20for%20consulting%20services%20no.aspx (last visited Apr. 16, 2012).

corrective action or impose sanctions that include probation, suspension, revocation of license, limitation of practice, and fines.[213] Although the above discussion of AICPA rules addresses only the primary concerns that opponents of relaxed UPL rules have raised, a more in-depth review of the AICPA CPC will yield only one conclusion—these rules provide more than adequate protection for the clients that CPAs advise.[214] In sum, the legal profession can best serve and protect the public interest by allowing CPAs to freely practice in their areas of expertise under their own rules of professional conduct.[215]

## CONCLUSION

The principal policy behind the legal profession's rules of professional conduct is protection of the public. Throughout history, the legal profession has purportedly sought to promote this policy by regulating and enforcing UPL rules. UPL rules boil down to two fundamental issues: (1) which activities constitute the "practice of law," and (2) which of those activities are "unauthorized." State regulatory bodies and courts alike have been largely unsuccessful in answering the first of these questions, particularly in the context of professional services. Because accounting and tax services are practically indistinguishable from what most jurisdictions consider the practice of law, CPAs have mounted a powerful attack against UPL rules in an effort to obtain an exemption from their enforcement. Augmenting CPAs' efforts, the U.S. Congress and Department of the Treasury have enacted legislation and regulations that expressly authorize CPAs to provide a broad spectrum of tax-related services. Additionally, the Tax

213. *See, e.g.*, Florida Board of Accountancy, SOREIDE LAW GROUP LLC, http://www.floridalicenselaws.com/floridaboardofaccountancy.html (last visited Mar. 21, 2012).

214. In addition to the CPC, the AICPA has also promulgated detailed professional standards on the various other areas of practice in which CPAs engage. *See, e.g.*, Statements on Standards for Tax Services (Jan. 1, 2010), *available at* http://www.aicpa.org/Research/Standards/Tax/Pages/default.aspx (last visited Mar. 21, 2012).

215. *In re* Unauthorized Practice of Law Rules, 422 S.E.2d 123, 124-25 (S.C. 1992). The South Carolina Supreme Court stated in its 1992 *In re Unauthorized Practice of Law Rules* opinion:

> Our respect for the rigorous professional training, certification and licensing procedures, continuing education requirements, and ethical code required of [CPAs] convinces us that they are entitled to recognition of their unique status . . . . [w]e are confident that allowing CPAs to practice in their areas of expertise, subject to their own professional regulation, will best serve to both protect and promote the public interest.

*Id.*

Court Rules permit CPAs to represent tax litigation clients in a federal judicial court, and Congress has extended to these CPA representatives practitioner-client privilege. The federal preemption doctrine has provided an effective mechanism for CPAs to leverage federal action and override the overbroad and unreasonable state UPL rules. Accordingly, the federal government has turned otherwise impermissible activities of CPAs into the authorized practice of law.

Beyond tax compliance, an enormous demand for integrated legal, accounting, tax, and business advisory services exists in today's global markets. Responding to this demand, countries outside the United States have removed the lines of demarcation between the accounting and legal professions by modifying their UPL rules to accommodate MDPs. The Big Four accounting firms have taken full advantage of this UPL deregulation, launching large-scale, fully-integrated MDP practices to become some of the largest providers of legal services in the world. Despite the valiant efforts of the U.S. accounting profession and other pro-MDP constituencies, the ABA and practically every state bar has refused to acquiesce, rejecting MDPs altogether.

The operation of strict and vague UPL rules has ultimately contravened their purpose of protecting the public. Rather than promoting delivery of competent advice, the rules have instead precluded qualified nonlawyer professionals from offering services within their fields of expertise. Opponents of relaxed UPL rules claim that these rules promote the core values of the profession: competence, independent judgment, confidentiality, and loyalty. However, by virtue of their professional licensure, CPAs are not only more capable than attorneys to render certain tax and business advisory services, but are also bound by an exhaustive code of professional conduct that arguably protects the public more effectively than the legal profession's rules. In sum, to truly serve the public interest, the ABA and state bars should grant CPAs a status-based exemption from UPL rules and modify these rules to accommodate the market demand for integrated legal, tax, and business services by authorizing multidisciplinary practice.