

9-1-2001

## Multidisciplinary Practices: Must a Change to Model Rule 5.4 Apply to All Law Firms Uniformly?

Marc N. Biamonte

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>

 Part of the [Business Organizations Law Commons](#), and the [Legal Profession Commons](#)

---

### Recommended Citation

Marc N. Biamonte, *Multidisciplinary Practices: Must a Change to Model Rule 5.4 Apply to All Law Firms Uniformly?*, 42 B.C.L. Rev. 1161 (2001), <http://lawdigitalcommons.bc.edu/bclr/vol42/iss5/3>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# MULTIDISCIPLINARY PRACTICES: MUST A CHANGE TO MODEL RULE 5.4 APPLY TO ALL LAW FIRMS UNIFORMLY?

**Abstract:** At the American Bar Association 2000 annual meeting, delegates voted to reinforce Model Rule 5.4, prohibiting fee sharing and partnership between lawyers and non-lawyers in arrangements known as multidisciplinary practices. Nevertheless, the topic continues to be controversial, primarily because the Big Five accounting firms are hiring an increasing number of lawyers and expanding into services that many argue constitute the practice of law. This Note asserts that applying Rule 5.4 uniformly to law firms of all sizes is not in the best interest of the small firms and solo practitioners that comprise the majority of the legal profession; such firms and their clients would benefit if small firms were allowed to participate in MDPs. The author suggests, however, that such firms not be permitted to partner with public auditing firms, whose duty to disclose client activity to the public conflicts with the lawyer's duty to protect client confidences.

## INTRODUCTION

Multidisciplinary practice (MDP) refers to a professional entity in which a lawyer (or lawyers) partners with nonlawyers to provide both legal and nonlegal services.<sup>1</sup> Control of the MDP may reside with either the lawyers or nonlawyers, but in both situations lawyers are required to share fees for legal services with nonlawyers.<sup>2</sup> This arrangement squarely conflicts with the ethical rules regarding fee sharing found in *The Model Rules of Professional Conduct* (Model Rules) promulgated by the American Bar Association (ABA) and adopted by all jurisdictions in some form.<sup>3</sup> The topic has become more controversial in recent years primarily due to the increased employment of lawyers by the Big Five accounting firms (the Big Five) and their expansion of

---

<sup>1</sup> See Robert A. Stein, *Multidisciplinary Practices: Prohibit or Regulate?*, 84 MINN. L. REV. 1529, 1529-30 (2000).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.* The exception is the District of Columbia, which has adopted a modified version.

services that many argue constitute the "practice of law."<sup>4</sup> These firms have always employed attorneys to assist in their substantial tax practices.<sup>5</sup> With revenues from traditional audit services declining, however, many accounting firms have been forced to offer new services, which has led to their expansion into the management consulting field.<sup>6</sup>

This expansion has led accounting firms to offer clients services that appear to closely resemble a law practice; such services include advice regarding corporate mergers and acquisitions and regulatory compliance.<sup>7</sup> The Big Five have already taken advantage of laws allowing MDPs in Europe to develop significant law practices abroad.<sup>8</sup> They are now mobilizing their powerful lobby in an effort to change the laws in the United States to directly compete with law firms.<sup>9</sup> If accounting firms succeed, the way law is practiced in the United States may never be the same.<sup>10</sup> With so much at stake, emotions are high and vocal advocates can be heard on both sides of the debate.<sup>11</sup> Many scholars and practitioners feel the MDP matter has emerged as the most important issue facing the legal profession in recent times.<sup>12</sup>

---

<sup>4</sup> See *id.* at 1530–31. The Big Five Accounting firms are: PricewaterhouseCoopers LLP, Arthur Andersen LLP, KPMG Peat Marwick LLP, Ernst & Young LLP and Deloitte & Touche LLP.

<sup>5</sup> See Stein, *supra* note 1, at 1530, 1546.

<sup>6</sup> See *id.*

<sup>7</sup> See *id.* at 1534.

<sup>8</sup> See *id.* at 1536–37. For example, Arthur Andersen's legal arm, Andersen Legal, has a network of 2,900 attorneys and more than 102 offices located in thirty-five countries. Arthur Andersen website, at <http://www.arthurAndersen.com/websitelegal.nsf> (last visited Oct. 9, 2000). Similarly, in 1999, PricewaterhouseCoopers (PwC) announced it would build the fifth largest law firm in the world in the next five years with over \$1 billion in fees and 3000 lawyers. PwC already has the second largest law firm in Spain. PwC website, at <http://www.pwcglobal.com/extweb/ncinthenews.nsf> (last visited Oct. 9, 2000).

<sup>9</sup> See John M. Covalesski, *ABA Nixes MDPs*, ACCOUNTING TODAY, July 24, 2000, at 1.

<sup>10</sup> See *id.*; see also Stein, *supra* note 1, at 1529.

<sup>11</sup> See, e.g., *Symposium on Multidisciplinary Practices: The Future of the Profession*, 84 MINN. L. REV. 1083, 1083–1654 (2000); *The Phyllis W. Beck Chair in Law Symposium: New Roles, No Rules? Redefining Lawyers' Work*, 72 TEMP. L. REV. 773, 773–1035 (1999).

<sup>12</sup> See Stein, *supra* note 1, at 1537. Recently, a plan to create a new credential called the "Cognitor" sponsored by a consortium of four international accounting associations has caused MDP opponents to worry. See Mark Hansen, *A New Credential*, A.B.A. J. 1, 18 (Feb. 2001). The first Cognitor title could be awarded in the summer of 2002. A Cognitor is a tentative name for a proposed new global business credential that would recognize the credential holder's ability to "provide a range of professional services, from accounting to business law." Cognitor supporters consider the credential a solution to the changing economy, filling the need of a one-stop-shop for professional services. This concept is very similar to the arguments raised by MDP proponents and raises serious concern for those against multidisciplinary practices. The legal profession will need to watch the develop-

Rule 5.4 of The Model Rules clearly prohibits the creation of a firm that delivers legal services and has partners who are both lawyers and nonlawyers.<sup>13</sup> Rule 5.4(a) provides that a "lawyer or law firm shall not share legal fees with a nonlawyer."<sup>14</sup> Rule 5.4(b) further provides that a "lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."<sup>15</sup> Finally, Rule 5.4(d) provides that a lawyer "shall not practice with or in the form of a Professional Corporation or an Association authorized to practice law if a nonlawyer has any interest therein, as a corporate director or officer, or has the right to direct or control the professional judgment of the lawyer."<sup>16</sup> Thus, Rule 5.4 is the primary barrier to MDP supporters, preventing nonlawyer professionals from partnering with lawyers in an effort to serve the same clients.<sup>17</sup>

The debate over MDPs is not new. In the 1980s, Robert Kutak chaired an ABA Commission and made recommendations to relax the fee sharing prohibition, allowing lawyers to partner with nonlawyers and to share fees, provided the partnership only offered legal services to a client.<sup>18</sup> The District of Columbia was the only jurisdiction to adopt Kutak's recommended modification to the Model Rules.<sup>19</sup> The ABA said little more on the subject until August of 1998 when Philip S. Andersen, then President of the ABA, appointed a twelve person Commission on Multidisciplinary Practice (the Commission) to examine the MDP issue.<sup>20</sup> At the ABA's annual meeting in 1999, the Commission presented its recommendation that MDPs be permitted.<sup>21</sup> The Bar Delegates decided not to vote on the recommendation at that time, stating they wanted additional time to study and fully digest the report and findings of the Commission.<sup>22</sup> At the ABA's 2000 an-

---

ment of the Cognitor credential carefully and assess its impact on the legal profession. *See id.*

<sup>13</sup> *See* PROF'L RESPONSIBILITY STANDARDS, RULES & STATUTES 94 (John S. Dzienkowski ed., 1999).

<sup>14</sup> *Id.* This rule is subject to certain exceptions.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

<sup>18</sup> *See* Stein, *supra* note 1, at 1538. Robert J. Kutak was a lawyer from Omaha, Nebraska who chaired the ABA's first commission to revamp the Model Code of Professional Conduct until his death in 1983. The ABA House of Delegates adopted the Kutak Commission's Model Rules of Professional Conduct in August of 1983. *See id.*

<sup>19</sup> *See* Stein, *supra* note 1, at 1538.

<sup>20</sup> *See id.* at 1539.

<sup>21</sup> *See id.* at 1543.

<sup>22</sup> *See id.* at 1543-44.

nual meeting, however, in a surprising vote taken after only an hour of debate on the topic, the ABA delegates voted 314 to 106 to support an anti-MDP resolution jointly sponsored by New York, New Jersey, Illinois, Florida and Ohio (New York et al.), effectively reinforcing the Association's stance against fee sharing and lawyers partnering with nonlawyers.<sup>23</sup>

Although MDP proponents consider the ABA's affirmation of the status quo regarding Rule 5.4 a setback, the controversy is far from resolved.<sup>24</sup> Opponents of MDPs feel the delegates vote will reverse the recent momentum toward MDPs.<sup>25</sup> MDP advocates, however, indicate that the MDP lobby will simply shift its efforts to the local and state bar associations.<sup>26</sup> Regardless of the ABA's July 2000 vote, the decision regarding MDPs is ultimately the task of the individual state legislatures responsible for promulgating state rules of professional responsibility—although the ABA's position on such matters is given great weight.<sup>27</sup> Currently, there is little consensus among local and state bar associations on the topic.<sup>28</sup> Further, many states have initiated their own investigations that are presently in various stages of completion.<sup>29</sup>

This Note asserts that considering a change to Rule 5.4 that must apply uniformly to all law firms, regardless of size, is not in the best interest of the majority of the legal profession—small firms and solo practitioners.<sup>30</sup> The Note further argues that recent actions by the ABA to disband its Commission on Multidisciplinary Practices are shortsighted and irresponsible, because evidence clearly establishes that the issue is by no means settled.<sup>31</sup> Part I reviews the arguments both for and against MDPs and examines the ABA Commission's

---

<sup>23</sup> See Wendy Davis, *MDP Overwhelmingly Rejected, 3 to 1 Vote Affirms Legal Profession's Core Values*, N.Y.L.J., July 12, 2000, at 1.

<sup>24</sup> See, e.g., Covaleski, *supra* note 9, at 1; Sheryle Stratton & Lee A. Sheppard, *American Bar Association Says No to Multidisciplinary Practice*, TAX NOTES, July 17, 2000, at 311–16.

<sup>25</sup> See Covaleski, *supra* note 9, at 1.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*; see also American Bar Association, *MDP Report on State Positions*, 1 [hereinafter *MDP Report*], available at <http://www.abanet.org/cpr/mdpstats.html> (last visited Oct. 3, 2001).

<sup>29</sup> See *MDP Report*, *supra* note 28, at 1. Twenty-three states have appointed committees, but the committees have not yet returned reports. Ten states have appointed committees that have returned reports but have taken no action on the reports. Three states have taken favorable action on committee reports in favor of MDPs. Nine states have taken action against change based on anti-MDP findings. Only four states have not appointed committees as of the July 2000 ABA annual meeting. See *id.*

<sup>30</sup> See *infra* notes 200–226 and accompanying text.

<sup>31</sup> See *infra* notes 255–265 and accompanying text.

findings and recommendations.<sup>32</sup> Part II outlines the ethical and economic considerations regarding MDPs.<sup>33</sup> Part III considers whether other professions, primarily Big Five accounting firms, could adopt the legal profession's firm-wide imputation of a conflicts of interest standard.<sup>34</sup> Part IV argues that a change to Rule 5.4 need not apply uniformly to all law firms; rather, a change to the rule allowing MDPs in only small firm and solo practitioner environments is a possible alternative and would greatly benefit such practitioners and their clients.<sup>35</sup> Part IV further argues that even if small firms are permitted to practice in a multidisciplinary setting, such firms should never be permitted to partner with public auditing firms.<sup>36</sup> Finally, Part V proposes that regardless of the ABA's vote not to modify Rule 5.4, lawyers and nonlawyers will continue to integrate legal and nonlegal professions, clearly demonstrating that the ABA must either continue to consider modifications to Rule 5.4 or more persistently identify and prosecute the illegal practice of law.<sup>37</sup>

## I. BACKGROUND

### A. Proponents' Views Regarding MDPs

Most arguments in favor of MDPs focus on improving client service and providing more diverse choices to the ultimate consumer of legal services.<sup>38</sup> The fast paced and ever changing global marketplace requires firms to have the capability to access a wide array of disciplines—globally, regionally and locally—which may affect a client's business.<sup>39</sup> Arguably, law firms with their current structure do not have the capability to meet these client demands.<sup>40</sup> Most of the benefits mentioned above have been described in a phrase adopted

---

<sup>32</sup> See *infra* notes 38–131 and accompanying text.

<sup>33</sup> See *infra* notes 132–199 and accompanying text.

<sup>34</sup> See *infra* notes 200–226 and accompanying text.

<sup>35</sup> See *infra* notes 227–253 and accompanying text.

<sup>36</sup> See *infra* notes 254–265 and accompanying text.

<sup>37</sup> See *infra* notes 254–265 and accompanying text.

<sup>38</sup> See *New York State Bar Association Report of Special Committee on Multi-Disciplinary Practice and The Legal Profession*, 10 [hereinafter *New York State Bar Report*], available at <http://www.nysba.org/multidiscrpt.html#> (last visited Nov. 20, 2000); see also Lowell J. Noteboom, *Professions in Convergence: Taking the Next Step*, 84 MINN. L. REV. 1359, 1378–79 (2000).

<sup>39</sup> See *New York State Bar Report*, *supra* note 38, at 10–11.

<sup>40</sup> See *id.*

by MDP proponents—"one-stop shopping."<sup>41</sup> The core of this concept is that offering clients the option of going to one professional services firm for all of their professional needs will provide advantages in efficiency, timeliness, coordination and, ultimately, cost to the consumer.<sup>42</sup>

In addition to efficiency savings, proponents contend that MDPs will offer clients better quality of service since one organization will be able to address not only clients' legal needs, but their business and financial concerns as well.<sup>43</sup> This ability to use only one firm for an entire issue or transaction will also provide the client a higher degree of trust and confidence that all aspects of the transaction will be understood and handled appropriately.<sup>44</sup>

Proponents further contend that the speed with which attorneys respond to client issues can be greatly enhanced with the formation of MDPs.<sup>45</sup> Today, many law firms have merged and expanded to build larger networks, but they are still no match when compared to accounting firms, which enjoy considerably greater scope and breadth.<sup>46</sup> These accounting firms have a ready access to technology, human resources and information throughout the nation and around the world in ways that U.S. law firms cannot match.<sup>47</sup> The Big Five firms have offices and resources in almost every major city in the United States and around the world.<sup>48</sup> This allows accounting firms to serve client needs more quickly and effectively in today's global marketplace.<sup>49</sup> MDP supporters argue that giving attorneys access to this vast network can only improve the services they provide, expanding their role in representing their clients and broadening the skill set of the attorneys—especially within small firms and solo practitioner settings.<sup>50</sup>

The views of small firms and solo practitioners concerning the MDP debate are split, as evidenced by testimony before the Commis-

---

<sup>41</sup> See *id.* at 10; see also Noteboom, *supra* note 38, at 1393–94.

<sup>42</sup> See *New York State Bar Report*, *supra* note 38, at 11.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> See *New York State Bar Report*, *supra* note 38, at 11. Due to the size of Big Five firms, advantages stem from their resources, including intellectual capital on a seemingly endless list of topics, technological advances, and access to their solid base of Fortune 500 audit clients. See *id.*

<sup>48</sup> See, e.g., PricewaterhouseCoopers website, at <http://www.pwcglobal.com>.

<sup>49</sup> See *New York State Bar Report*, *supra* note 38, at 11.

<sup>50</sup> See *id.*

sion.<sup>51</sup> The small firms and solo practitioners opposed to MDPs continue to focus on the threat to the core values of the legal profession.<sup>52</sup> Those in favor of MDPs have been able to point to specific benefits their practices will receive by embracing MDPs.<sup>53</sup> In their opinion, allowing a solo practitioner or a small firm to share fees and partner with nonlawyer professionals will enhance their ability to serve individuals in their communities through more effective and cost-efficient representation.<sup>54</sup>

For example, Philip Stinson, a Principal in the Philadelphia-based law firm of Stinson Law Associates, P.C., testified before the Commission in support of MDPs.<sup>55</sup> Mr. Stinson's firm has four attorneys in two offices dedicated to representing the needs of parents with disabled children in special education matters, disability rights litigation and disputes involving health care insurance providers and the care of chronically ill children.<sup>56</sup> Mr. Stinson testified that he is confronted with multidisciplinary interactions on a daily basis, frequently in his representation of exceptional children at special education due process hearings.<sup>57</sup> Representation of such children requires the coordination of many professionals, most importantly lawyers and clinical psychologists.<sup>58</sup> Under current professional responsibility rules, Mr. Stinson's firm is required to maintain an arm's-length relationship with the psychologists with whom it works side-by-side on behalf of its clients.<sup>59</sup> Mr. Stinson believes his firm would best be able to provide legal services if he were permitted to join forces with the clinical psychologists who are an integral part of the team advocating on the child's behalf.<sup>60</sup> He added that he intended to expand Stinson Law Associates, P.C. over the next year by opening three more offices

---

<sup>51</sup> See *Written Testimony of L. Kent Abney, MDP Hearings*, 1 (Oct. 1999), available at <http://www.abanet.org/cpr/abney1.html> (last visited Nov. 14, 2000); *Written Testimony of Robert L. Ostertag, MDP Hearings*, 1-6 (Oct. 1999) [hereinafter *Ostertag Testimony*], available at <http://www.abanet.org/cpr/ostertag.html> (last visited Nov. 14, 2000); *Statement of Philip Stinson, MDP Hearings*, 1-3 (Oct. 1999) [hereinafter *Stinson Statement*], available at <http://www.abanet.org/cpr/stinson.html> (last visited Nov. 14, 2000).

<sup>52</sup> See *infra* notes 124-197 and accompanying text.

<sup>53</sup> See, e.g., *Stinson Statement*, *supra* note 51, at 1-3.

<sup>54</sup> See *id.*

<sup>55</sup> See *id.* The Commission conducted these hearings in an effort to study the MDP issue and draft its recommendation to the ABA House Delegates. See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> See *Stinson Statement*, *supra* note 51, at 1-3.

<sup>59</sup> See *id.*

<sup>60</sup> See *id.*



across the country.<sup>61</sup> He believes, however, that this will only be financially feasible if the firm is able to deliver legal services in a multidisciplinary environment.<sup>62</sup>

In addition to small firm lawyers, owners of small businesses and those prominent in the small business community testified before the Commission to express their support of MDPs.<sup>63</sup> These individuals noted that small businesses occupy an important place in the global economy and have been integral to the U.S. economy's recent prosperity.<sup>64</sup> George Abbott, the owner of a small business that provides materials handling consulting and implementation services, has been active in the small business community and has held numerous leadership positions in several national organizations, including the National Family Business Council, the National Small Business Association and National Small Business United.<sup>65</sup> Mr. Abbott presented statistics during his testimony indicating that small businesses "represent over ninety-nine percent of all employers, employ fifty-two percent of private workers, provide the overwhelming majority of all new jobs and account for fifty-one percent of the private sector output."<sup>66</sup> In his support for MDPs, he noted such arrangements would provide small business owners three advantages integral to their success: choice, convenience and cost-effectiveness.<sup>67</sup>

Furthermore, Mr. Abbott testified that no two small businesses are alike and that the ability to choose the arrangement that works best for their particular needs is vital to the success of any new ventures.<sup>68</sup> Beyond choice, many small business owners struggle to find enough time in the day to do everything necessary to stay afloat.<sup>69</sup> Being required to juggle meetings with different firms to talk with financial planners, lawyers, accountants, public relations specialists and advertising experts is a daunting task that leaves little time to focus on more important matters such as day-to-day operations and business expansion.<sup>70</sup> Mr. Abbott contended that by housing different

---

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> See, e.g., *Statement of George Abbott, MDP Hearings*, 1 (Feb. 2000) [hereinafter *Abbott Statement*], available at <http://www.abanet.org/cpr/abbott.html> (last visited Nov. 14, 2000).

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

<sup>66</sup> *Id.*

<sup>67</sup> See *id.*

<sup>68</sup> See *Abbott Statement*, *supra* note 63, at 1-2.

<sup>69</sup> See *id.* at 2.

<sup>70</sup> See *id.*

professionals in one firm, small business owners could receive coordinated advice from a team of integrated professionals all working together to meet the client's particular needs.<sup>71</sup>

Finally, Mr. Abbott testified that small business owners believe MDPs will be a more cost-effective method of obtaining professional services.<sup>72</sup> They believe that hiring separate professionals for advice removes the opportunity for volume discounts or package pricing thereby increasing the overall cost.<sup>73</sup> In addition, many small business owners contend that getting each separate firm up to speed regarding their particular needs is inefficient, thus adding to the overall cost of the services.<sup>74</sup> Mr. Abbott testified that his experience indicates many small businesses go without proper professional advice due to the perceived cost, the inconvenience and, in some cases, the inability to integrate the input from various advisors, and the feeling that they have no control over the costs that they will incur.<sup>75</sup> Mr. Abbott forcefully argued that these problems could be remedied in an MDP environment.<sup>76</sup>

### B. ABA MDP Commission's Findings and Recommendation

In 1999, the Commission conducted five days of open hearings and met in executive sessions on three occasions.<sup>77</sup> Forty-two witnesses testified, and a significant number of interested persons submitted written comments.<sup>78</sup> The ABA Taxation Section and the ABA General Practice, Solo and Small Firm Section formally endorsed the concept of MDPs.<sup>79</sup> In an effort to get additional information and feedback, the Commission published five potential MDP models.<sup>80</sup> The Commission did not endorse any one model, but used the results of the feedback to help shape its initial recommendation.<sup>81</sup>

---

<sup>71</sup> See *id.*

<sup>72</sup> See *id.* at 3.

<sup>73</sup> See *Abbott Statement*, *supra* note 63, at 3.

<sup>74</sup> See *id.*

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See generally American Bar Association, *Multidisciplinary Practice Commission—Hypotheticals and Models*, 1 [hereinafter *Hypotheticals and Models*], available at <http://www.abanet.org/cpr/multicomhypos.html> (last visited Nov. 14, 2000).

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See *id.* at 2–7.

<sup>81</sup> See *id.* at 1.

"The Cooperative Model" retains the status quo with no changes to the current Rule 5.4.<sup>82</sup> Under this model, prohibitions against sharing fees and partnering with nonlawyers would continue, and lawyers would be free to employ nonlawyer professionals to assist them in advising their clients.<sup>83</sup> Any lawyer employing a nonlawyer professional must take steps to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer, especially with respect to the obligation not to disclose information relating to the representation and the protection of work product.<sup>84</sup>

"The Command and Control Model" is based on the amended Rule 5.4 currently adopted by the District of Columbia.<sup>85</sup> The Washington, D.C. Rules of Professional Conduct permit a lawyer to form a partnership with a nonlawyer and to share legal fees subject to certain restrictions.<sup>86</sup> These restrictions indicate the law firm or organization must have "as its sole purpose" the providing of legal services to others.<sup>87</sup> The nonlawyer must agree "to abide by these rules of professional conduct," and any lawyer with a financial interest or managerial authority must "undertake to be responsible for the nonlawyer participants to the same extent as if the nonlawyer participants were lawyers under Rule 5.1."<sup>88</sup> Therefore, any nonlawyer professional participating in an MDP in the District of Columbia is subject to the lawyers' rules of professional conduct, including Rule 1.6 on confidentiality of information and Rules 1.7-1.10 on conflicts of interest.<sup>89</sup>

As members of such an MDP, nonlegal professionals could not provide their services, like accounting or financial planning, to anyone except in connection with the offering of legal services.<sup>90</sup> Other significant issues raised by this model have not been addressed by the Commission.<sup>91</sup> For example, it is clear that nonlawyer professionals operating in an MDP environment will be subject to the ethical rules

---

<sup>82</sup> See *Hypotheticals and Models*, *supra* note 77.

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*, at 3.

<sup>86</sup> See D.C. RULES OF PROF'L CONDUCT V-3 (D.C. 1990).

<sup>87</sup> See *id.*

<sup>88</sup> *Id.* Rule 5.1 indicates that a partner in a law firm will make reasonable efforts to ensure all lawyers in the firm conform to the rules of professional conduct and that a lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if such lawyer orders or ratifies the conduct of the other lawyer or has direct supervisory responsibility over the lawyer. See *id.*

<sup>89</sup> See *Hypotheticals and Models*, *supra* note 77, at 3.

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

of their respective professions, but, whether and to what extent the MDP and the nonlawyers' independent practices should be treated as a single entity for conflict of interest and imputation purposes (i.e., subject to lawyers' ethical standards) has yet to be determined.<sup>92</sup>

"The Ancillary Business Model" represents a situation by which a lawyer operates a secondary business that provides professional services other than legal services to clients.<sup>93</sup> This model conforms to Rule 5.7 concerning the responsibilities of lawyers regarding law-related services.<sup>94</sup> Rule 5.7 indicates that a lawyer will be subject to the Rules of Professional Conduct with respect to law-related services "if the law-related services are provided, (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or (2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist."<sup>95</sup> This model permits lawyers and nonlawyer professionals to partner in an ancillary business, sharing fees and jointly making management decisions, provided that the clients of the ancillary business understand that the services offered are distinct from the law firm and the ancillary business does not offer legal services.<sup>96</sup> The lawyer partners provide consulting services, not legal services, to the clients of the ancillary business; some, but not all, of the clients of the ancillary business may also be clients of the law firm and vice versa.<sup>97</sup> The Commission recognized that this model raises imputation and conflict of interest issues similar to those of model two that have yet to be resolved.<sup>98</sup>

"The Contract Model" involves a professional services firm contracting with an independent law firm under various terms.<sup>99</sup> Typical contract terms include the following: first, the law firm agrees to identify its affiliation with the professional services firm on its letterhead, business cards and in its advertising;<sup>100</sup> second, the law firm and professional services firm agree to refer clients to each other (either on

---

<sup>92</sup> See *id.*

<sup>93</sup> See *id.* at 4.

<sup>94</sup> See PROF'L RESPONSIBILITY STANDARDS, RULES & STATUTES, *supra* note 13, at 96.

<sup>95</sup> *Id.*

<sup>96</sup> See *id.*

<sup>97</sup> See *Hypotheticals and Models*, *supra* note 77, at 4.

<sup>98</sup> See *id.*

<sup>99</sup> See *id.* at 5.

<sup>100</sup> See *id.*

an exclusive or nonexclusive basis);<sup>101</sup> finally, the law firm agrees to purchase goods and services from the professional services firm.<sup>102</sup> In this model, the law firm would remain a separate entity controlled and managed by lawyers, and would only be able to accept clients who had no connection to the affiliated professional services firm.<sup>103</sup>

"The Fully Integrated Model" envisions an environment in which there is no free-standing law firm—a true MDP.<sup>104</sup> This model assumes one professional services firm with separate organizational units (e.g., accounting, business consulting, legal services, etc.) advertising that it provides a "seamless web" of services.<sup>105</sup> Clients may either retain legal services only, without ever utilizing the other services of the organization, or the legal and nonlegal services may be provided in connection with the same matter or different matters.<sup>106</sup> The fully integrated model, however, has the same conflict of interest and imputation issues of the previous models, including additional problems regarding confidentiality.<sup>107</sup>

In August 1999, after a number of hearings and meetings held around the country, and in consideration of the feedback obtained from the models described above, the Commission released the results of its study concluding that with the appropriate safeguards a lawyer can deliver legal services in an MDP without endangering the core values of the legal profession.<sup>108</sup>

The Commission identified the core values of the legal profession as professional independence of judgment, the protection of

---

<sup>101</sup> See *id.*

<sup>102</sup> See *Hypotheticals and Models*, *supra* note 77, at 5.

<sup>103</sup> See *id.*

<sup>104</sup> See *id.* at 6.

<sup>105</sup> See *id.*

<sup>106</sup> See *id.*

<sup>107</sup> See *Hypotheticals and Models*, *supra* note 77, at 6.

<sup>108</sup> In its 1999 report, the Commission concluded:

[T]hat with the appropriate safeguards a lawyer can deliver legal services to the clients of an MDP without endangering the core values of the legal profession or the interests they are designed to protect. The opportunity to structure a new vehicle for the delivery of legal services should be available to the lawyers who express an interest in providing those services to their clients through an MDP and to those clients who express an interest in additional choices of legal service providers. There is, of course, no assurance that lawyers will choose to practice in MDPs or that clients will prefer to purchase legal services from such providers.

confidential client information and loyalty to the client through the avoidance of conflict of interests.<sup>109</sup> The Commission believed that “appropriate safeguards” could be developed to protect the core values in conjunction with lifting the ban on fee sharing and partnering with nonlawyers (or entities comprised of nonlawyers).<sup>110</sup> The “appropriate safeguards” identified by the Commission in its formal recommendation to the ABA in July 1999 require an MDP to provide a letter to the state’s highest court signed by the chief executive officer of the MDP stating:

The MDP will not interfere with a lawyer’s independent professional judgment and will establish procedures to protect such independent judgment;

The MDP will establish procedures to segregate client funds as required by the legal profession;

All members of the MDP providing/assisting in the delivery of legal services will abide by the lawyer’s/legal rules of professional conduct;

The MDP will acknowledge the lawyers’ unique role in society and in the administration of justice including rendering pro bono publico services;

The MDP will annually review all above procedures for effectiveness and amend as needed; and

The MDP will file a certification annually with the appropriate court and permit the court to conduct audits of the MDP while bearing the costs of any such audits.<sup>111</sup>

The Commission ended its recommendation with a provision indicating that failure to comply with the safeguards described above would result in either a withdrawal of the MDP’s authorization to deliver legal services or “other appropriate remedial measures as ordered by the court.”<sup>112</sup>

The Commission presented the ABA with its initial recommendation at the ABA’s 1999 annual meeting.<sup>113</sup> The ABA decided not to adopt the Commission’s recommendation at that time, indicating it

---

<sup>109</sup> See *id.* at 2.

<sup>110</sup> See *id.*

<sup>111</sup> ABA Committee on Multidisciplinary Practice, *Report to House Delegates, Recommendation*, 2–3 [hereinafter *Report to House Delegates*], available at <http://www.abanet.org/cpr/multidisciplinary.html> (last visited Oct. 9, 2000).

<sup>112</sup> See *id.*

<sup>113</sup> See Stein, *supra* note 1, at 1543.

wanted additional time to digest the proposal and findings so as to make a more informed decision.<sup>114</sup> The Commission continued its efforts over the next year and prepared a modified recommendation that was presented to the ABA at its 2000 annual meeting in July.<sup>115</sup>

The Commission's 2000 MDP recommendation appeared to be a watered down version of its 1999 recommendation, having removed much of the detail of the 1999 recommendation.<sup>116</sup> Specifically, one of the critical areas scaled back was the Commission's recommendations regarding MDP regulation; the 2000 recommendation removed all language and detailed procedures regarding regulation of MDPs.<sup>117</sup> Instead of providing a detailed suggestion to jurisdictions considering a change to their rules to permit MDPs, the Commission simply stated, "regulatory authorities should enforce existing rules and adopt such additional enforcement procedures as are needed to implement these principles and to protect the public interest."<sup>118</sup> The Report accompanying the recommendation stated that the detailed regulatory scheme provided in the 1999 recommendation was excluded from its 2000 recommendation due to significant criticism received by the Commission describing its regulatory scheme as unworkable.<sup>119</sup> Rather than spending the year researching and developing a more workable regulation scheme, the Commission appears to have passed on the issue, leaving it to the local jurisdictions to solve the enforcement problem if those jurisdictions decide to amend their rules of professional conduct to allow MDPs.<sup>120</sup>

After removing much of the detail from the initial draft, the Commission presented its revised recommendation at the ABA's 2000 annual meeting but urged the House Delegates to consider postponing any action concerning MDPs until the 2001 mid-year ABA meeting, since many of the states had not yet completed their own studies concerning the MDP issue.<sup>121</sup> The House Delegates ignored the Commission's suggestion and, after only an hour of debate, voted to adopt the recommendation by New York et al. that Rule 5.4 be left

---

<sup>114</sup> See *id.* at 1543-44.

<sup>115</sup> See generally ABA Committee on Multidisciplinary Practice, *Report to the House Delegates*, 1, 9 [hereinafter *Report to House Delegates II*], available at <http://www.abanet.org/cpr/mdpfinalrep2000.html> (last visited Nov. 14, 2000).

<sup>116</sup> See *id.* at 1.

<sup>117</sup> See *id.*

<sup>118</sup> *Id.*

<sup>119</sup> See *id.* at 7.

<sup>120</sup> See *Report to House Delegates II*, *supra* note 115, at 7.

<sup>121</sup> See *id.* at 2.

intact, rejecting the Commission's recommendation and discharging the Commission, thereby ending any additional discussion on the subject.<sup>122</sup> Prior to the adoption of the New York et al. recommendation, the debate at the July 2000 annual meeting primarily focused on a need to bring the issue of MDPs to a close.<sup>123</sup> The proponents of the New York et al. recommendation argued for closure on the issue, claiming the profession was vulnerable every day the issue remained unresolved, but never articulating the nature and scope of this vulnerability.<sup>124</sup> Nevertheless, the New York et al. recommendation passed.<sup>125</sup>

### C. *New York et al. and Its Opposing View*

Recommendation 10F (10F), adopted by the ABA at its 2000 annual meeting, was based upon the insights gained and the positions adopted by the New York MDP commission appointed by the New York State Bar Association and headed by the former ABA President Robert MacCrate.<sup>126</sup> Recommendation 10F has several parts, but basically called for an end to the debate over modification to Rule 5.4 and an end to the Commission's work.<sup>127</sup> First, 10F stated that it is in the public interest to preserve the core values of the legal profession, and went on to identify those core values as:

- (1) undivided loyalty to the client,
- (2) duty to exercise independent legal judgment for the benefit of the client,
- (3) duty to hold client confidences inviolate,
- (4) duty to avoid conflicts of interests with clients,
- (5) duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice, and

---

<sup>122</sup> See *ABA Recommendation*, 1-2 [hereinafter *ABA Recommendation*], available at <http://www.abanet.org/cpr/mdprecom10F.html> (last visited Nov. 26, 2000).

<sup>123</sup> See *Unedited Transcript, House Delegates Annual Meeting*, 1-12 (July 11, 2000) [hereinafter *Unedited Transcript*], available at [http://www.abanet.org/cpr/mdp\\_hod\\_transc.html](http://www.abanet.org/cpr/mdp_hod_transc.html) (last visited Nov. 26, 2000).

<sup>124</sup> See *id.*

<sup>125</sup> See *ABA Recommendation*, *supra* note 122, at 1-2; see also *Unedited Transcript*, *supra* note 123, at 10.

<sup>126</sup> See generally American Bar Association, *MDP Report 10F*, 1, available at <http://www.abanet.org/cpr/mdp-report10F.html> (last visited Nov. 14, 2001).

<sup>127</sup> See *ABA Recommendation*, *supra* note 122, at 1-2.



(6) duty to promote access to justice.<sup>128</sup>

Next, 10F asked all jurisdictions to reevaluate and redefine the definition of the "practice of law," encouraging all jurisdictions to retain and enforce laws that bar the practice of law by entities other than law firms.<sup>129</sup> More specifically, 10F stated that the sharing of legal fees and the control and ownership of the practice of law with non-lawyers is inconsistent with the core values of the legal profession, thus laws prohibiting such arrangements should not be revised.<sup>130</sup> Finally, 10F called for the Commission to be discharged.<sup>131</sup>

## II. ETHICAL AND ECONOMIC CONSIDERATIONS REGARDING MDPs, INCLUDING A GLOBAL PERSPECTIVE

### A. *Traditional Professional Independence—Different Views and Expectations*

The legal profession has long praised its traditional requirement of professional independence designed to protect the public interest by assuring that the attorney is free to exercise professional judgment without outside influences.<sup>132</sup> Many attorneys who oppose MDPs feel that allowing nonlawyer professionals into the system will threaten this professional independence.<sup>133</sup> These concerns primarily focus on issues relating to nonlawyer control over work that can be termed the "practice of law."<sup>134</sup> If nonlawyers become the primary "rainmakers" or if they bill the most hours, they could have greater influence over a firm's policies than the lawyers.<sup>135</sup> Over time, opponents argue, this influence by nonlawyer professionals will affect other segments of the legal profession, like the judiciary, diluting the values and social commitments traditionally associated with the legal profession.<sup>136</sup>

Opponents also express their concern that nonlawyer professionals have not been exposed to or instilled with the traditions and values of the legal profession, and that they are not subject to the same dis-

<sup>128</sup> See *id.* at 1.

<sup>129</sup> See *id.* at 2.

<sup>130</sup> See *id.*

<sup>131</sup> See *id.*

<sup>132</sup> See *New York State Bar Report*, *supra* note 38, at 12–13.

<sup>133</sup> See Harold Levinson, *No: Keep the Profession Distinctive*, A.B.A. J., May 1990, at 39.

<sup>134</sup> See *id.*

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

ciplinary system governing those in the legal profession.<sup>137</sup> Absent immersion in the traditions and values of the legal profession, non-lawyer professionals have not undertaken the societal obligations inherent in the legal profession.<sup>138</sup> These obligations include participation in “the constant improvement of society’s legal system” and a responsibility “to make that system readily accessible to society.”<sup>139</sup> Concerns center, for example, on the possibility that a nonlawyer manager, who has not grown up in a culture that emphasizes the importance of affording every individual access to the legal system, may declare that no time be spent on *pro bono publico* services.<sup>140</sup>

Many MDP proponents argue that the legal pressures from non-lawyer managers to betray legal traditions and values (in addition to ethical guidelines) would be no greater than the current pressure from lawyer managers within firms.<sup>141</sup> In addition, nonlawyer professionals have attacked attorneys for acting in an elitist manner by contending that only lawyers, and not other professionals, can hold themselves to high ethical standards.<sup>142</sup>

### B. Confidentiality—May Be Waived in MDP Environments

Opponents of MDPs agree that altering the Model Rules to allow MDPs would create significant confusion surrounding the confidentiality of client information and the attorney-client privilege.<sup>143</sup> This possible confusion has been found to have the potential to lead to a weakening of the public’s confidence in the privilege/confidentiality, thereby thwarting its important purpose, which is

to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy

---

<sup>137</sup> See Lawrence J. Fox, *Accountants, The Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV. 1097, 1103–04 (2000).

<sup>138</sup> See Levinson, *supra* note 133, at 39.

<sup>139</sup> *Id.*

<sup>140</sup> See *New York State Bar Report*, *supra* note 38, at 13.

<sup>141</sup> See Fox, *supra* note 137, at 1103.

<sup>142</sup> See Stratton & Sheppard, *supra* note 24, at 313.

<sup>143</sup> See, e.g., Fox, *supra* note 137, at 1106; Stein, *supra* note 1, at 1542–43; *Bernard Wolfman February 2000 Hearing Testimony on MDP*, 1 [hereinafter *Wolfman Testimony*], available at <http://www.abanet.org/cpr/wolfinan4.html> (last visited Nov. 14, 2000).

depends upon the lawyer's being fully informed by the client.<sup>144</sup>

Currently, Model Rule 1.6 will only permit revelation of a client communication by an attorney to prevent the client from committing a criminal or fraudulent act that the lawyer "believes is likely to result in imminent death or substantial bodily harm, or substantial injury to the financial interest or property of another."<sup>145</sup> Confidentiality, however, may be lost for any information the client gives the lawyer in the presence of third persons unconnected with the representation.<sup>146</sup> This is where potential problems in an MDP environment arise. For example, if there are multiple professionals within a firm serving a client with multiple issues (some legal, some financial, etc.), the client may be uncertain when the privilege applies.<sup>147</sup> Opponents worry that this confusion will lead to inadvertent breaches of confidentiality and privilege damaging to the client and the attorney's reputation.<sup>148</sup> It may also lead clients to withhold information from their attorneys that may be vital to providing the best, or even adequate, representation.<sup>149</sup>

The Commission's 2000 recommendation places the burden on lawyers participating in an MDP to ensure that other professionals within the MDP protect confidentiality.<sup>150</sup> Many opponents feel this is an unrealistic burden to place on a lawyer in a large organization comprised of hundreds or thousands of nonlawyers.<sup>151</sup> Some advocates have gone further, claiming that the privilege should only run between the client and the respective attorney and not the MDP.<sup>152</sup> All those opposed to MDPs agree that such a narrow construction of confidentiality and privilege would certainly aid in the formation of MDPs, but would also lead to a destruction of the entire concept.<sup>153</sup> Opponents contend that such a narrow view of confidentiality will

<sup>144</sup> See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

<sup>145</sup> See PROF'L RESPONSIBILITY STANDARDS, RULES & STATUTES, *supra* note 13, at 21.

<sup>146</sup> See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 25 (1998).

<sup>147</sup> See, e.g., Fox, *supra* note 137, at 1106; Stein, *supra* note 1, at 1542-43.

<sup>148</sup> See Fox, *supra* note 137, at 1106; Stein, *supra* note 1, at 1542-43.

<sup>149</sup> See *Paper Presented by Gary Johnson re MDP, 2-3* [hereinafter *Johnson Paper*], available at <http://www.abanet.org/cpr/johnson2.html> (last visited Nov. 14, 2000).

<sup>150</sup> See *id.*

<sup>151</sup> See *id.* at 3.

<sup>152</sup> See *id.*

<sup>153</sup> See *id.*

clog the free flow of information that the Supreme Court itself has indicated as critical to the effective representation of clients.<sup>154</sup>

Beyond the potential issues that arise with "generic" nonlawyer professionals in an MDP environment, and due to the Big Five's significant role in the pro-MDP movement, many anti-MDP lawyers have stressed the direct conflict between a lawyer's confidentiality obligation and a public auditor's duty to publicly disclose.<sup>155</sup> Opponents are quick to point out that lawyers and public auditors have different obligations and duties to their clients and to the public.<sup>156</sup> For example, auditors have an obligation to report their conclusions, not only to their client, but also to the public.<sup>157</sup> Public auditors who have failed to fully disclose information they had in their possession have often been sued for malpractice.<sup>158</sup> Lawyers, however, are ethically bound to represent only the interests of their clients (within the limits of the law) and have a duty not to reveal client confidences to the public.<sup>159</sup> James Moore, a partner at Harter, Secrest & Emery in Rochester, New York and past president of the New York State Bar Association, articulated the potential conflict in his speech at the Pace Law Review Symposium on MDPs in the fall of 1999: "One could easily imagine circumstances which might confront a lawyer in an MDP who might acquire knowledge about a client which he or she would regard as confidential, but which his or her accountant partner might feel obliged to disclose publicly."<sup>160</sup>

MDP opponents are quick to point out that even the Big Five are taking notice of this conflict surrounding confidentiality principles and have recently taken drastic steps in order to safeguard the MDP concept and abide by recent SEC announcements concerning conflicts of interest.<sup>161</sup> For example, on February 16, 2000, it was reported that PricewaterhouseCoopers (PwC) was splitting off its tax and auditing work from its other consulting businesses, which in turn

---

<sup>154</sup> See *Johnson Paper*, *supra* note 149, at 3.

<sup>155</sup> See, e.g., *Fox*, *supra* note 137, at 1106; James C. Moore, *Lawyers and Accountants: Is the Delivery of Legal Services Through the Multidisciplinary Practice in the Best Interests of Clients and the Public?*, 20 *PAGE L. REV.* 33, 37-38 (1999); Stein, *supra* note 1, at 1242-43.

<sup>156</sup> See Moore, *supra* note 155, at 37-38.

<sup>157</sup> See 2 *AICPA PROF'L STANDARDS* 4581, 4671 (1996).

<sup>158</sup> See Moore, *supra* note 155, at 38.

<sup>159</sup> See *PROF'L RESPONSIBILITY STANDARDS, RULES & STATUTES*, *supra* note 13, at 21.

<sup>160</sup> Moore, *supra* note 155, at 38.

<sup>161</sup> See, e.g., *Fox*, *supra* note 137, at 1104-05.

might be split into two or more additional entities.<sup>162</sup> Shortly after PwC's announcement, Ernst & Young announced it would be selling its non-audit business to Gemini S.A. of France.<sup>163</sup> These strategic maneuvers are also an effort to reduce the many conflicts of interest that can (and have) arisen concerning the integration of legal work with accounting—particularly the attestation function.<sup>164</sup>

### C. Loyalty—Avoidance of Conflicts of Interest

The Model Rules currently require the imputation of conflicts of interest to all members of a law firm.<sup>165</sup> Therefore, if any one member of a firm has a conflict with a client of the firm, regardless of whether he is working for that specific client, Rule 1.10 indicates the entire firm has a conflict and shall not represent the entity.<sup>166</sup> Accounting firms, however, only require the conflict be imputed to members of a particular team serving the specific client, thus conflicts within a firm can exist as long as the individual(s) with the conflict is not providing any service to the respective client.<sup>167</sup> Supporters of MDPs are displeased by the legal profession's firmwide imputation requirement and consider it a major stumbling block in the successful transition to MDPs.<sup>168</sup>

The Big Five were permitted to grow to their current size due, in large part, to the relaxed imputation rules governing their profession.<sup>169</sup> Without such relaxation, the Big Five would have been forced to turn down a significant amount of business.<sup>170</sup> Supporters of MDPs describe "firewalls" used by the Big Five as a mechanism that may be

<sup>162</sup> See Elizabeth MacDonald, *PricewaterhouseCoopers Will Divide into Two or More Parts, Under Pressure*, WALL ST. J., Feb. 18, 2000, at B8; see also Elizabeth MacDonald, *PricewaterhouseCoopers Nears Plan for Restructuring Involving Split or Sale*, WALL ST. J., Feb. 16, 2000, at C11.

<sup>163</sup> See John Tagliabue, *Cap Gemini to Acquire Ernst & Young's Consulting Business*, N.Y. TIMES, Mar. 1, 2000, at C1.

<sup>164</sup> See *infra* notes 171–192 and accompanying text.

<sup>165</sup> See PROF'L RESPONSIBILITY STANDARDS, RULES & STATUTES, *supra* note 13, at 42.

<sup>166</sup> See *id.* Rule 1.10 (a) operates from the "premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated." See *id.*

<sup>167</sup> See Fox, *supra* note 137, at 1101; see also Brian Caswell & Catherine Allen, *The Engagement Team Approach to Independence*, J. OF ACCT., Feb. 2001, at 57 (noting movement from "firm-based rules concerning independence to an engagement-team approach" relaxes the independence requirements even further).

<sup>168</sup> See *Johnson Paper*, *supra* note 149, at 3.

<sup>169</sup> See Fox, *supra* note 137, at 1101.

<sup>170</sup> See *id.*

used for the successful relaxation of the legal imputation standard to smooth the transition to MDPs.<sup>171</sup> These firewalls serve as a means to allow the same firm to represent two conflicting parties simultaneously by separating the two teams that are working on conflicting matters, sometimes within the same office and sometimes geographically.<sup>172</sup> While proponents point to the success of firewalls, many lawyers who oppose MDPs are concerned with the self-governance of such a mechanism in light of recent SEC findings regarding auditor independence at PwC.<sup>173</sup> The report indicated that half of the partners of PwC, including thirty-one top executives, had violated the auditor independence rules prohibiting investment in audit clients of the firm.<sup>174</sup> A total of 1,885 staffers committed a total of 8,064 violations—forty-five percent of the infractions were carried out by partners who audit public companies.<sup>175</sup> The SEC suggested that fifty-two companies hire another audit firm to replace PwC in an effort to alleviate the independence problems.<sup>176</sup>

The dismissive nature of PwC's reaction to the investigation concerned many MDP opponents.<sup>177</sup> PwC's Chairman, Nicholas Moore, and PwC's Chief Executive Officer, James Schiro, stated, "the vast majority of [the] infractions resulted from an honest failure to appreciate the importance of compliance, failure to check restricted investments, and a lack of understanding of the intricacies of the rules."<sup>178</sup> MDP opponents argue that if accounting firms cannot be trusted to police their own watered-down imputation rules, there is no way they can be expected to abide by the legal community's firmwide imputation of conflicts requirement.<sup>179</sup> Rather, the accounting firms will continue to seek to change the imputation requirement—a move that opponents contend will have disastrous results for the legal community and its clients.<sup>180</sup> Bernard Wolfman, Fessenden Professor of Law at Harvard Law School, in his testimony to the Commission, discussed

---

<sup>171</sup> See *New York State Bar Report*, *supra* note 38, at 24.

<sup>172</sup> See *id.*

<sup>173</sup> See Elizabeth MacDonald & Michael Schroeder, *Report by SEC Says PricewaterhouseCoopers Violated Rules on Conflicts of Interest*, WALL ST. J., Jan. 7, 2000, at A3.

<sup>174</sup> See *id.*

<sup>175</sup> See *id.*

<sup>176</sup> See Elizabeth MacDonald, *Accountant Faces Salvo from SEC*, WALL ST. J., Feb. 28, 2000, at A3.

<sup>177</sup> See Fox, *supra* note 137, at 1100.

<sup>178</sup> MacDonald & Schroeder, *supra* note 173, at A3 (quoting letter from PricewaterhouseCoopers).

<sup>179</sup> See Fox, *supra* note 137, at 1101.

<sup>180</sup> See *id.*

the above-mentioned violations of PwC and other accounting firms, noting that the initial response from the firms was that the rules governing conflicts need to be changed.<sup>181</sup> A Big Five spokesman said that the conflict rules governing ownership of stock of clients was merely an SEC rule that had been rejected by the American Institute of Certified Public Accountants (AICPA) at its introduction in 1931, implying compliance was not important.<sup>182</sup> Mr. Wolfman suggested that these immediate responses "should give serious pause to our entrusting the care and control of the legal profession to those who have demonstrated such indifference to the law and such lack of fidelity to long established ethical norms and values."<sup>183</sup>

In an addendum to his testimony, Mr. Wolfman noted that the Council of the AICPA (analogous to the ABA House of Delegates) has adopted a resolution that would mandate an MDP composed of practicing CPAs and lawyers to be at least fifty-one percent owned by CPAs.<sup>184</sup> In about twenty states, statutes have already been passed which would impose the fifty-one percent CPA ownership requirement.<sup>185</sup> Opponents argue this is yet another clear sign that the future control of the legal profession in an MDP environment will be out of the hands of lawyers, with complete responsibility resting with non-lawyer professionals to the detriment of society.<sup>186</sup>

#### D. *Economic Considerations and Global Perspectives*

Much of the debate surrounding the potential modification of Rule 5.4 has focused on the significant economic considerations of any change, specifically, those related to effects on clients.<sup>187</sup> The Commission heard significant testimony from small business owners as well as from in-house counsel urging a change that would permit lawyers and accountants to partner and act as one in an effort to provide more comprehensive service to their clients.<sup>188</sup>

---

<sup>181</sup> See *Wolfman Testimony*, *supra* note 143, at 3.

<sup>182</sup> See *id.*

<sup>183</sup> *Id.*

<sup>184</sup> See *id.* at 5.

<sup>185</sup> See *id.*

<sup>186</sup> See *Fox*, *supra* note 137, at 1100.

<sup>187</sup> See, e.g., *Moore*, *supra* note 155, at 35–36; *Noteboom*, *supra* note 38, at 1392–96; *Burnele V. Powell*, *Flight from the Center: Is it Just or Just About Money?*, 84 MINN. L. REV. 1439, 1466–67 (2000); *Wolfman Paper*, *supra* note 143, at 2; *Johnson Paper*, *supra* note 149, at 2–3.

<sup>188</sup> See *Noteboom*, *supra* note 38, at 1393–95.

In addition to the testimony of business persons, proponents of MDPs have frequently cited the success and growth of large MDP practices in Europe as proof that accountants and lawyers can partner without detrimental effects to society.<sup>189</sup> Specifically, Laurel Terry, Professor of Law at Pennsylvania State Dickinson School of Law, spent a year studying MDPs in Germany where she noted that small MDPs, particularly, operated quite effectively in the German marketplace.<sup>190</sup> Based on her study, Professor Terry recommends that the U.S. adopt the Commission's "Fully Integrated Model" (Model Five) that would not require a lawyer majority ownership/control or limitation of the MDP to the provision of legal services.<sup>191</sup>

While proponents have attempted to demonstrate the success of European MDPs, opponents have pointed out weaknesses and unsatisfied clients within the European community.<sup>192</sup> In his testimony before the Commission, Professor Wolfman cited a comprehensive survey of 350 of Britain's largest corporations that showed eighty-eight percent of the corporations "do not want an amalgamation of their now independent lawyers and accountants," a view expressed independently by both the chief legal officers and chief financial officers.<sup>193</sup> Wolfman went on to cite a report published by the Consultative Organization of the Bar Organizations of the European Union and other European States (CCBE) published in late 1999, which noted problems with the current MDPs in Europe.<sup>194</sup> The CCBE Report concluded that problems inherent in the integration of lawyers and nonlawyers could not be adequately overcome to permit lawyer independence and client confidentiality.<sup>195</sup> The CCBE further noted that the legal profession is a crucial and indispensable element in the administration of justice and safeguarding its efficiency and integrity is the "highest concern and priority," thus, the CCBE advised against permitting forms of "integrated co-operation" between lawyers and nonlawyers.<sup>196</sup>

---

<sup>189</sup> See Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV. 1547, 1623 (2000).

<sup>190</sup> See *id.*

<sup>191</sup> See *id.* at 1611-12 (even though the majority of MDPs in Germany are lawyer controlled).

<sup>192</sup> See, e.g., *Wolfman Testimony*, *supra* note 143, at 2 (quoting a survey published in London's *Commercial Lawyer* on June 21, 1998).

<sup>193</sup> See *id.*

<sup>194</sup> See *id.* at 4.

<sup>195</sup> *Id.* (quoting CCBE Report from its Nov. 12, 1999 meeting in Athens, Greece).

<sup>196</sup> See *id.*



Proponents and the Commission have not focused on the above-mentioned studies concerning European MDPs, rather, they have chosen to focus their attention on a "somewhat less comprehensive" survey published in a recent edition of the *Financial Times*.<sup>197</sup> This survey indicates that two-thirds of the respondents oppose lawyer-accountant MDPs, but fifty percent of the respondents said that if, in order to keep their existing lawyers and accountants, they would have to accept MDPs (if the two would merge), they would do so.<sup>198</sup> Opponents contend that the Commission has had plenty of time to conduct its own comprehensive survey on the matter of client demand but has not done so.<sup>199</sup>

### III. CONCERNS ABOUT CONFIDENTIALITY AND CONFLICTS MET BY CHARGES OF ELITISM

MDPs present a serious danger to the legal profession.<sup>200</sup> The recent vote of the ABA's House of Delegates refusing to permit MDPs is a clear demonstration of how concerned members of the bar truly are.<sup>201</sup> The largest threat to the profession and opponents' strongest arguments against MDPs relate to the potential compromises of confidentiality and conflicts of interest that will inevitably arise in an MDP environment.<sup>202</sup> Confidentiality allows clients to willingly divulge all necessary (and sometimes damaging) facts regarding their representation to allow the lawyer to present the best case for the client.<sup>203</sup> MDPs have the potential to create confusion about confidentiality, leading to possible inadvertent breaches that could damage clients.<sup>204</sup> This will only result in the slow erosion of the attorney-client relationship, leading to an overall weakening of the legal system.<sup>205</sup>

#### A. *Can Accounting Firms Adopt the Legal Profession's Imputation of Conflicts Standard?*

There is no practical way that the Big Five, due to their enormous size, can ever adopt the legal profession's requirement of imputation

<sup>197</sup> See *Wolfman Testimony*, *supra* note 143, at 2.

<sup>198</sup> See *id.*

<sup>199</sup> See *id.*

<sup>200</sup> See *supra* notes 126-131 and accompanying text.

<sup>201</sup> See *supra* notes 21-23 and accompanying text.

<sup>202</sup> See *supra* notes 132-186 and accompanying text.

<sup>203</sup> See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

<sup>204</sup> See *supra* notes 143-164 and accompanying text.

<sup>205</sup> See, e.g., Fox, *supra* note 137, at 1097.

of conflicts of interest to the entire firm, rather than merely to the specific team members working on the client matter, as their current rules dictate.<sup>206</sup> It is clear that currently the accounting firms cannot even handle monitoring their limited conflict of interest requirements in a way that satisfies their own regulatory body, the SEC.<sup>207</sup> The role of the public auditor is critical to the investing public and should not be taken lightly.<sup>208</sup> For these reasons, any firm that provides attestation services to public companies should not be able to practice law.<sup>209</sup>

The lawyers' requirement of independence from outside influences is essential to ensuring the client will receive adequate representation.<sup>210</sup> The direct conflict relating to the public auditor's duty to disclose client activity to the public with the lawyer's duty to hold client confidences is too great.<sup>211</sup> The SEC has spoken on the issue and agrees that a public auditor's independence would be impaired if their firm also provided legal services to a publicly traded company.<sup>212</sup> Further, recent Big Five conduct indicates an implicit acceptance of this rationale as evidenced by the announced divestment by PwC of its audit and tax practices and the sale by Ernst & Young of its non-audit practice.<sup>213</sup>

This conduct not only indicates an implicit agreement that conflicts exist between attestation services and legal services, but may also be perceived as a demonstration of where the Big Five's desires lie.<sup>214</sup> The accounting firms were initially pushing for MDP authorization from the ABA on the theory that they would be better able to serve their clients in a one-stop-shopping environment.<sup>215</sup> After all the criticism by MDP opponents and the announcement by the SEC

---

<sup>206</sup> See *supra* notes 165–186 and accompanying text.

<sup>207</sup> A SEC audit of PricewaterhouseCoopers revealed that half of the partners at the firm had violated the conflict of interest standards by owning stock in the public companies they audited. See MacDonald & Schroeder, *supra* note 173, at A3.

<sup>208</sup> See, e.g., *Johnson Paper*, *supra* note 149, at 6. After quoting SEC Commissioner Norman S. Johnson and SEC's Director of Enforcement Richard H. Walker, both indicating that attestation and advocacy services cannot be combined into one firm, Mr. Johnson went on to say, "This is where the market trends of one-stop convenience and consolidation run into a brick wall. Too much is at stake to permit this particular combination. *Id.*"

<sup>209</sup> See *Wolfman Testimony*, *supra* note 143, at 1.

<sup>210</sup> See notes 144–148 and accompanying text.

<sup>211</sup> See Fox, *supra* note 137, at 1102–03.

<sup>212</sup> See *id.* at 1099–1100.

<sup>213</sup> See *supra* notes 161–164 and accompanying text.

<sup>214</sup> See Fox, *supra* note 137, at 1104–06.

<sup>215</sup> See *supra* notes 38–50 and accompanying text.

frowning upon auditor/lawyer MDPs, certain firms decided to abandon their long standing "bread and butter" audit and tax practices in an effort to remove any conflicts standing in the way of an MDP environment.<sup>216</sup> Such an abandonment of the one-stop-shopping theory strongly signals a purely profit-driven motivation by the Big Five.<sup>217</sup> It will be interesting and important to see how truly "separate" the audit and tax practices actually become from the remaining practice areas within the firm, particularly in light of the accounting firms' recent lack of concern for their conflict of interest rules.<sup>218</sup>

### B. *Are MDP Opponents Elitist?*

Many MDP opponents argue that nonlawyer professionals have not been instilled with the values and traditions of the legal profession, which could lead to the erosion of the societal obligations inherent in the practice of law.<sup>219</sup> MDP advocates have criticized this view as an elitist position that wrongly assumes that only lawyers can hold themselves to high ethical standards.<sup>220</sup> While at first appearance it may look like an elitist position, opponents of MDPs are simply concerned that nonlawyer managers in an MDP environment may be more apt to violate the strict ethics requirements of the legal profession because they are not subject to the lawyers' disciplinary system and thus cannot be held accountable for their actions.<sup>221</sup>

Unlike the lawyers' definition of loyalty, which accountants could adopt if they truly committed to it, the definitions of professional independence utilized by lawyers and accountants only have one thing in common, their names.<sup>222</sup> The accountant's independence is an independence from their client—they must bring a healthy skepticism to their work to protect the public from relying on financial statements that contain material misstatements.<sup>223</sup> The SEC has indicated many times regarding auditors, "we want no advocates here, but rather professional distance and objectivity."<sup>224</sup> Lawyers, however, view professional independence as an independence from outside

---

<sup>216</sup> See *supra* notes 161–164 and accompanying text.

<sup>217</sup> See Fox, *supra* note 137, at 1104–06.

<sup>218</sup> See Fox, *supra* note 137, at 1105; MacDonald & Schroeder, *supra* note 173, at A3.

<sup>219</sup> See *supra* notes 137–140 and accompanying text.

<sup>220</sup> See *supra* notes 141–142 and accompanying text.

<sup>221</sup> See Fox, *supra* note 137, at 1103.

<sup>222</sup> See *id.* at 1102.

<sup>223</sup> See *id.*

<sup>224</sup> *Id.*

influences (e.g., government, other clients, third parties, etc.).<sup>225</sup> This independence from outside influences is essential to allowing a lawyer to exercise “unbridled loyalty and zealous advocacy” in the representation of a client.<sup>226</sup>

#### IV. DO SMALL FIRMS AND SOLO PRACTITIONERS NEED PROTECTION FROM MDPs?

Much of the opposition to MDPs has been directed at the Big Five and has revolved around the size of the accounting firms.<sup>227</sup> Many authors and commentators who oppose MDPs have implicitly indicated that by advocating the continuation of the status quo regarding Rule 5.4, they are not only stopping large firm MDPs but are also protecting the small firms and solo practitioners in the legal community.<sup>228</sup> By doing so, however, they may be ignoring the needs and desires of lawyers practicing in the small firm or solo practitioner environment.<sup>229</sup> Opponents have argued that should MDPs be permitted, small firms and solo practitioners will be swallowed up by the huge accounting/legal/consulting firms that will result.<sup>230</sup>

Such an outcome has been compared to the demise of the local bookstore at the hands of Barnes & Noble or the local drugstore at the hands of major drugstore chains such as CVS.<sup>231</sup> It seems doubtful, however, that the Big Five will create their vast legal practice by buying small firms and solo practitioners. Rather, the accounting firms, which already dwarf the largest U.S. law practices, will attempt to buy-out the top 100 U.S. law firms. These huge MDPs will not be able—nor want—to serve the legal needs of all citizens, unlike Barnes & Noble and CVS. They will primarily focus their attention on large, complex legal matters. This will leave an important gap to be filled by the already existing small firms and solo practitioners—serving the individual and small corporate clients on small to medium-sized matters.

The assumption that a change to Rule 5.4 would have to apply uniformly to all lawyers and nonlawyers in all practice environments is narrow-minded, short-sighted, and may not be in the best interest of

---

<sup>225</sup> See *id.* at 1102–03.

<sup>226</sup> See Fox, *supra* note 137, at 1103.

<sup>227</sup> See, e.g., Wolfman Testimony, *supra* note 143, at 2.

<sup>228</sup> See, e.g., Ostertag Testimony, *supra* note 51, at 2.

<sup>229</sup> See, e.g., Abbott Statement, *supra* note 63, at 1.

<sup>230</sup> See Ostertag Testimony, *supra* note 51, at 2.

<sup>231</sup> See *id.*

the majority of the legal profession or its clients. While the notion that MDPs should not be permitted to operate in a large firm environment, primarily due to confidentiality and conflict of interest problems, is reasonable, the MDP environment can have extensive benefits for small firms and solo practitioners.<sup>292</sup> More than sixty-seven percent of lawyers in private practice in the United States practice in firms with six attorneys or fewer.<sup>293</sup> Arguing that the Big Five should be prevented from practicing law without specifically addressing the potential needs and desires of more than two-thirds of the legal profession misses the point.<sup>294</sup> The ABA seems to have barred a change to Rule 5.4 in an effort to prevent the Big Five from practicing law—what appears to be a purely defensive maneuver—instead of developing their own solution to the changing economic landscape.<sup>295</sup> Problems surrounding independent professional judgment, confidentiality and conflicts of interest, which are the primary focus when discussing large firm MDPs, can more easily be solved in a small firm environment.

None of the testimony before the Commission suggested anything other than a uniform modification to the Model Rules. A revised rule, however, could be drafted whereby small firms, but not large ones, would be permitted to operate MDPs. In order for this modification to be credibly made, the Commission would need to conduct extensive research and determine the optimum number of attorneys a firm may have whereby potential problems surrounding professional judgment, confidentiality and conflicts of interest can be easily mitigated. For the sake of further discussion, assume the optimum number is ten or fewer.<sup>296</sup>

Under this proposed regime, Rule 5.4 could be broken into two sections. Section one could require attorneys practicing in firms with eleven lawyers or more to be subject to existing Rule 5.4. Section two, however, could indicate that attorneys who practice in a firm with ten lawyers or fewer or operate as a sole practitioner may share legal fees with a nonlawyer and form a partnership with a nonlawyer, subject to the following:

---

<sup>292</sup> See, e.g., *Abbott Statement*, *supra* note 63, at 1; *Stinson Statement*, *supra* note 51, at 1–3.

<sup>293</sup> See BARBARA A. CURRAN & CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT 25* (1994).

<sup>294</sup> See *supra* notes 56–62 and accompanying text.

<sup>295</sup> See *supra* notes 77–125 and accompanying text.

<sup>296</sup> No empirical or statistical data were reviewed to arrive at this conclusion. The number utilized above is for theoretical discussion only.

- (1) Conflicts of interest must be imputed to the entire firm, both lawyers and nonlawyers;
- (2) All partners/professionals, both lawyers and nonlawyers, must adhere to both the legal and nonlegal ethical standards as promulgated by the respective governing bodies of the respective professions;<sup>237</sup>
- (3) Nonlawyer professionals who partner with lawyers must register with the local bar and receive a certificate of approval; and
- (4) Lawyers must retain a majority ownership in the partnership.<sup>238</sup>

The registration requirement in (3) above would also require a one-time fee as well as annual dues in an effort to place the cost of the program and compliance testing on the professionals.<sup>239</sup> Further, registering with local bar associations will enable the bar to enforce the legal ethical standards on any nonlawyer professional who partners with an attorney. Sanctions for violations may include censure and revocation of the certificate of approval, preventing the nonlawyer professional from partnering with attorneys in the future. Similar sanctions may be levied against attorneys.

Critics could argue that too much responsibility for ensuring a nonlawyer professional is certified to partner with a lawyer rests on the lawyer. While this argument may have merit, there is no clear problem with a lawyer having significant responsibility to ensure proper certification with the state bar association of a nonlawyer professional with whom the lawyer would like to form a partnership. This protective measure is necessary to preserve the integrity of the legal profession, and any benefits small firms and solo practitioners receive by a modification to the rules will not come without a corresponding increase in responsibility for safeguarding the legal profession and its clients.<sup>240</sup>

---

<sup>237</sup> The more restrictive standard will control in the event any conflicts between the legal ethical standards and another professional standard exists.

<sup>238</sup> See *supra* notes 77–125 and accompanying text (providing suggested requirements derived from Commission's two recommendations and testimony presented before the Commission).

<sup>239</sup> See *Report to House Delegates, supra* note 111, at 2-3 (fee associated with such regulation was suggested by the Commission's initial recommendation to the House Delegates in July, 1999).

<sup>240</sup> See *supra* notes 108–110 and accompanying text.

This proposed modification would enable lawyers in small firms and solo practitioners to partner, for example, with certified public accountants, certified financial advisors or certified financial planners to provide more comprehensive service to individual clients. Numerous other options would be open to such lawyers, including partnering with PhDs, medical doctors or economists (to name only a few), all to the benefit of small firm clients. As Philip Stinson testified before the Commission, his four-lawyer law practice dedicated to the representation of parents with disabled children would benefit tremendously from a modification to Rule 5.4.<sup>241</sup> A rule change would allow him to partner with the clinical psychologists he works side-by-side with, allowing him to deliver higher quality and more cost effective representation to his clients.<sup>242</sup> Having these nonlawyer professionals as members of his firm will allow Mr. Stinson to develop closer relationships with the physicians and enable his clients to have real time access to the individuals necessary for the case.<sup>243</sup> He further testified that the only way he feels he can expand his practice is if a change to the rules will allow him to partner with the physicians who are integral to his practice.<sup>244</sup>

This partnering could be achieved with minimal, if any, problems concerning lawyers' ethical obligations. By requiring lawyers to remain majority owners, any threat to lawyers' professional independent judgment can be greatly minimized, if not eliminated.<sup>245</sup> Pressures on MDP lawyers may develop from other non-legal areas of the partnership, but with lawyers as majority owners, the ultimate decisions regarding legal and nonlegal representation will rest with the attorney(s)—exactly where they should.<sup>246</sup> In addition, requiring lawyer majorities and lawyer imputation rules will control the size of MDPs, keeping them small, a factor that Professor Terry has indicated has been important in the success of German MDPs.<sup>247</sup>

Further, conflicts of interest can easily be imputed to the entire firm in a small practice without delaying client representation or risking serious undiscovered conflicts. Most representations undertaken by small firms do not lend themselves to the types of potential

---

<sup>241</sup> See *supra* notes 56–62 and accompanying text.

<sup>242</sup> See *supra* notes 56–62 and accompanying text.

<sup>243</sup> See *supra* notes 56–62 and accompanying text.

<sup>244</sup> See *supra* notes 56–62 and accompanying text.

<sup>245</sup> *But see, e.g.,* Terry, *supra* note 189, at 1612–13, 1623–24.

<sup>246</sup> See Fox, *supra* note 137, at 1103.

<sup>247</sup> See Terry, *supra* note 189, at 1623.

conflicts experienced by large firms representing many large corporate clients. The possibility of two attorneys representing opposite sides of the same matter without immediately becoming aware of the conflict is extremely small, if not non-existent in a firm of ten or fewer lawyers. Finally, any confusion surrounding client confidentiality can be mitigated more easily in a small firm than in a firm the size of PwC, for example. Clear instructions can be provided to a client concerning confidentiality and proper steps can be taken by the attorney to avoid any unintended breaches.

Beyond the desire for a favorable modification to Rule 5.4 by small practitioners, small business owners have also testified in favor of a rule change.<sup>248</sup> As George Abbott indicated in his testimony, small businesses represent the largest percentage of employers in the country and would benefit by small firm MDPs through increased choice, convenience and cost-effectiveness.<sup>249</sup> Any rule change should be undertaken with the interests of the clients in mind, not just the interests of law firms or accounting firms. Allowing large MDPs would not benefit small businesses, because the bulk of legal work performed for such businesses is done by small law firms—primarily due to cost restraints.<sup>250</sup> A rule allowing small firm MDPs, however, would have an immediate and direct impact in favor of the small business owner, making a non-uniform modification to the Model Rules more favorable.<sup>251</sup>

Any revision to the Model Rules should specify, however, that a lawyer is not, under any circumstances, permitted to partner with a public auditor.<sup>252</sup> The potential problems associated with confidentiality and conflicts of interest are too great.<sup>253</sup> Allowing small firms to operate MDPs, however, should not lead to problems concerning public auditors. Almost all, if not all, public companies are audited by the Big Five, and all underwriters and investment bankers require companies going through an initial public offering to use one of the Big Five. Very few, if any, public company audit firms are small enough to fall within the proposed exception to Rule 5.4.

---

<sup>248</sup> See *supra* notes 63–76 and accompanying text.

<sup>249</sup> See *supra* notes 63–76 and accompanying text.

<sup>250</sup> See *supra* notes 63–76 and accompanying text.

<sup>251</sup> See *supra* notes 63–76 and accompanying text.

<sup>252</sup> See *supra* notes 161–166 and accompanying text.

<sup>253</sup> See *supra* notes 143–186 and accompanying text.



## V. HAVE LAWYERS AND NONLAWYERS CONTINUED TO INTEGRATE LEGAL AND NONLEGAL PROFESSIONS?

Many commentators and practitioners inside and outside the legal community have accused the ABA of "burying their heads in the sand" and ignoring the MDP issue.<sup>254</sup> The recent vote to leave Rule 5.4 as is and disband the Multidisciplinary Practice Commission after only a superficial study is evidence of such behavior.<sup>255</sup> Lawyers in support of MDPs have not abandoned their desire to work/partner with other professions.<sup>256</sup> Many law firms are branching out into law-related businesses and using Rule 5.7 as a shield.<sup>257</sup> Rule 5.7 allows law firms to operate "law-related services" if the service is provided in conjunction with, and in substance relates to, the provision of legal services.<sup>258</sup> Such services have included document management, litigation consultation, technology solutions, investigative work and real estate services.<sup>259</sup> MDP proponents are pushing the definition of "law related services" to meet their needs and expand their firms' practices into non-traditional areas.<sup>260</sup> One MDP proponent utilizing Rule 5.7 to his advantage views such arrangements as MDPs with a different name.<sup>261</sup> These lawyers are quick to point out that the issue of MDPs and lawyers sharing fees is not going away no matter what actions are taken by the ABA.<sup>262</sup>

More discussion is needed concerning potential modifications to Rule 5.4 that will allow MDP environments in small firms while simultaneously preventing large firms, i.e., the Big Five, from operating MDPs. The proposed non-uniform modification to Rule 5.4 should be viewed positively by MDP proponents as a constructive step forward and as a test case to see the effects an MDP environment may have on the legal community. MDP advocates, however, may initially speak out against such a limited rule change (since the MDP movement has been primarily pushed by the large accounting firms), but after reflection may realize it may be a step forward in their direction, al-

---

<sup>254</sup> See, e.g., Covalleski, *supra* note 9, at 1; Noteboom, *supra* note 38, at 1398; Stein, *supra* note 1, at 1546.

<sup>255</sup> See *supra* notes 21-23 and accompanying text.

<sup>256</sup> See John Gibeaut, *Cash Boughts*, A.B.A. J., Feb. 2001, at 50.

<sup>257</sup> See *id.*

<sup>258</sup> See PROF'L RESPONSIBILITY STANDARDS, RULES & STATUTES, *supra* note 13, at 96-97.

<sup>259</sup> See Gibeaut, *supra* note 256, at 52.

<sup>260</sup> See *id.*

<sup>261</sup> See *id.*

<sup>262</sup> See *id.*

beit a small one. MDP critics likely would chastise the ABA for such a decision, focusing on the potential downward spiral of the legal profession. After further reflection, however, opponents should realize that this proposal is attempting to take practical steps to better the majority of the legal profession, rather than voting merely as a defensive reaction against a perceived threat.

Even if the ABA and the states decide a partial modification to Rule 5.4 is not in the best interest of the entire profession, the ABA should develop a plan and announce a renewed effort to identify, prosecute and prevent the unauthorized practice of law in the United States.<sup>263</sup> By voting to maintain the status quo when everyone is aware of extensive violations taking place regarding the unauthorized practice of law, the ABA insults the integrity of the legal profession and sends a clear message to violators, "we don't approve of your actions, but we are going to do nothing about it, therefore, go right ahead."<sup>264</sup> The ABA must be consistent in its message. If it is their position that MDPs are bad for the profession, they must vigorously identify and stop illegal MDPs already in existence.<sup>265</sup>

#### CONCLUSION

MDPs are not a new phenomenon, but as the Big Five continued to expand and push the envelope with regard to what may be considered "the practice of law," the ABA needed to take action. By forming a Commission on Multidisciplinary Practices and studying the issue for nearly two years, the ABA appeared to be taking steps in the right direction. Unfortunately, this progress was brought to an abrupt halt when the Bar Delegates voted against the Commission's recommendation to permit MDPs while simultaneously disbanding the Commission—what appeared to be the end of the ABA's inquiry. This was, however, not the end of society's efforts to create MDPs. Nothing has changed due to the ABA's vote; the Big Five continue their activities, which arguably represent the practice of law, with no deterrence from the ABA, and lawyers who wish to practice in MDP environments appear to be getting around Rule 5.4 by using Rule 5.7 (ancillary businesses) as a shield.

While it is important to ensure that the hallmarks of the legal profession (independent judgment, loyalty, and confidentiality) are

---

<sup>263</sup> See, e.g., Fox, *supra* note 137, at 1107-08; Stein, *supra* note 1, at 1535.

<sup>264</sup> See Fox, *supra* note 137, at 1107-08; Stein, *supra* note 1, at 1535.

<sup>265</sup> See Fox, *supra* note 137, at 1107-08; Stein, *supra* note 1, at 1535.

not destroyed through the creation of MDPs, it is critical to ensure all possibilities have been considered before ending further inquiry into the subject. The ABA decided not to allow MDPs under any circumstance. It did not consider, however, the possibility of a rule change that would not apply to all law firms uniformly. This is but one of many creative and unique solutions the ABA should consider before closing the book on the issue. It is clear that the legal profession is one based strongly on history and precedent, but economic and societal conditions do change and the legal profession must consider change to adapt and remain strong, allowing it to better meet the needs of clients and remain a guiding force in our society.

MARC N. BIAMONTE