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Multidisciplinary Practice and the Future of the Legal Profession: Considering a Role for Independent Directors

John H. Matheson & Peter D. Favorite***

I. INTRODUCTION

Edward Bartoli, a Chicago attorney, was recently suspended by the Illinois Supreme Court for aiding nonlawyers in the unauthorized practice of law.¹ Bartoli's argument? He claimed that he was merely running a multidisciplinary practice ("MDP"). The regulations governing such activity would soon change, claimed Bartoli, and thus he was only "ahead of his time."²

Because of the apparent inevitability of MDP-reform, attorneys like Bartoli are contemplating the creation of, and participation in, multidisciplinary practices throughout the United States. State regulatory bodies will be faced with the difficult determination of whether sanctions are necessary in some cases and whether sanctions are prudent in others. And many professionals, lawyers and nonlawyers, will offer the same argument if pressed: "We're only ahead of our time."

While it is not accurate to say that current professional responsibility and unauthorized practice regulations are of no consequence, those practitioners "ahead of their time" give the profession something to

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1. Bartoli was acting as legal counsel for an organization that marketed estate-planning packages. He was accused of the unauthorized practice of law for helping to train sales representatives in giving "legal counsel" to the organization's clients.

2. Mistakenly believing that the American Bar Association's ("ABA") House of Delegates would soon alter its position on multidisciplinary practice, Bartoli's attorney argued that his client's position was analogous to the prosecution of liquor-sales just prior to the repeal of Prohibition: "You know, if you convict someone, send them to jail for 10 years when you know tomorrow alcohol becomes legal, it kind of affects your idea of the dignity of the court." Patricia Manson, *High Court Suspends Lawyer Who Marketed Living Trusts*, CHI. DAILY L. BULL., Aug. 7, 2000, at 3.

consider in terms of a changing perspective. The issue of multidisciplinary practice will undergo more tumultuous debate and discussion. Lines will be drawn. Political factions will wage war with each other. Reform may be created in steps. But in practical terms, the revolution in legal services known as "MDP" is already here.

We suggest that interested legal professionals devote considerable time and energy not merely to continuing discussions and debate, but to actually prepare for the reality of multidisciplinary practice. Once MDP is formally allowed and operated through an effective framework in the United States, both sides of this issue will have less about which to complain: MDPs will be organized and run within a system that attains efficient profits in an ethical manner.

Perhaps the most basic and important issues surrounding multidisciplinary practice concern the organization and control of MDPs. This Article³ advocates that the widespread practice of using independent directors in publicly traded American corporations has much to offer both lawyers and nonlawyers in creating a workable framework for MDPs. Part II explores the reasons why the MDP issue is of great current concern. Part III analyzes the recent activity of the ABA Commission on Multidisciplinary Practice. Part IV presents an overview of the key arguments both for and against MDP-reform. Part V advocates the use of independent directors as one potential solution to the MDP issue. Finally, Part VI examines the use of independent directors as part of the five alternative business models suggested by the Commission.

II. A GLIMPSE OF THE COMING REVOLUTION: MDP

MDP⁴ is often described as the "most important issue facing the legal profession today."⁵ Currently, state regulations prohibit lawyers from

3. This Article is perhaps best appreciated as the third of a series. The first suggested that law firms be allowed to attract capital through nonlawyer investment. 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 (1998). The second examined the clash between the ABA's Commission on MDP and the factions opposed to MDP. John H. Matheson & Edward S. Adams, *Not "If" but "How": Reflecting on the ABA Commission's Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269 (2000).

4. There are a few terms used in this paper that typically carry a precise meaning. For the sake of clarity, short definitions are provided here. The definition of "MDP," for the purposes of both the ABA Commission and this Article, is as follows:

[A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a

partnerships and fee-sharing with nonlawyers in most situations. Changing these deeply-rooted⁶ prohibitions will not come without political struggle. In the latest setback for proponents of reform, the American Bar Association's ("ABA") House of Delegates strongly endorsed a recommendation opposing multidisciplinary practice on July 11, 2000.⁷ The ABA-approved recommendation states that it is inconsistent with the profession's "core values"⁸ for lawyers and nonlawyers to share fees, for nonlawyers to own or control a law firm, or for nonlawyers to have control over the practice of law. With the ABA's latest rejection of proposals for MDP-reform, the debate will surely intensify and perhaps involve greater levels of politicking.⁹

The recent expansion of non-legal professional firms, typically accounting firms, into the practice of law has exposed the issue of whether changes in the way lawyers are regulated are necessary or, alternatively, whether the profession should resist the temptation of change and strengthen the application of current restrictions on MDPs.¹⁰

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.

Comm'n on Multidisciplinary Practice, Am. Bar Ass'n, *Report Appendix A* (1999), at <http://www.abanet.org/cpr/mdpappendixa.html>. "Legal services" is defined as those services which are considered the "practice of law" by relevant professional regulations. *Id.* "Practice of law" means "the provision of professional legal advice or services where there is a [lawyer-]client relationship of trust or reliance." *Id.* Such services include, among others, preparing or expressing legal opinions and appearing or acting as an attorney. *Id.*

5. Darryl Van Duch, *ABA Honchos Differ Over MDP Vote*, NAT'L L.J., Aug. 23, 1999, at A6 (quoting the description used by the American Bar Association's former president, William G. Paul).

6. See generally Charles W. Wolfram, *The ABA and MDPs: Context, History, and Process*, 84 MINN. L. REV. 1625 (2000) (analyzing the historical development of restrictions on MDPs).

7. Geanne Rosenberg, *Accounting Legal Affiliates Criticize ABA's Proposal to Restrict MDPs*, NAT'L L.J., July 31, 2000, at B6.

8. See generally Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115 (2000) (examining the core values debate); Robert A. Stein, *Multidisciplinary Practices: Prohibit or Regulate?*, 84 MINN. L. REV. 1529 (2000) (examining the core values debate).

9. See Stein, *supra* note 8, at 1530-34. "Big Five" forces are now hinting that their "consumer choice" arguments for MDPs should find favor with the federal government. *Id.* This prediction is most likely not just threatening rhetoric. The federal government has stressed consumer-choice arguments over the past decade; such monumental events like the passing and strengthening of NAFTA, the prosecution of Microsoft, and permanent trading-status for China were realized with consumer-choice arguments at the fore. Is the notion of federal "intrusion" into attorney-regulation so fantastic?

10. See generally 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 (2000) (describing the accounting firms' recent entry into the legal services market); Lowell J. Noteboom, *Professions in Convergence: Taking the Next Step*, 84 MINN. L. REV. 1359 (2000)

Proponents of MDPs cite the globalization of markets, advances in technology and information sharing, more expansive government regulation of commercial and private activities, and clients' demands as reasons for loosening the restrictions on MDPs. These clients, say those in favor of MDPs, more than ever before desire coordinated advice from lawyers, accountants, financial planners, social workers, and other professionals. As the global economy expands, both large and small business clients will look to teams of professionals from different disciplines for consolidated advice on complex commercial and regulatory issues.¹¹

Some argue that the proponents of MDP simply realize and accept that which has been occurring in the country, and the world, for years. While the specific practice of partnership and fee-sharing between lawyers and nonlawyers has hardly been the norm, some legal and non-legal professional firms have often been so interdependent that the technical prohibitions on partnership and fee-sharing are bothersome obstacles and essentially outdated.¹² On the other hand, those opposing MDPs, while acknowledging the steady change in professional firms over the years, argue that the changes have reached a critical point, and existing regulations should not be relaxed, but instead maintained or even strengthened.

A. *The Profession Threatened: Attorneys and Market Share*

The emergence, or re-emergence, of the MDP issue began roughly ten years ago when the accounting profession searched for new growth opportunities and started offering businesses a large variety of professional services.¹³ Consulting firms soon followed suit, aggressively promoting "services remarkably similar to those traditionally offered by law firms, such as advice on mergers and acquisitions, estate planning, human resources, and litigation support systems."¹⁴ This strategy was based on the concept of "full service stations"—firms that would provide all of a corporation's significant

(charting the current paths of both the accounting and legal professions).

11. Am. Bar Ass'n, *Background Paper on Multidisciplinary Practice: Issues and Developments*, PROF. LAW., Fall 1998. See generally Burnele V. Powell, *Flight From the Center: Is It Just or Just About the Money?*, 84 MINN. L. REV. 1439 (2000) (positing that the highest quality legal service may only be available from an MDP).

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

13. See generally Fox, *supra* note 10.

14. Comm'n on Multidisciplinary Practice, Am. Bar Ass'n, *Background Paper on Multidisciplinary Practice: Issues and Developments* (1999), at <http://www.abanet.org/cpr/multicomreport0199.html>.

needs. The legal profession took note of this development, and worry soon followed.¹⁵

The growth of these non-legal firms led to the practice of hiring more and more lawyers.¹⁶ The employment of lawyers by accounting firms, for example, necessarily raises questions of unauthorized practice (under the ABA Model Rules). Accounting firms typically manage to dodge this issue by insisting that their lawyers are not “practicing law,” but only giving “tax advice.”¹⁷ Current ABA President William G. Paul argues that this is the reason the legal profession should take aggressive action: “Thousands of lawyers are already working for the Big 5 accounting firms.”¹⁸ Those attorneys, argues Paul, “need to be properly regulated.”¹⁹

While the accounting firms contend that they are not practicing law, the issue is often one of perspective. What lawyers would contend is law practice, accountants call “consulting.” For example, under the heading “legal consulting,” an accounting firm offers “advice [that] covers all stages of the litigation process, from initiating a claim to negotiating a settlement.”²⁰ It is still largely unsettled whether the ABA Model Rules prevent lawyers who work for accounting firms from performing those services. The resolution of this issue is crucial for the legal profession: “If there aren’t differences, then accountants don’t need to be hiring lawyers,” according to Houston lawyer Steve Salch, past chair of the ABA Tax Section.²¹

Legal distinctions between the professions have blurred, as well, in the past few years, so the ABA feels a pressing need to tackle the MDP issue.²² Accounting firms, for instance, may now represent clients in Tax Court, and Congress recently created an “accountant-client

15. “‘I think it’s a fact that the accounting firms are winning the war when it comes to who’s going to represent business,’ says Roger L. Page, national tax practice director for Deloitte & Touche.” John Gibeaut, *Squeeze Play: As Accountants Edge Themselves Into Legal Market, Lawyers May Find Themselves Not Only Blindsided By the Assault But Also Limited By Professional Rules*, 84 A.B.A. J., Feb. 1998, at 42.

16. *Report of the Special Committee on the Law Governing Firm Structure and Operation* (2000), at <http://www.nysba.org/whatsnew/maccrate.pdf>.

17. Gibeaut, *supra* note 15, at 44.

18. Van Duch, *supra* note 5, at A6.

19. *Id.*

20. Gibeaut, *supra* note 15, at 44. Two of the Big Five have been investigated in at least one state for engaging in the unauthorized practice of law. See Elizabeth MacDonald, *Texas Probes Anderson, Deloitte on Charges of Practicing Law*, WALL ST. J., May 28, 1998, at B15.

21. Gibeaut, *supra* note 15, at 44.

22. Comm’n on Multidisciplinary Practice, Am. Bar Ass’n, *Report* (1999), at <http://www.abanet.org/cpr/mdpreport.html> [hereinafter *1999 Report*].

privilege” within the Internal Revenue Code.²³ Many observers in the legal profession see the general trend in both law and business as one that rejects the traditional distinctions between lawyers and other professionals. These observers warn of dire consequences should the legal profession not take heed and guard against this trend.²⁴ The definitions and interpretations of “legal services” and “unauthorized practice of law” are, of course, critical. The courts have yet to tackle these issues with any energy, so the policy provided by the ABA will most likely influence the profession’s course for the next century.²⁵

While large law firms are naturally the loudest voice in the cry for MDP-reform, some small and solo providers also favor the idea, but perhaps for different reasons.²⁶ There is, of course, a hierarchy among professional firms in market-coverage: those firms already “at the top” are interested in staying there; those immediately below them are interested in a chance to secure a “higher” position, and so on. The large law firms are concerned that large nonlawyer firms are seizing a dangerously large portion of the professional services market; small law firms expressing support for MDP-reform are interested in an opportunity to compete with the large law firms.²⁷ On the other hand, lawyers from both large and small firms are concerned that MDPs are a dangerous temptation for the profession, seeing the issue as a threat to the profession’s core values, perhaps tarnishing them beyond repair.²⁸

In Europe, “Big Five” accounting firms are pressing their expansion into the legal services market. European countries are continuing to relax restrictions on MDPs,²⁹ and accounting firms have a head start on

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

24. See generally John Gibeaut, *Practice Debate Heats Up*, A.B.A. J., Aug. 1999, at 14. ABA Commissioner, Burnele V. Powell, for example, on what he hears from most lawyers, states: “They’re saying if we don’t have more flexibility [with MDPs], the accountants will eat us for lunch.” *Id.* at 16.

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

26. Comm’n on Multidisciplinary Practice, Am. Bar Ass’n, *Appendix C Reporter’s Notes* (1999), at <http://www.abanet.org/cpr/mdpappendixc.html> [hereinafter *Reporter’s Notes*].

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

28. *Id.*

29. See generally Laurel S. Terry, *German MDPs: Lessons To Learn*, 84 MINN. L. REV. 1547 (2000) (describing Germany’s regulation of MDPs).

international law firms in taking advantage of the new market.³⁰ For example, PricewaterhouseCoopers employs over 1600 non-tax lawyers outside the United States, making it in effect the third-largest law firm in the world.³¹ Thus, while American law firms are just beginning to feel the threat in the United States, they have already lost significant ground overseas. The time has come, say pro-MDP forces, for the legal profession to take action.

B. The ABA's Regulation Concerning MDPs

The primary purpose of regulating lawyers is the protection of a lawyer's independent professional judgment in service to client and court. The ABA has, since 1928, taken a generally consistent stand against MDPs. Through its Canons of Professional Ethics, the Model Code of Professional Responsibility, and the Model Rules of Professional Conduct, the ABA has sought to limit the influence of third parties.

Although the ABA is only a professional association and has no direct authority over lawyers, it bears powerful influence in informing the judgments of state court systems and legislatures, and these are the entities responsible for exercising control over the legal profession. The model regulations crafted by the ABA are most often adopted by state authorities in similar form.³² Thus, if one is interested in effecting widespread change in the regulation of the legal profession, one had best pursue it within the ABA's model system. As it is, most likely because of the ABA's profound influence, MDPs are currently prohibited in all fifty states.³³

1. ABA Canons of Ethics

In 1928, the ABA introduced several new provisions to the Canons of Ethics prohibiting the partnership of lawyers and non-legal

30. See generally Gianluca Morello, Note, *Big Six Accounting Firms Shop Worldwide for Law Firms*, 21 *FORDHAM INT'L L.J.* 190 (1997); *Reporter's Notes*, supra note 26. England in particular has taken a leadership role in spurring on reforms. See Comm'n of Multidisciplinary Practice, Am. Bar Ass'n, *Updated Background and Informational Report Part I* (1999), at <http://www.abanet.org/cpr/febmdp.html>.

31. Michael M. Bowden, *Your Next Partner Might Not Be a Lawyer*, *LAW. WKLY. USA*, June 28, 1999, at B2, available at <http://www.lweekly.com/99LWUSA/590>.

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

33. The only United States jurisdiction that permits combinations of lawyers and nonlawyers in the provision of legal services is the District of Columbia. But the Washington, D.C. Rule of Professional Conduct 5.4(b)(1) mandates that such firms have as their sole function the practice of law. See D.C. RULES OF PROF'L CONDUCT R. 5.4(b) (1990).

professionals. The most relevant provisions are Canons 33, 34, and 35.³⁴ Canon 33's provisions read, in part: "Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where a part of the membership business consists of the practice of law."³⁵ Canon 34 held that "[n]o division of fees is proper, except with another lawyer, based upon a division of service or responsibility."³⁶ Canon 35 stated that "the professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer He should avoid all relations which direct the performance of his duties in the interests of such intermediary."³⁷

During the years that the Canons of Ethics were in force, the ABA Committee on Professional Ethics and Grievances consistently found that these provisions prohibited nearly any form of partnership between lawyers and non-legal professionals that offered services to the public.³⁸ Of course, if the lawyer completely disassociated himself from the profession, the lawyer could enter such partnerships.³⁹

2. ABA Model Code of Professional Responsibility

The Canons of Ethics were replaced by another regulatory framework, but the provisions of the Canons of Ethics most relevant to MDPs were continued by the ABA Model Code of Professional Responsibility in 1969.⁴⁰ Canons 33, 34, and 35 were replaced with different language and titles, but the prohibitions remained remarkably similar.

The Model Code's prohibition on multidisciplinary partnerships read: "A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law."⁴¹ The prohibition on fee-splitting among lawyers and non-legal professionals stated: "A lawyer or law firm shall not share legal fees with a non-lawyer."⁴² The Model Code did not retain the "non-lawyer

34. See *Report of the 51st Annual Meeting of the American Bar Ass'n*, 53 REP. A.B.A. 120-30 (1928).

35. *Id.* at 778.

36. *Id.*

37. *Id.* at 779.

38. Andrews, *supra* note 32, at 587.

39. *Id.*

40. See *Annual Report of the American Bar Ass'n Including Proceeding of the 92nd Annual Meeting*, 94 REP. A.B.A. 389-91 (1969).

41. MODEL CODE OF PROF'L RESPONSIBILITY, DR 3-103(A) (1980).

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

oversight” provision as a distinct rule, but managed to express much the same prohibition in various parts of its text: one provision prohibits a lawyer from being part of a professional corporation in which the lawyer’s professional judgment is directed or controlled by a nonlawyer; another prohibits the regulation of a lawyer’s professional judgment by a nonlawyer who pays or employs that lawyer.⁴³

The ABA Committee on Ethics and Responsibility has seldom visited MDP issues since the institution of the Code, but it seems clear that the Committee’s opinions interpreted ethics rules to prohibit the partnership of lawyer and nonlawyer when the partnership is for profit, the nonlawyer has a strong managerial or financial role, and the organization’s business is law or law-related.⁴⁴

3. The ABA Model Rules of Professional Conduct

The ABA’s ethical regulations were again revised with the adoption of the Model Rules of Professional Conduct (“Model Rules”).⁴⁵ Despite some technical changes, the general prohibitions on MDPs, fee-splitting, and nonlawyer oversight were continued.

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

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

- (1) an agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;
- (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) *A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.*

43. *Id.* DR 5-107(C).

44. For a concise description of the Committee’s opinions and action, see Andrews, *supra* note 32, at 591-94.

45. Over forty states have adopted the Model Rules. With the exception of the District of Columbia, guidelines similar to those contained in Model Rule 5.4(a), (b) & (d) are found in the ethics codes of the fifty states. See LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 91:401.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) *A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:*

- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
- (2) a nonlawyer is a corporate director or officer thereof; or
- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.⁴⁶

The creation of the Model Rules began with the creation of the ABA Special Committee on Evaluation of Professional Standards ("Kutak Commission").⁴⁷ During the drafting of the Model Rules, the Kutak Commission considered and rejected the traditional idea that practicing lawyers should be prohibited from entering into business associations with nonlawyers.⁴⁸ As a result, the Commission recommended that the ABA adopt Proposed Rule 5.4, which provided:

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

- (a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
- (b) information relating to the representation of a client is protected as required by [the rule on confidentiality of information];
- (c) the arrangement does not involve advertising or personal contact with prospective clients prohibited by [the advertising and soliciting rules]; and
- (d) the arrangement does not result in charging a fee that violates [the rule on fees].⁴⁹

Proposed Rule 5.4 represented a dramatic departure from the traditional stance taken by the Canons and the Model Code.⁵⁰ As

46. MODEL RULES OF PROF'L CONDUCT R. 5.4 (1998) (emphasis added).

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

48. *Id.*

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

50. The Comment and Notes accompanying Proposed Rule 5.4 rationalized this departure from traditional prohibitions on forming partnerships or sharing fees with nonlawyers by noting

written, the new Rule 5.4 would have allowed corporate investment and, thus, nonlawyer control of law firms. Indeed, it would have opened the door for a law firm to “go public.” It is no surprise, in light of traditional thinking, that this proposed rule was the only rule from the 1982 final draft that was rejected in its entirety and rewritten by the House of Delegates.⁵¹

The Kutak Commission justified its rejection of the traditional approach in both the Comment and Legal Background sections that accompanied their Proposed Rule 5.4.⁵² The Legal Background section, in particular, was highly critical of the traditional view:

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

The exceptions to per se prohibitions on legal service arrangements involving non-lawyers have substantially eroded the general rule, leading to inconsistent treatment of various methods of organization on the basis of form or sponsorship. Adherence to the traditional prohibitions has impeded development of new methods of providing legal services.⁵³

Similarly, the Comment to Proposed Rule 5.4 indicated that “[g]iven the complex variety of modern legal services, it is impractical to define organizational forms that uniquely can guarantee compliance with the Rules of Professional Conduct.”⁵⁴ Apparently, the ABA House of

the changes in the practice of law over time. Gilbert & Lempert, *supra* note 47, at 386. The Commission pointed out that law firms no longer consist solely of lawyers. *Id.* Law firms increasingly rely on paralegals and professionals from other fields to manage various aspects of the firm. *Id.* Additionally, a large number of lawyers work in organizations other than law firms, such as government agencies, private corporations, and public defender and group legal service organizations. *Id.* Nonlawyers often direct the work of lawyers in these organizations. *Id.*

51. See GILLERS & SIMON, *supra* note 49, at 300.

52. Andrews, *supra* note 32, at 594.

53. *Id.* at 594-95 (quoting COMM’N ON EVALUATION OF PROF’L STANDARDS, PROPOSED FINAL DRAFT OF MODEL RULES OF PROF’L CONDUCT 177, 178 (1981)).

54. *Annual Report of the American Bar Ass’n Including Proceeding of the 105th Annual Meeting*, 107 REP. A.B.A. 887 (1982). The Kutak Commission included a listing of the different legal services organizations:

[M]ultimember partnerships, firms employing paraprofessionals and professionals of other disciplines, professional corporations, insurance companies that employ counsel who represent insureds, law departments of private organizations and government agencies, legal service agencies and defender organizations, and group legal service

Delegates did not agree with the Kutak Commission's analysis. In February 1983, the Proposed Rule 5.4 became the subject of debate at a House of Delegates meeting.⁵⁵ Supporters of the rule met strong opposition from the General Practice Section.⁵⁶ Earlier, the General Practice Section had submitted an amendment to Proposed Rule 5.4 that essentially continued the traditional prohibitions against fee splitting and forming business associations with nonlawyers.⁵⁷ Opponents of the Kutak Commission's version of the rule asserted several grounds for their opposition.⁵⁸ First, the Commission's proposal would permit Sears, H & R Block, or Big Eight accounting firms to open law offices which would compete with traditional law firms.⁵⁹ Second, nonlawyer ownership of law firms would threaten the professional independence of lawyers.⁶⁰ Third, nonlawyer ownership would result in economic pressures that would undermine the professionalism of law.⁶¹ Finally,

organizations in which nonlawyers, or lawyers acting in a managerial capacity, may be directors or have managerial responsibility.

Id.

55. Gilbert & Lempert, *supra* note 47, at 391.

56. *Id.* at 392.

57. *Id.* at 391-92.

58. Andrews, *supra* note 32, at 595.

59. *Id.* During the debate, a member opposing the Kutak Commission's proposed rule admonished:

You each have a constituency. How will you explain to the sole practitioner who finds himself in competition with Sears why you voted for this? How will you explain to the man in the mid-size firm who is being put out of business by the big eight law [sic] firms? How will you explain that?

Id. at 595 n.107 (quoting Unedited Transcript of ABA House of Delegates Session 48 (Feb. 8, 1983) (statement of Al Conant)).

60. *See id.* at 595. Another opponent stated:

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

Id. at 595 n.108 (quoting Unedited Transcript of ABA House of Delegates Session 46-47 (Feb. 8, 1983) (statement of Bob Hawkins)).

61. *See id.* at 595. Another opponent inquired:

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

opponents to the Proposed Rule stated that such a rule could dramatically alter, in unforeseeable ways, the structure of the legal profession.⁶² According to Professor Geoffrey Hazard, Jr., the debate died down quickly after he responded “yes” to the question: “Does this rule mean that Sears, Roebuck will be able to open a law office?”⁶³ In the end, the General Practice Section’s traditional view carried the day, and the Kutak Commission’s Proposed Rule 5.4 was defeated.⁶⁴

As it turns out, the current Model Rule 5.4(a) prohibits a lawyer from sharing fees with a nonlawyer, except for extremely limited cases.⁶⁵ Rule 5.4(b) prohibits a lawyer from forming a partnership with a nonlawyer if any of the activities of the partnership consist of the “practice of law.”⁶⁶ And Rule 5.4(d) prohibits a lawyer from practicing in a professional corporation or association if a nonlawyer is a corporate director or officer or otherwise has the right to direct or control the professional judgment of the lawyer.⁶⁷ Therefore, Model Rule 5.4, while allowing lawyer-nonlawyer cooperation in the responsible representation of a client, retains the prohibition of “multidisciplinary practice” as contemplated by the tradition of ABA regulations.⁶⁸

C. *The Feeble Attempts at a Quick Solution*

Critics argue that modern law firms are run as businesses, and these businesses must have ways to meet the needs of clients. In response to the prohibitions on MDPs, many law firms have established separate “ancillary businesses” in which lawyers and nonlawyer partners provide professional services to clients.⁶⁹ An example arrangement is one in which a law firm and a “Big Five” accounting firm “cooperate” to share

lawyer; the venturer isn’t even under the jurisdiction.

Id. at 595 n.109 (quoting Unedited Transcript of ABA House of Delegates Session 46-47 (Feb. 8, 1983) (statement of Charles Kettlewell)).

62. “No one can tell you what the impact of Rule 5.4 is going to be on the legal profession, but everyone can assure you, and you can assure yourself merely by reading it, that it is going to have a major impact and mark a fundamental change in the practice of law.” *Id.* at 596 n.110 (quoting Unedited Transcript of ABA House of Delegates Session 37-38 (Feb. 8, 1983) (statement of Al Conant)).

63. *See* Gilbert & Lempert, *supra* note 47, at 392.

64. *See id.*

65. MODEL RULES OF PROF’L CONDUCT R. 5.4(a) (1983).

66. *Id.* R. 5.4(b).

67. *Id.* R. 5.4(d).

68. *See supra* note 4 (defining the term “multidisciplinary practice”).

69. *See Reporter’s Notes, supra* note 26. *See generally* Noteboom, *supra* note 10 (addressing the ancillary businesses phenomenon).

clients and serve each other's professional needs.⁷⁰ Because these service-structures are designed to deliver non-legal services, they are not affected by the prohibitions on partnerships and fee-sharing with nonlawyers.⁷¹ But critics charge that these ancillary businesses—as one might have expected—were beginning to approach, if they had not already met, the definition of “prohibited activities” under the Model Rules.⁷² That is, the lawyers participating as “consultants” in these ancillary business were engaged in the unauthorized practice of law. At the very least, say the critics, these ancillary business arrangements violate the “spirit” of the Rules, if not its “letter.”⁷³ The ABA House of Delegates, after extended discussion and debate, finally tackled the issue with the adoption of a rule that made all lawyers providing “law-related” services subject to the Model Rules.⁷⁴

Those lawyers and firms that were particularly frustrated by the Model Rules' prohibitions on MDPs attempted to find a solution to the prohibitions by creating patchwork-relationships with other professionals. In so doing, however, these “solutions” have not reduced the sparring over MDP-related issues, but actually accentuated it.⁷⁵ Ancillary businesses have not only faced ethics-related challenges in the ABA, but they also face competitive disadvantages in the raising of capital and other elements of business.⁷⁶ The ABA, perhaps tired and frustrated with the debate, decided to confront the issue of MDP.

III. RECENT HISTORY OF ABA ACTIVITY CONCERNING MDP

In 1998, the ABA established its Commission on Multidisciplinary Practice to examine the issue of MDPs and deliver a recommendation. The Commission was to report on the extent of encroachment into the legal profession by other professionals; the potential impact of MDPs on the legal profession; and possible modifications to current ethical rules and principles.⁷⁷ The Commission gathered opinions from the public, bar regulators, and lawyers, from interests both national and

70. See Patricia Manson, *Bar Leaders Debate Interprofessional Ties*, CHI. DAILY L. BULL., Aug. 9, 1999, at 1.

71. *Id.*; see also *supra* Part II.B (discussing the scheme of regulation).

72. See generally Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363 (1993) (applying Rule 5.4).

73. *Id.*

74. See *Reporter's Notes*, *supra* note 26.

75. *Id.*

76. *Id.*

77. *Id.*

international over a ten-month period.⁷⁸ The Commission submitted a study to the ABA House of Delegates and forwarded a second paper describing possible models of MDP and related information to the ABA's House of Delegates in February 1999.⁷⁹

A. Round One: The Commission's Bold Report and Recommendation

After further deliberations and study, the Commission submitted both a report and a recommendation to the House of Delegates.⁸⁰ The Commission recommended relaxing "the prohibitions against sharing legal fees and forming a partnership or other association with a nonlawyer when one of the activities is the practice of law."⁸¹ Among the specific items of recommendation were these: permission to share fees with a nonlawyer (within the MDP);⁸² permission to deliver legal services through the MDP, provided that the primary purpose of the MDP was the provision of legal services;⁸³ equal coverage of ethics rules for traditional law firms and MDPs;⁸⁴ strong regulatory provisions for MDPs controlled by nonlawyers.⁸⁵

The Commission often qualified these recommendations,⁸⁶ and it should be noted that its first item for recommendation includes this proposal: "The legal profession should adopt and maintain rules of professional conduct that protect its core values, independence of professional judgment, protection of confidential client information, and loyalty to the client through avoidance of conflicts of interest but [should allow MDPs]."⁸⁷

78. Between September 1998 and June 1999, the Commission conducted extensive hearings, during which fifty-six witnesses testified before the Commission, and other interested persons submitted written comments. *Id.*

79. Both documents are available on the Commission's web site. See *supra* note 4 and accompanying text.

80. For a thorough examination of the Report and Recommendation, see Matheson & Adams, *supra* note 3.

81. *Reporter's Notes*, *supra* note 26.

82. Comm'n on Multidisciplinary Practice, Am. Bar Ass'n, *Comm'n on Multidisciplinary Practice Report to the House of Delegates Recommendation*, Recommendations 2, 12 (1999), at <http://www.abanet.org/cpr/mdprecommendation.html> [hereinafter *Recommendation*].

83. *Id.* Recommendation 3.

84. *Id.* Recommendation 7.

85. *Id.* Recommendations 14 & 15.

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

87. *Id.* Recommendation 1.

1. A Less-Than-Enthusiastic Reaction to the Commission

In August 1999, amid growing concern that it was moving too quickly on the issue, the ABA's policy-making House of Delegates agreed after three hours of debate to table a vote in order to further study the issue. There was little doubt among delegates at the time that, had there been a vote on the proposal, it would have been defeated.⁸⁸

A few influential state bar associations had, in a preemptive strike against pro-MDP forces, passed resolutions against the acceptance of MDPs. Most of the opposition focused on the fee-sharing element of MDP-reform.⁸⁹ The New York State Bar Association ("NYBA"), for instance, took the lead as one of the most persistent voices against MDPs and the ABA Commission's recommendation. The NYBA stated that it

opposes any changes in existing regulations prohibiting attorneys from practicing law in MDPs, in the absence of a sufficient demonstration that such changes are in the best interest of clients and society and do not undermine or dilute the integrity of the delivery of legal services by the legal profession.⁹⁰

A prominent international law association ("Union Internationale des Avocats"), on the other hand, welcomed the news of the Commission and its recommendations. Attempting to create further international support for MDPs, the group proposed universal ethics rules which could serve as model rules for those nations favoring MDPs or those currently wrestling with the issue.⁹¹

The accounting profession hailed the Commission's recommendations as a positive development and looked forward to the "merging of the two professions."⁹² "Big Five" accounting firms wanted, and still hope for, coordination with the legal profession for two main reasons: one, accounting firms will not have to worry about strong, organized opposition to their recent growth; and, two, cooperation between the professions—while allowing law firms to

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

89. See, e.g., Rocco Cammarere, *Multidisciplinary Practices: Gone, But Not Forgotten*, N.J. LAW., Aug. 16, 1999, at 1; *News this Week*, NAT'L L.J., Aug. 16, 1999, at A4; Gary Spencer, *Bar Opposes Non-Lawyers Sharing Fees*, N.Y.L.J., June 29, 1999, at 1.

90. Spencer, *supra* note 89, at 1.

91. Darryl Van Duch, *MDPs Get International Support: Global Lawyer Group Proposes Ethics Rules that Could Help ABA*, NAT'L L.J., July 12, 1999, at A4.

92. *ABA Urges One-Stop Shopping*, J. ACCT., Sept. 1, 1999, at 1 [hereinafter *One-Stop Shopping*].

regain some of the market—will also allow accounting firms to further increase their overall “one-stop shopping” lead in the marketplace.⁹³

B. Round Two: The Commission’s Efforts to Compromise

In December 1999, the Commission issued its Updated Background and Information Report and Request for Comments (“Updated Report”).⁹⁴ The Commission had decided that it had best answer the most often-repeated criticism and encourage further discussions.⁹⁵

In its Updated Report, the Commission noted that “[s]trategic and other alliances between law firms and Big Five accounting firms are becoming increasingly popular.”⁹⁶ The Commission also discussed the rapidly changing legal landscape outside of the United States.⁹⁷ The Commission focused on nine issues in responding to criticism of the original report.⁹⁸ These key issues ranged from including competency as a core value in structuring the regulation of MDPs to whether control of MDPs should be limited to lawyers.⁹⁹ While the Commission showed flexibility in its approach, in all of its responses it continued to suggest that MDP-reform was not a matter of “if” it should occur, but rather “how” it should occur.¹⁰⁰

In the final section of the Updated Report, the Commission included several interesting comments. The Commission invited comments for the first time on whether “stepped-up enforcement of [unauthorized practice of law statutes] and related code of conduct provisions is in the public interest and/or an achievable objective.”¹⁰¹ But then, however, the Commission returned to its primary focus and invited comments on what type of MDP model should be used, suggesting that variations include the District of Columbia rule, a contract model allowing close affiliation of law firms with other professionals, or a fully integrated MDP model.¹⁰²

93. John M. Covalleski, *ABA Cracks Open Door for CPA-Lawyer Mergers*, ACCT. TODAY, June 21, 1999, at 1, available at 1999 WL 9767576.

94. Comm’n on Multidisciplinary Practice, Am. Bar Ass’n, *Updated Background and Information Report and Request for Comments* (1999), at <http://www.abanet.org/cpr/febmdp.html>.

95. *Id.*

96. *Id.* at 2.

97. *Id.* at 3-4.

98. *Id.* at 4-8.

99. *Id.* at 4, 7.

100. *Id.* at 4-8.

101. *Id.* at 9.

102. *Id.* at 9-16.

The Commission continued its treatment of answering criticism and furthering discussion at the ABA's Midyear Meeting in February 2000. There, the Commission's "town hall" approach featured an impressive and lengthy discussion of MDP and its implications for the profession.¹⁰³ Using criticism and data received since its initial Report and Recommendation in 1999, the Commission issued a new position.

1. Compromise: The Commission's 2000 Recommendation

The Commission's Report to the July House of Delegates contained a short and carefully crafted list of recommendations.¹⁰⁴

1. Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services, provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services. . . .

. . . .

3. 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.

4. The prohibition on nonlawyers delivering legal services and the obligations of all lawyers to observe the rules of professional conduct should not be altered.

5. Passive investment in a Multidisciplinary Practice should not be permitted.¹⁰⁵

2. Failed Compromise: The 2000 ABA House of Delegates' Decision

In July 2000, the ABA House of Delegates surprised some observers by overwhelmingly rejecting proposals for MDP-reform. Most persons expected that the delegates would either again postpone any recommendations for reform or narrowly reject reform-related proposals, but the ABA adopted a strongly-worded recommendation that "no nonlawyer or nonlegal entity involved in the provision of such services should own or control the practice of law by a lawyer or law

103. The discussions were moderated by Judge Patrick E. Higgenbotham, U.S. Court of Appeals for the Fifth Circuit. The meeting was broadcast live via the internet, and is available for viewing at <http://www.abanet.org/mdp> (last visited Mar. 27, 2001).

104. Comm'n on Multidisciplinary Practice, Am. Bar Ass'n, *Comm'n on Multidisciplinary Practice Report to the House of Delegates* (2000), at <http://www.abanet.org/cpr/mdpfinalrep2000.html> [hereinafter *2000 Report*]. It should be noted that the Recommendation also included a firm reminder that implementation must protect the "core values" of the legal profession. *Id.*

105. *Id.*

firm or otherwise be permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person.”¹⁰⁶

It is important to note that formal approval of MDP by the ABA would not have meant the end of discussions. Under the current system of regulation, any proposal eventually approved by the ABA will still have to be adopted by the states, where many bar associations have not yet made a decision on MDP.¹⁰⁷

IV. ARGUMENTS SURROUNDING MDP

The issue of MDP-reform brings passionate opinions from many different quarters. Without delving into too much detail of any single argument, here is an overview of the arguments consistently advanced over the past few years. Where especially relevant, words from the Commission on Multidisciplinary Practice will be included within the presentation.

A. Arguments for MDP-Reform

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

1. Loss of Position in the Professional Services Marketplace

At first glance, the protection of economic interests seems natural to an argument opposing MDPs. For example, since MDPs will allow partnerships with nonlawyers, those opposing MDPs are sometimes portrayed as “economic protectionists” of the legal profession.¹⁰⁸ That is, they see nonlawyers stealing a piece from a fixed pie of lawyer-type work. But economic interests, and perhaps “protectionist” interests, are

106. Am. Bar Ass’n, *House of Delegates Recommendation* (June 2000), at <http://www.abanet.org/cpr/mdp-report10f.html> (last modified Mar. 5, 2001). The recommendation’s stance was framed within a perspective of “preserv[ing] the core values of the legal profession.” *Id.* The July 2000 delegates also firmly rejected an alternative recommendation that encouraged postponing any discouraging action until the issue could be further studied by legal associations. *Id.*

107. See, e.g., Comm’n on Multidisciplinary Practice, *Report from the ABA Comm’n on Multidisciplinary Practice*, at <http://www.abanet.org/cpr/mdpstats.html> (last modified July 6, 2000). Reports concerning state bar associations’ positions are sketchy, at best. It does appear, however, that most associations taking an active role in the debate are opposed to meaningful reform.

108. See, e.g., Andrews, *supra* note 32, at 586.

ironically a strong interest for those legal factions favoring MDPs. In reality it seems the legal-services market and, almost certainly, the professional services market, is expanding. If lawyers stay in their law-only niche and do not effectively offer the multidisciplinary services that clients seek, they will lose market share. On the other hand, if lawyers recognize the demands of the changing marketplace and work to cooperate with other professionals to obtain a piece of the ever-increasing professional services pie, their economic interests likely will be the motivation for spurring on modern reform.¹⁰⁹

Lawyers are obviously worried about the encroachment on their profession by accounting firms and other professional services firms. Some of these firms focus directly on giving legal or quasi-legal advice, while other nonlegal firms hire lawyers from law firms or law schools to accomplish the same thing. The result is that these non-legal firms are providing multi-disciplinary services while "hiding" behind a nonlegal label, and are thus threatening the traditional domain of the law firm. If this trend continues, while the legal profession does not expand its ability to reach more clientele, the result will likely be the diminishment of business for lawyers.¹¹⁰ As one lawyer puts it: "We are all paranoid about driving our clients into the arms of other professionals and that's one of the reasons we are [pushing MDP-reform]."¹¹¹

While it is not to be expected that the ABA Commission would publicly communicate its fears concerning the loss of business for lawyers, the Commission was surely motivated, at least in part, by the "market threat" to the legal profession. The Commission has highlighted one aspect of economic concern, saying that while there are no precise statistics on accounting firms' presence in the international legal market, "the evidence of their emergence as alternative providers is overwhelming."¹¹²

The Commission noted, as well, that courts have been increasingly reluctant to enforce Unauthorized Practice of Law ("UPL") statutes because the term "practice of law" is vague and confusing.¹¹³ The Commission's implicit conclusion is clear: with the growth of

109. *Supra* note 44 and accompanying text (noting that the MDP debate has been in and out of the limelight for some time).

110. *See generally* Jacobs, *supra* note 88.

111. *See* Elizabeth Davidson, *Keeping Clients on a Single Track*, LAW., Sept. 20, 1999, at 12, available at 1999 WL 9133531.

112. *Reporter's Notes*, *supra* note 26.

113. *Id.* The Commission mentions that there have been only two recent enforcement actions against the most critical element of nonlawyer competition: Big Five accounting firms. *Id.*

nonlawyer firms and the lack of control over the “unauthorized practice of law,” the legal profession is facing severe competition in the legal-services marketplace.

2. Convenience of the Client

This is perhaps the most repeated argument from the pro-MDP forces. Proponents of MDPs argue that clients of law firms have a need—a need that is expanding with the complexity of law and business—for obtaining multiple professional services from a single provider.¹¹⁴ Instead of contacting, visiting, and contracting with various professional firms, the modern client has a significant interest in the availability of a single firm providing legal, financial, and other professional services.¹¹⁵ Those arguing the “convenience of the client” line of reasoning cite the clear pattern of convenience-shopping in today’s marketplace, whether the convenience be the “Mall of America,” satellite broadcasting for television or the conglomeration of international professional services.¹¹⁶ This powerful characteristic of the market is what drives the legal profession to change—not the mere whims or selfish interests of legal or non-legal professionals.

In the first part of its 1999 Recommendation, the Commission proposed relaxing regulations to allow “the development of new structures for the more effective delivery of services and better public access to the legal system.”¹¹⁷ The ABA Commission seemed to find the “client convenience” argument the most reliable in recommending a relaxation of MDP-regulations. The Commission emphasized that “[t]he 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

114. See generally Noteboom, *supra* note 10 (examining client and consumer group testimony before the Commission).

115. See generally James M. Fischer, *Why Can't Lawyers Split Fees? Why Ask Why, Ask When?*, 6 GEO. J. LEGAL ETHICS 1 (1992). Some have been arguing that MDPs would not only be more convenient for clients, but they would actually provide much better legal representation. See, e.g., Peter C. Kostant, *Breeding Better Watchdogs: Multidisciplinary Partnerships in Corporate Legal Practice*, 84 MINN. L. REV. 1213 (2000).

116. One advocate for MDPs reasons: “When customers walk into one of my golf stores, I don’t sell them a set of clubs, then send them to four different places for shoes, gloves, balls and a bag. So why do I have to go to different offices to find lawyers, accountants, financial planners, insurance agents and public relations experts?” Michael Paul, *Law Firms Shouldn't be for Lawyers Only*, WALL ST. J., Aug. 9, 1999, at A18.

117. *Recommendation, supra* note 82.

clients who express an interest in additional choices of legal service providers.”¹¹⁸

3. Changes are Demanded by Natural Trends in the Global Economy

In a line of reasoning similar to the “client convenience” argument, many argue that the legal profession in the United States must adapt to marketplace competition as it becomes “globalized” and remove those regulations that restrict its participation in the new global economy.¹¹⁹ Accounting firms recognized this trend long ago and have already established a significant foothold in the international market of MDPs. If the legal profession cannot adapt to these natural changes in the economy, in time it will slowly be pushed aside as others continue to take advantage of new opportunities.¹²⁰

The largest 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 obligation. In some European markets, these accounting firms already have a place among the largest providers of legal services for businesses. This development is not likely to be curbed if the legal profession does not alter its own regulation: the GATT treaty, which governs most international trade matters, claims jurisdiction over these professions through the World Trade Organization—an organization historically predisposed against self-interested regulation.¹²¹

While the Commission did not closely examine the potential impact of trade agreements and trade organizations on MDPs,¹²² it did consider the international marketplace to be a strong challenge to current regulations. The Commission hinted at the inevitable trend of globalization by examining pro-MDP proposals, current regulations around the world, and the participation in such friendly markets by non-legal professional firms.¹²³

118. *1999 Report*, *supra* note 22.

119. Doug Dandow, Editorial, *Lawyers Need to Evolve with the Economy*, J. COMMERCE, Aug. 13, 1999, at 9, available at 1999 WL 6382138.

120. *One-Stop Shopping*, *supra* note 92, at 15.

121. Gibeaut, *supra* note 15, at 44.

122. *See 1999 Report*, *supra* note 22.

123. *Reporter's Notes*, *supra* note 26.

4. Access to New Capital

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

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

B. Arguments Opposed to MDP

Opponents of MDP traditionally argue on the basis of ethical considerations. They argue that the economic factors raised by MDP advocates are connected to a short-term perspective, and that the profession and clients are bound to suffer if MDP prohibitions are relaxed.

1. Professional Objectivity Threatened

The primary concern of groups opposing MDPs is the threat to a lawyer's independent judgment. When a lawyer has intimate strategic and financial attachments to non-legal professionals, so goes the argument, there are bound to be frustrating obstacles to an independent judgment. For example, if the lawyer is a partner with a financial

planner, and the financial planner has invested a great deal of time and money in creating a plan for a client, the lawyer might be pressured to give less-than-independent counsel to the client. As the president of the New York Bar Association recently noted in a letter of warning about the dangers of MDPs, “[a]bout half of the practice of a decent lawyer consists of telling would-be clients that they are damned fools and should stop.”¹²⁴ This “half” of a proper practice, say those opposed to MDPs, would be threatened if current regulations are relaxed.

The ABA Commission recognized this issue as “[t]he most frequently raised concern” regarding the relaxation of ethics rules.¹²⁵ The Commission pointed out that this is indeed a legitimate concern, but MDPs would not create this “problem”—it already exists:

In today’s world, many lawyers routinely work in practice settings in which they are subject to management oversight by nonlawyers. The profession has a history of lawyers working in corporate law departments or government offices. Lawyers also work for organizations that provide legal services to their members or other clients (e.g., union-sponsored and prepaid legal services plans, community legal services organizations). Independence has been maintained in those settings.¹²⁶

Recognizing this threat to independent judgment, the Commission recommended that the ABA Model Rules clearly state that a lawyer supervised by a nonlawyer may not use as a defense the fact that the lawyer merely complied with the nonlawyer’s resolution of a question of professional duty.¹²⁷ In addition, the Commission recommended a requirement that an MDP not controlled by lawyers supply to the appropriate court a written statement that it will not directly or indirectly interfere with a lawyer’s independent judgment on behalf of a client, and that it will establish and enforce procedures designed to protect a lawyer’s exercise of independent judgment.¹²⁸ Finally, in trying to calm some fears, the Commission has emphasized that it is not recommending a change in the provisions concerning equity investments in any entity providing legal services: “It would not be

124. James C. Moore, *Lawyer Independence: Being Able to Tell the Client “You Are a Damned Fool!”*, 71 N.Y. ST. B.J. 5 (1999).

125. 1999 Report, *supra* note 22. See generally Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469 (2000) (discussing the independent judgment core value and arguing that the Commission’s recommendations will not protect it).

126. 1999 Report, *supra* note 22.

127. Recommendation, *supra* note 82, Recommendation 6.

128. *Id.* Recommendation 14.

permitted for an individual or entity to acquire all or any part of the ownership of an MDP for investment or other purposes.”¹²⁹

2. Client-Confidentiality at Risk

Some argue that closer integration between lawyers and other professionals will bring numerous violations of ethics rules and jeopardize client interests.¹³⁰ Other professionals are not bound by the same obligations which bind lawyers, and in some cases, are positively bound by potentially conflicting obligations.¹³¹ For example, in the case of an MDP including both accountants and lawyers, there is a ready-made conflict of interest. U.S. securities laws require accountants to disclose audit irregularities to the Securities and Exchange Commission if a company does not quickly correct the problems. By contrast, lawyers are bound by their ethics rules to protect client confidentiality.¹³²

The Commission agreed that confidentiality is a serious concern, since some professions do have different confidentiality standards. The Commission recommended that no changes be made to the lawyer’s obligation to protect confidential client information, and proposed several safeguards to protect against potential conflicts.¹³³ Specifically, the Commission provided that:

8. In connection with the delivery of legal services, all clients of an MDP should be treated as the lawyer’s clients for purposes of conflicts of interest and imputation in the same manner as if the MDP were a law firm and all employees, partners, shareholders or the like were lawyers.

9. To the extent that the delivery of nonlegal services to a client is compatible with the delivery of legal services to the same client and with the rules of professional conduct, a lawyer should be required to make reasonable efforts to ensure that the client sufficiently understands that the lawyer and nonlawyer may have different obligations with respect to disclosure of client information and that the

129. 1999 Report, *supra* note 22.

130. See generally Carol A. Needham, *Permitting Lawyers To Participate in Multidisciplinary Practice: Business as Usual or the End of the Profession as We Know It?*, 84 MINN. L. REV. 1315 (2000) (arguing that attorneys’ and auditors’ duties are fundamentally incompatible). But see Kostant, *supra* note 115 (advocating that loosening ethical rules will better serve large corporate clients); Richard W. Painter, *Lawyers’ Rules, Auditors’ Rules and the Psychology of Concealment*, 84 MINN. L. REV. 1399 (2000) (arguing that auditor’s ethical rules are better than lawyer’s ethical rules in preventing risk-taking activity by both clients and lawyers).

131. Jacobs, *supra* note 88.

132. 1999 Report, *supra* note 22.

133. *Id.* at 3.

courts may treat the client's communications to the lawyer and nonlawyer differently.

10. A lawyer in an MDP who delivers legal services to a client of the MDP and who works with, or is assisted by, a nonlawyer who is delivering nonlegal services in connection with the delivery of legal services to the client should be required to make reasonable efforts to ensure that the MDP has in effect measures to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.¹³⁴

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

Those concerned about MDPs often mention a general concern for the legal profession. If lawyers are treated more and more like other profit-oriented professionals, say those so concerned, the profession is bound to lose its sense of "special purpose" in civil society. Lawyers continue to serve a critical function in society because government and clients demand a critical professionalism from them.

Taking a perspective that is an offshoot of the "loss of professional objectivity" argument, some lawyers worry that since MDPs will offer legal advice alongside a potential myriad of services, clients will lose trust in their lawyers' undivided loyalty. As one lawyer says, "if we are giving people legal advice and then we say, here's our friendly neighborhood consultant, then our objectivity takes a dent. I would worry that our client would not view us as independent."¹³⁵ Others critical of MDPs argue that—whether or not nonlawyers have definitive "control" over an MDP or not—the profession's professional objectivity as a whole is bound to suffer. Intimate partnerships with those who possess neither a legal education (probably) nor an interest in legal ethics (most likely) can only have a damaging effect on the profession's independent judgment.¹³⁶ Some MDP opponents, citing a 1995 ABA study, suggest that while large firms will not be harmed by the growth of MDPs, mid-size and smaller firms will most likely be forced out of business by large international conglomerates.¹³⁷ This concentration of power and resources does not offer future clients the choices and level

134. *Recommendation, supra* note 82, Recommendations 8-10.

135. Elizabeth Davidson, *Keeping Clients on a Single Track*, LAW., Sept. 20, 1999, at 12 (quoting Simon Jeffreys).

136. Harold Levinson, *The Risks of Multidisciplinary Practice*, N.Y.L.J., June 21, 1999, at 2.

137. Michael M. Bowden, *Your Next Partner Might Not Be a Lawyer*, 99 LAW. WKLY. USA 590, June 28, 1999, at B2; *see also* Elizabeth Amon, *Megamerger Has A Mainstream Lesson*, NAT'L L.J., July 26, 1999, at A21.

of intimate trust that they need and deserve: in short, observers warn that some clients may be asking for “one-stop shopping” now, but more clients will be harmed by it later.

The Commission recognized this important aspect of the MDP debate and divided its decision into two broad issues: whether the prohibitions on MDPs should be relaxed and, if so, how the profession’s values could be protected through new rules and amendments.¹³⁸ After deciding MDPs were generally favorable vehicles for legal services, the Commission crafted proposals to protect the critical nature of the profession. The first element of its recommendation stresses that “the legal profession should adopt and maintain rules of professional conduct that protect its core values, independence of professional judgment, protection of confidential client information, and loyalty to the client through avoidance of conflicts of interest.”¹³⁹

The Commission, in addressing the issue of MDPs’ general harm to the legal profession, noted that it sought evidence of harm to clients in “analogous situations” and found no such evidence. Actions alleging malpractice or breach of fiduciary duty against both a law firm and an ancillary business, for example, could not be found.¹⁴⁰ The Commission also heard and addressed concerns that MDPs would tend to concentrate legal resources into giant firms, destroying small and solo providers, thereby damaging the independence of the profession. The Commission revealed that informal surveys established that most small firms and solo practitioners were interested in creating MDPs of their own.¹⁴¹

4. Unauthorized Practice of Law

Another common fear held by those who oppose ending the prohibition on MDPs is that it will lead to the unauthorized practice of law. Critics argue that although such trespasses onto the protected turf of lawyers may not be purposeful, they will occur nonetheless.¹⁴²

138. *Reporter’s Notes*, *supra* note 26.

139. *Recommendation*, *supra* note 82, Recommendation 1.

140. *Reporter’s Notes*, *supra* note 26.

141. *Id.*

142. It is suggested, for example, that a real estate agent partnered with a tax or real estate lawyer may discuss the tax ramifications of a proposed real estate transaction. If this discussion took place in a real estate office, the client may question the validity of the advice, but if the same comment is given in a law office, it may carry more weight with the client. See Cindy Alberts Carson, *Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms*, 7 GEO. J. LEGAL ETHICS 593, 615-17; see also *In re* Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344, 1345-46 (N.J. 1995) (*per curiam*) (finding residential real estate brokers and title company officers may conduct real estate transactions that

Critics argue further that this may occur because the limits of “the practice of law” are undefined and differ by jurisdiction.¹⁴³ But it is these very differences in the definition of “the practice of law” which indicate that this fear is unfounded.

Many states, for example, place the power to draft real estate documents solely in the hands of lawyers. However, in 1962, Arizona chose to grant real estate brokers and salespersons the concurrent authority to draft such documents.¹⁴⁴ Since then, these nonlawyers have been serving client needs, and, after almost thirty-five years, no hard evidence has shown that clients have received poor advice or service as a result of Arizona’s decision.¹⁴⁵

Additionally, the practice of law in modern law firms has grown to include all manner of nonlawyers who successfully face the daily challenge of not practicing law.¹⁴⁶ Law firms employ paralegals, legal secretaries, and other personnel who constantly deal with clients. These nonlawyer employees may not give legal advice to clients, and they may not take other actions that may be construed as the practice of law. If they do violate this rule and engage in the unauthorized practice of law, the lawyer or law firm employer may be sanctioned.¹⁴⁷ Since these employees and assistants of lawyers can coexist with the ethics rules, why can’t nonlawyer investors or partners? The only answer is, they can.

A lawyer who enters an employment relationship with nonlawyers remains bound by the applicable rules of conduct. These supervising lawyers are required to ensure that the conduct of nonlawyers is “compatible with the professional obligations of the lawyer.”¹⁴⁸ Full compliance with these rules requires that lawyers not assist in the

involve certain aspects of the practice of law, provided they warn customers of their conflicting interests and of the risk of not being represented by an attorney).

143. See Carson, *supra* note 142, at 615-16.

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

145. *Id.*

146. See generally James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A “Radical” Proposal To Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159 (2000) (describing the continuing evolution of the legal profession and the practice of law).

147. See MODEL RULES OF PROF’L CONDUCT R. 5.3(c) (1983).

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

unauthorized practice of law,¹⁴⁹ not share client confidences with unauthorized persons,¹⁵⁰ and not allow the nonlawyer employee to affect the lawyer's independent professional judgment.¹⁵¹

One additional criticism surrounding attempts to allow lawyers to become partners with nonlawyers is that it presents those with limited legal training an opportunity to practice law without a license.¹⁵² The fear is that this may be a back-door into legal practice for disbarred lawyers or for law school graduates who cannot pass the bar. The reality is that the rules requiring lawyers to be responsible for such nonlawyers' actions still apply in this case, just as they do for paralegals or any other nonlawyer. It is also unlikely that abuses of this nature will be common—few practicing attorneys are likely to avail themselves of the services of those found not worthy of admission to the bar or those whose conduct resulted in the removal of their license to practice.

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

V. INDEPENDENT DIRECTORS: BORROWING FROM BUSINESS TO PROTECT ETHICS

In the past and present MDP debate, the issues of “ownership and control” are perhaps the most troublesome obstacles to meaningful reform. Those advocating revolutionary change in the provision of legal services maintain that lawyers can act in concert with other providers of professional services, and that ownership and control can be shared. Those resisting the change usually emphatically insist that lawyers must “own and control” the work of other lawyers.

Many have already suggested that lawyers should occupy policymaking and management positions within MDPs. The ABA

149. *See id.* R. 5.5(b).

150. *See id.* R. 1.6.

151. *See id.* R. 5.4(c).

152. *See Carson, supra* note 142, at 617.

Commission on Multidisciplinary Practice, perhaps purposely being vague, has noted that lawyers should “have the control and authority necessary to assure lawyer independence.”¹⁵³ Less influential factions have argued that positions of ownership and authority should be occupied by a lawyer-majority.¹⁵⁴

Other groups have provided a more focused recommendation on the issue of MDP organization and control. The influential New York State Bar Association voiced its firm opinion that an MDP’s legal services *must* be under the exclusive control of a lawyer or group of lawyers.¹⁵⁵ At the same time, New York—one of the strongest defenders of longstanding rules of ethics—did say that requiring the *entire* MDP organization to be controlled by lawyers would be unrealistic.¹⁵⁶

It seems that if the basic terms of the “own and control” debate stay the same, the same arguments will always be with us. Those demanding complete control by attorneys will continue to claim that MDPs will destroy the profession if nonlawyers have a voice in ownership and management; those insisting on some form of shared control will continue to argue that MDPs cannot be effective unless control is shared. This stalemate can, we think, be broken through the introduction of an alternative method of control: independent, outside legal directors for MDPs.

A. *The Dual Nature of the Profession Suggests a Solution*

Lawyers are always engaged in a unique balancing act. The practice of law is one of society’s most valuable services. Lawyers seek justice for their clients, operate in concert with the judiciary, and protect the general public from an overreaching government. But those providing legal services, and those receiving the same, are well aware of the obvious: lawyers are interested in making a profit. Thus they must be concerned with the “cold” reality of seeking and protecting a healthy share of the marketplace and running an efficient business. This

153. *2000 Report*, *supra* note 104.

154. A minority of Commission members suggested that a majority or supermajority of the MDP’s owners be lawyers, and that the MDP’s primary purpose be the provision of legal services, but the ABA Commission opted instead for a vague recommendation regarding ownership and control. *Id.* Various state associations have taken the same or similar position. *See, e.g.*, Minnesota State Bar Ass’n, *Multidisciplinary Practice Task Force: Report and Recommendations* (June 23, 2000), available at http://www2.mnbar.org/mdp/convention_mdp/mdp_report_5-3-00.pdf.

155. Ass’n of the Bar of the City of New York, *Statement of Position on Multidisciplinary Practice* (1999), available at <http://www.abcny.org/mdprep.htm>.

156. *Id.*

balance of critical service and business has been a subject of discussion for some time, and the balance between “the practice of law” and “the business of law” is always shifting one way or the other.

Lately, for instance, observers have noted the substantial emphasis that firms place on pro bono hours. Years ago, pro bono work was something done by the retired lawyer, the small (and struggling) firm known specifically for charitable passions, etc. But today, pro bono work is something a law firm can do to separate itself from its competition, attract devoted associates, and solidify a reputation in the community. It is sometimes suggested that the pro bono phenomenon is only a mask for the indirect and cynical creation of future business. This may be the case for some firms; but surely the pursuit of justice is a motive, if not the primary objective, for most firms engaged in substantial pro bono service. If the firms’ interests are mixed, that should not surprise us—that reality is merely another example of the profession’s dual nature.

Perhaps because of the profession’s nature, lawyers often see themselves, for good or ill, as distinct—cut off from others providing professional services. While all lawyers would admit this division between groups of professionals exists, they do differ as to whether it is a positive or negative part of the profession. Advocates for MDP-reform, for example, bemoan this fact and complain that isolation of attorneys from nonlegal professionals is unnecessarily restrictive. Critics of MDPs argue that the division is thoroughly natural and necessary for the healthy independence of the profession. Regardless of whether lawyers are currently “isolated” or “independent,” their identity within the larger realm of the professional services market is sure to change. Economic forces much larger than the legal community are not prepared to halt because of the Model Rules. Lawyers must properly prepare their entrance into the professional services marketplace, or fail to notice their exit from the same.

The nature of the lawyer’s work—the balance between the practice of law and business practices—operates as a broad background for all MDP issues. The profession’s nature, of course, has always been the basis for debate, controversy, and suspicion for both those within and without the profession.¹⁵⁷ But the looming inevitability of MDPs emphasizes the special nature of the profession perhaps more than any other issue or period before it. For this reason, steps must be taken now

157. It is worthwhile here to note that battles over ethics rules have been waged for centuries. The profession was not first defined, of course, by the Model Rules.

to ensure that MDPs are created, and operated, within a framework that respects the dual nature of the profession.

It seems only fitting that attorneys should look to current business practices for a hint as to how to solve their looming business problems. The nature of the profession, after all, is a hybrid of public service and business, and the profession has lately been debating a new form of service and business. But, curiously, significant forces in the legal community have chosen to not only ignore potential solutions available in the business world, but isolate the legal profession from the business world.

The profession, to further the debate and successfully usher in MDPs, should take a cue from recent developments in corporate governance and management. Currently, the pro-MDP forces are presenting a compromise. They have surrendered any attempts to push passive investment in MDPs and, instead, focus only on allowing nonlawyer-control. The authors of this article maintain that both elements of MDP-reform—shared “control” and passive investment—will soon occur and, perhaps more importantly, one demands the other.¹⁵⁸ But regardless of the form that MDP first takes, it can benefit greatly from the presence of independent directors.

B. Independent Business Directors: Safeguarding Efficient Profits

Nearly all modern corporate governance theory can be traced back to the influential work, *The Modern Corporation and Private Property*. In that text, Professors Adolf Berle and Gardiner Means cautioned that nearly all publicly held corporations are characterized by a separation of ownership and control.¹⁵⁹ Because the corporation’s shareholders are scattered, both in numbers and voice, most shareholders cannot affect corporate decisionmaking; thus, the firm is often in the control of management.¹⁶⁰

158. Fierce competition from global professional services firms is currently providing law firms with the sense of urgency for MDP-reform. See *supra* Part II.A (discussing the “Big Five” threat in Europe). If MDPs are allowed, but with passive investment prohibited, it seems clear that the new MDPs will only slow the professional services firms’ march to domination of the market. Those new MDPs would be at a terrific disadvantage, for their ability to expand would be severely constrained by their lack of capital.

159. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 119-25 (1933).

160. *Id.* at 84-90; see also John H. Matheson & Brent A. Olsen, *Corporate Law and the Longterm Shareholder Model of Corporate Governance*, 76 MINN. L. REV. 1313, 1330-33 (1992) (discussing the history of corporate governance principles and suggesting a model framework for ownership and control).

Management in any corporation may be prone to acting in its own interest and neutral to or opposed to the best interests of the “owners,” or shareholders.¹⁶¹ The corporate board of directors is supposed to monitor management on behalf of shareholders. For most of the past century, however, the board either complicitly shirked its role or was otherwise rendered incompetent. All too often, both management-members (“inside directors”) or persons (e.g., former employees) with a connection to management had a significant presence on the board. The board’s purpose, then, was to some extent compromised, since management had the motive and opportunity to influence the very institution assigned to monitor them.¹⁶² Profits, and the resulting returns on investment, often suffered as a result of this ineffective form of monitoring.

Today, it is generally accepted by all concerned that independent directors¹⁶³ may provide effective oversight of management and promote accountability.¹⁶⁴ Shareholder activists, seeking more of a good thing, continue to demand that corporate boards include more independent directors, and directors that are more independent. Over the past twenty years, independent directorship has evolved from being the subject of interesting speculation to an assumed “best practice” for the most successful corporations in the world.¹⁶⁵ Today, independent

161. The cost associated with monitoring management’s actions is known as “agency cost.” Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 304-11 (1983) (explaining agency costs).

162. Studies seem to show that management’s influence has had a large part in the failure of boards in the past. See, e.g., Bernard S. Black, *The Value of Institutional Investor Monitoring: The Empirical Evidence*, 39 UCLA L. REV. 895 (1992).

163. There is no one definition for the term “independent director.” These independent directors are frequently described as “disinterested directors.” Depending on the specific business in which they play a role, their qualifications can be determined by federal agencies, shareholder groups, and state legislatures. But the general qualities and purposes of independent directors are the same, regardless of their environments—they are expected to be non-employees with no significant business ties to the management of the company.

164. See, e.g., Barry D. Baysinger & Henry N. Butler, *Revolution Versus Evolution in Corporation Law: The ALI’s Project and the Independent Director*, 52 GEO. WASH. L. REV. 557, 572 (1984); Stuart Rosenstein & Jeffrey G. Wyatt, *Outside Directors, Board Independence, and Shareholder Wealth*, 26 J. FIN. ECON. 175, 176 (1990). See generally Robert W. Hamilton, *Corporate Governance in America 1950-2000: Major Changes But Uncertain Benefits*, 25 IOWA J. CORP. L. 349, 366-73 (2000) (surveying the disparate results on whether independent directors affect shareholder wealth).

165. The Business Roundtable stresses independent directors as a mark of an effective corporate board. The Business Roundtable, *Statement on Corporate Governance*, at <http://www.brtable.org/issue.cfm/2/0/0/12> (Sept. 1, 1997).

directors comprise approximately two-thirds of the membership of the boards of directors in the largest publicly held companies.¹⁶⁶

Simply put, independent directors are supposed to serve as watchdogs for investors. Thus, they typically cannot have, and in some cases never had, a direct relationship with the company's management. Former employees of a company, for example, are often excluded from service as an independent director. Beyond the small differences in qualifications for independent directors in various industries, the broad requirement is that they be free of relationships that would interfere with their independent judgment. The theory and spreading practice of independent directorship has done much to reshape both domestic and global corporations.

C. Independent Legal Directors: Safeguarding Ethical Service

Corporate shareholders have long benefited from the independent director's role in the creation, maintenance, or improvement of efficient profits. The modern legal profession might learn from that practice and, perhaps through the collective voice of the ABA, soon demand that independent directors be used in the creation of MDPs.

It is our contention that forms of independent directorship will do much for the legal community in the near future, through aiding in the creation and maintenance of MDPs. Independent directors have proven their value to corporation's shareholders by serving as watchdogs over their investment. Independent minds, in the business world, bring a more efficient profit. It seems clear that this particular practice could do much for the MDPs in ensuring the ethical delivery of legal services. Lawyers from other firms, government, or academia could participate in the governance of an MDP with which they have no affiliation. Indeed, the disciplinary rules could be modified to require this practice.¹⁶⁷

Of course, there would be significant differences between independent directors in the business context and independent directors in the MDP. Independent directors in the world of business are not known for a specific profession. They are not routinely prized for having particular degrees or a "license to practice business."

166. See INVESTOR RESPONSIBILITY RESEARCH CENTER, CORPORATE GOVERNANCE SERVICE 1999 BACKGROUND REPORT L: THE ELECTION OF DIRECTORS, BOARD INDEPENDENCE AND RELATED ISSUES 7-8 (1999) (66.7% of directors of S&P 500 companies are independent).

167. The drafting of a new rule raises many questions that cannot be adequately explored in this Article. The more obvious questions all concern the qualifications and identity of these independent directors. For example, must they operate solely as independent directors or may they practice in another environment? Must they be qualified as "specialists" under state or federal regulatory bodies? What special liabilities would they bear, if any?

Independent directors in corporate America come in all shapes and sizes. General Electric might prefer to have independent persons with a mind for finance. Microsoft might currently want a hodgepodge of businesspeople with backgrounds in software, politics, and law. The role for independent directors in this environment is a constant: the directors are to see that Corporation X makes an efficient profit. But the individual peculiarities and nature of each corporation itself is the distinctive variable: Corporation X's business might benefit from a very different kind of independent director than would Corporation Y.

Independent legal directors in the world of MDPs, on the other hand, would face constants in both the role and nature of business. Their role, as contemplated in this Article, would always be the same. These independent directors would be present to ensure that the MDP delivers ethical legal service and that the legal practice has sufficient independence to ensure that result. The nature of the service to the MDP is also a constant, at least for our purposes: the MDP has a need for independent legal directors because of the concern for corruption of the legal profession. Thus, it seems that this critical role for independent directors in the MDP, and the very nature of the MDP, demands that these independent directors be attorneys. Some nonlawyers who are similarly interested in the creation of MDPs might balk at this conclusion, but it is a clear one. It is doubtful, for example, that an architect, or a banker, could provide substantive advice or direction in a matter of legal ethics. Not only is it doubtful that such a nonlawyer-professional could be of positive assistance in these matters, but these nonlawyers, if assigned such a responsibility, could force issues of ethical controversy where there need not be any concern.¹⁶⁸ It is not, of course, necessary that *all* independent directors in the MDP be attorneys. That is not our proposition at all. The MDP might indeed be wise to pursue, on top of the independent attorney-directors, other professionals to watch over parts or the whole of the MDP. Those independent directors specifically chosen to safeguard the ethics of the profession, however, must be attorneys.

Advancing the concept of independent directors in all MDPs could also place the legal profession in a politically desirable position. Not only would the ABA be seen as the force of exciting reform and innovation, but the ABA would also have a very effective model for

168. Certain practices in the profession, widely assumed ethical, make the average nonlawyer nervous. On the other hand, other practices which most lawyers assume to be a matter of grave harm, nonlawyers might assume to be of no concern. That underscores the dual nature (service and business) of this specialized profession.

preserving ethical service. The ABA would, to put it simply, “have its cake and eat it, too.” The alternative, of course, is really no longer an option. The ABA can bravely defeat proposal after proposal, losing crucial bits of support along the way, until MDP is finally a reality whether or not accepted. In that case, the general public would be treated to the spectacle of the lawyer-collective being “corrected” by societal forces. Given the already-unfortunate public opinion of lawyers, the ABA should not be interested in encouraging that perception. Instead, the ABA can alter its course and seize the chance to both control the perception and control the variables of MDPs.

VI. INDEPENDENT LEGAL DIRECTORS AND ALTERNATIVE MODELS OF MDP

There are a myriad of ways in which an MDP might be organized and operate, just as there are with any other business. The ABA Commission on Multidisciplinary Practice has suggested five alternative modes of operation.¹⁶⁹ Using those same models, we will examine how independent legal directors might soon be utilized.

A. *Model 1: The Cooperative Model*

This model exemplifies the status quo. The prohibitions against fee sharing and partnerships with nonlawyers would continue. Lawyers would be free to employ nonlawyer professionals on their staffs to assist them in advising clients. Lawyers could work with nonlawyer professionals whom they directly retain or who are retained by the client. To the extent that the nonlawyer professionals are employed, retained, or associated with a lawyer, the partners in a law firm and any lawyer having direct supervisory authority over a nonlawyer professional would have to take steps “to ensure that the person’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.

B. *Model 2: The Command and Control Model*

This model is based on the amended version of Rule 5.4 adopted in the District of Columbia:

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

169. The models form the basis for the following discussion and are described in detail in Comm’n on Multidisciplinary Practice, Am. Bar Ass’n, *Hypotheticals and Models* (1999), at <http://www.abanet.org/cpr/multicomhypos.html> (last modified Mar. 5, 2001).

....

- (4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b).
- (b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:
- (1) The partnership or organization has as its sole purpose providing legal services to clients;
 - (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.¹⁷⁰

This model or rule permits a lawyer to form a partnership with a nonlawyer and to share legal fees subject to certain clearly defined restrictions. For example, the law firm or organization must have “as its sole purpose” the provision of legal services to others; the nonlawyer must agree “to abide by these rules of professional conduct”; the lawyers with a financial interest or managerial authority must “undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1”; and these conditions must be set forth in writing.

Independent directors would be useful in this situation to ensure that the focus of the business continues solely to be of a legal nature. Independent directors would also seek to ensure that methods and processes exist for identifying potential conflicts. Further, independent directors would monitor the requirement that the nonlawyers abide by the rules of professional conduct.

C. Model 3: The Ancillary Business Model

In this model, a law firm operates an ancillary business that provides professional services to clients. The ancillary business conforms its conduct to Rule 5.7:

170. D.C. RULES OF PROF'L CONDUCT R. 5.4 (1990).

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), 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 the 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.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.¹⁷¹

Under this model the lawyers must take great care to assure that the law firm's clients understand that the ancillary business is distinct from the law firm and does not offer legal services. Lawyers and nonlawyer professionals are partners in the ancillary business, sharing fees and jointly making management decisions. 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 are also clients of the law firm and, correspondingly, some but not all clients of the law firm are also clients of the ancillary business.

In this model there is a danger of confusion both for the clients and for the lawyers and nonlawyers performing the services. Independent legal directors could be part of the governing group of both bodies to ensure that the professional lines are respected and that the firms represent themselves appropriately to the public. Further, independent legal directors could seek to ensure that the lawyers acting in the consulting business are not practicing law as part of that business.

D. Model 4: The Contract Model

In this model, a professional services firm would contract with an independent law firm. A typical contract might include terms such as (1) the law firm agreeing to identify its affiliation with the professional services firm on its letterhead and business cards, and in its advertising (e.g., A & B, P.C., a member of XYZ Professional Services, LLP); (2) the law firm and the professional services firm agreeing to refer clients to each other on a nonexclusive basis; and (3) the law firm agreeing to purchase goods and services from the professional services firm such as

171. MODEL RULES OF PROF'L CONDUCT R. 5.7, *rescinded* Aug. 12, 1992.

staff management, communications technology, and rent for the leasing of office space and equipment. The law firm remains an independent entity controlled and managed by lawyers and accepts clients who have no connection with the professional services firm.

The contract model might take different forms. In one form, the professional services firm might contract with a single law firm with only one office. In another, it might contract with a single law firm with several branch offices. In still another, it might contract with separate, independent law firms, some of which might have only a single office; others of which might have several branch offices.

As with the ancillary business model, independent legal directors would participate in management of the law firm (but not necessarily the professional services firm). They would oversee the development of policies to keep the legal identity separate, to preserve client confidences, and to maintain independent judgment.

E. Model 5: The Fully Integrated Model

In this model, there is no free-standing law firm. There is a single professional services firm, XYZ Integrated, with organizational units, such as accounting, business consulting, and legal services. This model advertises that it provides “a seamless web” of services, including legal services. The legal services unit may represent clients who either (1) retain its services but not those of any other unit of the firm or (2) retain its services as well as the services of other units in the firm. In the second case, the legal and nonlegal services may be provided in connection with the same matter or different matters.

The integrated model of MDP is probably the wave of the future.¹⁷² This model, in its basic form, presents both the greatest opportunities and dangers to the provision of legal services. The “seamless web” of services must not be allowed to jeopardize or compromise client confidences and legal judgment. The “core values” of loyalty, independence, and confidentiality must be preserved. And so they can be with the utilization of independent legal directors.

As with the publicly traded business corporation, independent (legal) directors can have their most valuable role. As they monitor performance and minimize agency costs in the business corporation, so too the independent legal directors in the MDP could monitor the practice to ensure procedures for preserving client confidences,

172. See generally Terry, *supra* note 29 (discussing Germany’s MDP regulation allowing Model 5 MDPs).

independent legal judgment, and professional objectivity. Indeed, as with most publicly held corporations, it might be prudent to require that a majority of the members of the governing body of the MDP be independent legal directors. In addition, they would be the only members of a new "legal practice and professionalism" committee. In this manner the MDP would exist with strong provisions for safeguarding the core values of the profession.

VII. CONCLUSION

The presence of independent directors can aid in the creation of efficient and ethical MDPs. Not only would a strong system of MDPs protect the profession's position in the marketplace, but it also protects the profession's current political position. It is now clear to all but the most passionately-opposed that economic and cultural forces greater than the ABA (and the entire legal profession) are encouraging MDP-discussions and speculation.

MDP will come. Whether in the form of slowly-mounting frustration from those seeking professional services, or from the suddenly-interested federal government, MDP will arrive. It is simply too late for the legal profession to be taking entrenched pro and con positions on the issue, thinking that the most passionate and eloquent arguments will win the day.¹⁷³ It is time for the legal profession to get the best deal it can. That deal will most likely involve a system of independent directors.

173. The current economic and political climate for MDP is much like that of the early 1990s for NAFTA. Meaningful discussions and debate concerning NAFTA could only have been conducted in the middle-to-late 1980s. By the time the controversy hit the newspapers, international forces had already, for all practical purposes, settled the issue.