Resolving the MDP Issue: Deciding If the Status Quo Is What's Best for the Client

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Resolving the MDP Issue: Deciding If the Status Quo Is What’s Best for the Client

I. INTRODUCTION

On the forefront of the current debate surrounding legal ethics is the heated question of whether the legal profession should permit its members to participate in multidisciplinary practices or partnerships ("MDPs") and thereby share fees with nonlawyers. Currently, this conduct is prohibited by the Model Rules of Professional Conduct. This

1. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1998). Model Rule 5.4 provides the following:
   (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 compensation or retirement plans, even though the plan is based in whole or in part on a profit-sharing arrangement.
   (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consists of the practice of law.
issue clearly has global implications for various professions desiring to partner with attorneys, and those persons with interest in this area have followed the debate closely as viewpoints are researched and expressed in support of one position over another. Nonetheless, the American Bar Association ("ABA") has effectively closed the door on the question of amending Model Rule 5.4 to allow MDPs. This leaves the matter entirely in the hands of state bar associations and courts that establish rules of professional conduct for their jurisdictions, thus meaning the issue is not dead yet (to the dismay of MDP opponents). This Comment addresses some of the underlying questions that all lawyers should ask before hastily "rush[ing] to judgment" on the issue of whether their state bar associations should relax the rules on the sharing of fees with nonlawyers.

(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 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.

Id.


3. This phrase is borrowed from the title of an article on MDPs and the debate surrounding them. See George S. Swan, The American Bar Association: Rush to Judgment, 4 NLA REV. 10 (2000).

4. In light of the ABA's rejection of the proposal to study further or adopt a favorable rule on MDPs, one commentator has urged states facing the issue (and thus, the lawyers and judges who will vote within state bar associations and courts) to begin the "analysis with a clean slate, as though our new world were a foreign country, newly liberated from an outworn despotism, and we seek to design a legal system consistent with a free society in a free world." George W. Overton, MDP: Will It Rise From the Dead?, CBA RECORD, Sept. 2000, at 62. In Overton's opinion the historic view disfavoring MDPs should not be "given any presumptive priority" as states address the issue now; rather, the analysis should begin anew. Id.
II. HISTORICAL PERSPECTIVE

A. Important Definitions

By its most basic definition, an MDP is "a partnership owned by lawyers and professionals from other disciplines who work together to solve client problems."\(^5\) According to the Commission on Multidisciplinary Practice ("Commission"), a unit of the ABA organized to study the issue of fee sharing with nonlawyers, the term "multidisciplinary practice" refers to

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.\(^6\) It includes an arrangement by which a law firm joins with one or more professional firms to provide services, and there is a direct or indirect sharing of profits as part of the arrangement.\(^6\)

Of course, as each state individually wrestles with the notion of whether to allow lawyers to participate in MDPs, it will shape its own definition of what constitutes an MDP. Furthermore, the totality of the relevant facts and circumstances will always dictate whether the relationship between a lawyer and nonlawyer in delivering legal and nonlegal services to a client amounts to an MDP under the definition.\(^7\) This should be consistent regardless of the definition chosen. However, for the purposes of this article, the Commission's definition will be the working definition used.

In its work on behalf of the ABA, the Commission further defined "legal services" as "services, which if provided by a lawyer engaged in the practice of law, would be regarded as part of such practice of law for purposes of the application of the rules of professional conduct."\(^8\)

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6. ABA Center for Professional Responsibility, Appendix A [hereinafter Commission Appendix A] (visited March 3, 2001) <http://www.abanet.org/CPR/mdpappendixa.html>. This definition was offered as an illustrative amendment to the Terminology section of the Model Rules of Professional Conduct, but it was not part of the Recommendation upon which the ABA House of Delegates would vote. See id.
Building on that language, the term "practice of law" was explained to denote

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

(a) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect interests in real or personal property, wills, codicils, instruments intended to affect the disposition of property of decedents' estates, documents relating to business and corporate transactions, other instruments intended to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business;
(b) Preparing or expressing legal opinions;
(c) Appearing or acting as an attorney in any tribunal;
(d) Preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal;
(e) Providing advice or counsel as to how any of these activities described in subparagraph (a) through (d) might be done, or whether they were done, in accordance with applicable law;
(f) Furnishing an attorney or attorneys, or other persons, to render the services described in subparagraphs (a) through (e) above.9

B. Prior Efforts to Incorporate Nonlawyer Partnerships and Fee Sharing into the Ethical Guidelines for Lawyers

In its current version, Model Rule 5.4 effectively prohibits MDPs by its provisions, which are designed to preclude or minimize the influence of nonlawyer third parties.10 When the Model Rules of Professional Conduct replaced the Model Code of Professional Responsibility in 1983, the sharing of fees with nonlawyers was also a controversial topic, although the debate did not change the ABA's formal position on that

9. Id. The Commission's definition for the term "practice of law" is based largely on a similar definition used in District of Columbia Rule 49. See id. The existing Model Rules of Professional Conduct do not have a provision defining what constitutes the practice of law, but instead leave that to individual states to decide either by rule or case law. See ABA Center for Professional Responsibility, Appendix C: Reporter's Notes for the Commission on Multidisciplinary Practice (visited March 3, 2001) <http://www.abanet.org/CPR/mdpappendixc.html>. The definition announced by the Commission is merely given as a model provision, and the Commission acknowledged that each state may desire for its highest court to continue to determine the scope of the definition of the practice of law. See id.

subject, which is now codified in Rule 5.4. This debate surrounding nonlawyer participation in the law was centered squarely in the ABA Commission on Evaluation of Professional Standards, which became known informally as the "Kutak Commission."  

Almost twenty-five years before the current showdown over MDPs, the Kutak Commission proposed an amended version of Rule 5.4 under which earlier versions of MDPs could be formed as long as lawyers could meet their professional responsibilities under the ethics rules. Recognizing that "safeguards" were needed to ensure ethical compliance, the Kutak Commission proposed Rules 5.3 and 5.5(b) as well as a provision that would have required written assurance that a lawyer's independence of judgment would be secured when that lawyer provides legal services in an organization managed by nonlawyers.

However, opponents challenged the proposed version due to both general and specific concerns. First, these critics feared that the rule would allow accounting firms and other service providers to open law

11. See Thomas R. Andrews, Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?, 40 Hastings L.J. 577, 584 (1989). Canons under the ABA Canons of Professional Ethics had earlier prohibited both lawyer-nonlawyer partnerships and fee-splitting between lawyers and nonlawyers, and these provisions were modified to become disciplinary rules under the Model Code of Professional Responsibility. See id. at 588.


13. See Andrews, supra note 11, at 593-94. In 1976 the Kutak Commission proposed the following text for Rule 5.4:

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if:

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

(b) Information relating to representation of the client is protected as required by Rule 1.6;

(c) The organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rule 7.2 or Rule 7.3; and

(d) The arrangement does not result in charging a fee that violates Rule 1.5.

Id.

firms and compete with traditional firms. Second, they were afraid that the independent judgment of lawyers would be threatened by nonlawyer ownership of firms. Finally, opponents voiced a general, overarching fear that such fee sharing would have a "fundamental but unknown effect on the legal profession." After weighing these objections, the ABA House of Delegates rejected the Kutak Commission's proposed Rule 5.4 and instead substituted the current Rule 5.4, which includes an absolute ban on fee sharing.

Scholars and practitioners alike have criticized the decision to reject the rule proposed by the Kutak Commission, especially in light of the degree to which it worked to ensure that valuable ethical precepts were guarded and preserved. Many believe that what ultimately buried any chance of passing a provision for fee sharing at the 1983 meeting was the "fear of Sears," a phrase that arose during floor debate. According to one recollection, when Professor Geoffrey Hazard was asked if Sears, Roebuck would be able to open a law office under the proposed rule, he answered "yes," at which point the debate quickly ended, leading to the rejection of the Kutak Commission's proposal.

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17. Id. It is interesting that in the last twenty-five years the criticism of and grounds for opposition to MDPs have remained substantially unchanged.
18. See id. at 596. Of all the rules proposed by the Kutak Commission, this rule was the only one completely rejected by the ABA House of Delegates. See Utah Report, supra note 12.
19. See Geoffrey C. Hazard, Jr. & William Hodes, 2 The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 5.4:101, at 796 (Supp. 1991). While addressing the rejection of the Kutak Commission's proposal, the criticism elicited from these two noted commentators also might ring true for the more recent rejection of an amendment allowing MDPs:

The Kutak Commission's carefully layered safeguards were disregarded, and in their place was put a flat prohibition on sharing fees or organizational authority with non-lawyers regardless of whether any specific harms occur or are even threatened. This substitution of a broad prophylactic rule where a narrow one would have sufficed suggests that . . . [an] illegitimate rationale was actually decisive, namely economic protectionism.

Id.
In the interim between passing Rule 5.4 of the Model Code of Professional Responsibility in 1976 and today's debate over amending or deleting that rule to allow MDPs, one jurisdiction has partially abandoned the ABA's formal position. Washington, D.C. modified its version of Rule 5.4 to allow lawyers and nonlawyers to form partnerships and share fees.\(^2\) As bold as this step was, the D.C. rule itself is not as revolutionary as some recent proposals. First, the D.C. rule limits partnership agreements and fee sharing to entities that are structured as law firms, and these law firms must only provide legal services to clients.\(^2\) Thus, the nonlawyers must provide services that are related to the legal services in more than a tangential way to satisfy the D.C.

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22. See Washington, D.C. Rules of Professional Conduct Rule 5.4 (1999). That rule provides the following:

(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 undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

   (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; and

   (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.

(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.

Id.

rule. Clearly, this rule does not contemplate the "one-stop shopping" model that epitomizes the current support for MDPs today. Second, a formal ethics opinion has further narrowed the scope of the D.C. rule by deciding that a multijurisdictional law firm with a D.C. office may not have a nonlawyer practice in the D.C. office. In light of these restrictions, the D.C. rule cannot provide much direction in the debate over MDPs today, but instead may be viewed more appropriately as a small impetus for the movement to change Model Rule 5.4. Those who seek a compromise might point to it as a middle ground that allows MDPs without compromising the core values of the profession. Even still, there are those hard-line advocates of the current Model Rule 5.4 that would look upon the D.C. rule as sacrificing the ideals of the profession.

C. The True Impetus: The Emergence of MDPs Internationally and the Call for Them in the United States

While the D.C. rule did its part for injecting the term "MDP" into the legal vernacular, this result was due in larger part to the explosion of accounting and consulting services into what has historically been regarded as the practice of law. Beginning in the early 1990s, accounting firms such as the "Big 5" began acquiring law firms in Europe; mergers and acquisitions also occurred in Canada and Australia. The effect of these arrangements is that accounting firms now provide legal services practically worldwide. Germany, Canada, France, Switzerland, and Australia all allow MDPs to some degree, and other countries are considering the measure as well.

In Germany, nonlawyer members of MDPs are subject to the country's professional rules of conduct for lawyers. German MDPs are typically smaller and thus do not face as many problems with conflicts of interest.

24. See infra notes 61, 64-68 and accompanying text for a discussion of the "one-stop shopping" rationale for allowing MDPs.

25. See Terry, supra note 20, at 875 (citing Testimony of Susan Gilbert (D.C. Bar) (Nov. 12, 1998)).


27. See, e.g., Terry, supra note 20, at 883-890 (describing the "[g]lobal [r]esponses to MDPs").
and confidentiality. However, the German bar remains interested in the effects of MDPs on competition and client choice for legal services.\textsuperscript{28} Canada likewise allows MDPs, but nonlawyers participating in MDPs are limited to providing legal services only.\textsuperscript{29} Again, confidentiality, loyalty, and independence of judgment are the overriding concerns in Canada as they are in the United States.\textsuperscript{30}

France has allowed accounting firms to affiliate with law firms, and this has led to a "captive" law firm arrangement whereby the two professions remain separate but share the same client base.\textsuperscript{31} Switzerland permits single-entity MDPs, and this arrangement is facilitated by the domination of the Swiss economy by the banking industry, which values the use of various professionals to make an informed decision.\textsuperscript{32} By deregulating its legal profession in the last twenty years, the United Kingdom has moved toward the creation of "legal practice plus" and "linked partnerships" for alliances between solicitors and nonlawyers, although the current rules still do not allow partnering or sharing of fees between lawyers and nonlawyers there.\textsuperscript{33} Portugal and Denmark do not allow the formation of MDPs.\textsuperscript{34} Spain has not taken a clear stand, although it has "energetically denounce[d]" the establishment of MDPs

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\item \textsuperscript{28} See Scott A. Jensen, Ethical Underpinnings for Multidisciplinary Practice Regulations in the United States and Abroad: Are Accounting Firms and Law Firms Really Different? (visited March 3, 2001) <http://www.stthom.edu/cbes/ethunder.html>.
\item \textsuperscript{29} See id. This arrangement is similar to Rule 5.4 of the District of Columbia Rules of Professional Conduct. See supra note 22.
\item \textsuperscript{30} See id.
\item \textsuperscript{32} See John S. Dzienkowski & Robert J. Peroni, Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century, 69 Fordham L. Rev. 83, 115 (2000) (citing Interview by John S. Dzienkowski and Robert J. Peroni with Carl Baudenbacher, Professor of Law, St. Gallen, Switzerland, Judge, EFTA Court of the European Union (July 1999)).
\item \textsuperscript{34} See Jensen, supra note 28. On an interesting note, Denmark does not prohibit law firms from adopting the name of an accounting firm. See id. This would apparently serve the efficiency and name-brand purpose or argument supporting MDPs even though MDPs themselves are not allowed. See infra text accompanying notes 69-71 (discussing "name-brand" recognition).
\end{itemize}
with lawyers and auditors as partners. However, the debate continues in the United States.

Within the last ten years, accounting firms have aggressively begun offering more taxation services to their clients, beginning with providing advice that required some application and interpretation of federal law on taxation. However, this meek beginning ballooned into what some lawyers and bar associations have characterized as the unauthorized practice of law ("UPL") in violation of Model Rule 5.5. Tax advice morphed into a consulting arm of the accounting firms, and now the "Big 5" offer advice on litigation support, ERISA, and regulatory compliance, as well as other matters. These same accounting firms have begun offering their clients representation on tax matters in court. Congress recently extended the attorney-client privilege to include taxpayer and tax practitioner in some circumstances. The accounting firms lobbied heavily for this provision.

Perhaps the most clear-cut example of the accounting profession's action in moving into legal practice is its calculated effort to recruit lawyers from law schools and traditional law firms to serve either in their MDPs outside the United States or in their consulting firms in the United States. These same accounting firms have formed "strategic alliances" with large law firms to provide services contemplated by MDPs. For instance, the Atlanta office of King & Spalding recently lost several lawyers who left to begin a new firm called McKee Nelson Ernst & Young, which is affiliated with the accounting and consulting firm of Ernst & Young. These "alliances" or "ventures" manage to avoid

36. See COMMISSION BACKGROUND PAPER, supra note 23, at pt. II.
37. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1998). See also COMMISSION BACKGROUND PAPER, supra note 23, at pt. II. While one might expect the number of UPL investigations to be significant given the debate over the entry of accounting firms into the practice of law, there are only two records of such enforcement actions. See id.; see also Elizabeth McDonald, Legal Beat: Texas Probes Andersen, Deloitte on Charges of Practicing Law, WALL ST. J., May 18, 1998, at B15.
38. See COMMISSION BACKGROUND PAPER, supra note 23, at pt. II.
39. See id.
41. See COMMISSION BACKGROUND PAPER, supra note 23, at pt. II.
42. See id.
43. See Ernst & Young Launches First Domestic Law Firm, TAX NOTES, Nov. 8, 1999, at 719; Jonathan Groner & Siobhan Roth, Envisioning a Big 5 Law Firm, LEGAL TIMES, Oct. 25, 1999, at 1; Tom Herman, Ernst & Young Will Finance Launch of Law Firm in
restrictions on the unauthorized practice of law and sharing of fees under a state's rules of professional conduct. In fact, attempts to investigate individuals or groups for the unauthorized practice of law have been largely unsuccessful. For this reason, MDP advocates point to this as evidence of de facto MDPs abounding.

D. The ABA Commission on Multidisciplinary Practice

In August 1998, ABA President Philip Anderson appointed the Commission on Multidisciplinary Practice to reconsider the issue of lawyer-nonlawyer partnerships in light of the most recent developments in the practice of law; the Commission was charged to "study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public." The Commission held hearings in November 1998 and issued a report that examined the movement toward MDPs, the success and failures that various disciplines had experienced in the MDP setting, and the current ethical framework banning MDPs. Early the next year, the Commission limited the scope of its inquiry to four issues:

1. the benefit and harm of allowing lawyers to partner and share fees with non-lawyers;
2. the effect of such partnering or fee-sharing on professional independence;
3. the difference between the professional rules governing lawyers and accountants; and
4. if lawyers were permitted to deliver legal services as employees or partners of non-law firms, what changes should be made to (i) the confidentiality rules, (ii) the conflicts-of-interest principle of imputed disqualification, (iii) the ethics rules imposing responsibility upon partners or supervisory lawyers, (iv) the ethics rules on unauthorized practice, (v) the ethics rules on advertising, (vi) the extent of disciplinary reach of the state bars upon such non-law firms, and (vii) any other areas.

The Commission held two more meetings in February and March of 1999, and members continued to receive commentary and correspondence.

Special Arrangement, WALL ST. J., Nov. 3, 1999, at B10. The arrangement called for the new firm to be the debtor and neighbor of Ernst & Young, who would finance the new firm although the two divisions would not share legal fees or profits. See Terry, supra note 20, at 879-80.

45. See Terry, supra note 20, at 882. See supra note 37.
47. See id. at 129-30.
48. See id. at 130 (citations omitted).
on the issue of MDPs. This gleaning of information resulted in the publication of the Commission's Final Report, which was issued on June 8, 1999, for consideration at the ABA House of Delegates' August 1999 meeting. The Commission offered a broad recommendation that the Model Rules not limit lawyers in the vehicles in which they provide legal services to clients, going as far as to say that even nonlawyer-controlled MDPs should be allowed as long as the core values of the legal profession remain unthreatened through the use of safeguards.

Lively debate ensued between opponents of the Commission's proposal and those who supported the progressive views. This led the Commission to move to defer the issue until further study could be conducted, and the ABA House of Delegates adopted a resolution that no amendments permitting MDPs should be passed for the Model Rules "unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients." The Commission worked tirelessly to receive additional feedback on the issue of legal services through MDPs, traveling around the United States to hear different viewpoints and to defend its position in the Final Report. The Commission issued its ultimate recommendations to the ABA House of Delegates in March 2000 for consideration at the July 2000 meeting in New York. The ABA House of Delegates rejected the measure by a 3-to-1 margin and replaced it with a counterproposal reaffirming the legal profession's commitment to its core values and the incompatibility of MDPs with those core values. The Colorado Bar offered a compromise proposal that would defer the vote and refer the matter for further study; however, this was similarly rejected. The

49. See id. at 130-31.
50. See id. at 132.
51. See id. 132-33.
52. See id. 135-45.
54. See Dzienkowski & Peroni, supra note 32, at 146.
55. See id. at 146-47. For a thorough examination of the draft of the March 2000 recommendation of the Commission, see Terry, supra note 20.
57. See Dzienkowski & Peroni, supra note 32, at 148. For the colorful perspective of a Colorado delegate who supported the Commission's proposal and has since refused to
ABA House of Delegates thanked the Commission for its efforts and announced there would be no further study on the matter.  

III. DISCUSSION

Because the ABA House of Delegates ceased all study of MDPs, this task has been left to the individual states if there is to be any revolution in Rule 5.4 at all. The Commission's report to the ABA House of Delegates has provided a useful starting point or foundation for state bar associations, which must weigh the arguments discussed below to resolve the issue of MDPs.

A. The Debate Surrounding MDPs

Ironically, both proponents and opponents of MDPs assert that they hold the client's interests as the foremost consideration in the discourse surrounding this issue, but each side differs in its interpretation of what is best for the client. Proponents offer efficient, "one-stop shopping" for the client while opponents urge that the client is best served by confidentiality, loyalty, independence of judgment, and competence as they are now understood under the Model Rules of Professional Conduct. One commentator has appropriately summed up the debate through tried and true clichés, beginning first with the opponents' view, "[i]f it ain't broke, don't fix it," as contrasted to the ideas espoused by the proponents, "those who say that 'the train has left the station,' so the time to regulate MDPs is now or never."
1. Support for MDPs. Chief among the justification supporting MDPs in the United States is the belief that clients want "one-stop shopping" for professional services. In a day and age when consumers flock to malls and giant grocery stores that offer everything from eggs to oil changes, one might not be surprised to hear that the average consumer would seek the same efficiency in receiving professional services.

The rationale commonly presented is that MDPs will expand the range of legal services available to the public and simultaneously make those services more affordable. The economist would refer to this phenomenon as "economies of scale," which quite simply means that as an entity grows in size, it saves money and resources and thus is able to pass along savings to its constituents, be they customers or clients. This "one-stop shopping" model also proposes to give clients more comprehensive solutions to their problems by having the MDP present a myriad of services related to those the lawyer would provide the client. For instance, a client involved as a plaintiff in a personal injury matter might have the attorney in the MDP represent him during the litigation, the accountant offer tax advice on structuring the settlement, and the investor manage the settlement award to provide the client with liquidity and a return on the settlement. Without leaving the four walls of the MDP, the client would have all of these services at his fingertips, and the services presumably would be less expensive for the client because the professionals would be sharing some fixed costs and overhead. The number of other examples in which this arrangement would be beneficial are too numerous to list in full.

65. However "efficient" this seems though, one opponent of MDPs and "one-stop shopping" has likened it to a "nightmare," predicting "a world where lawyers answered to non-lawyers, where professionalism had given way to the bottom line, where pro bono services and client loyalty were disbanded, and where law had become a product sold by multinational accounting firms and corporations." Dzienkowski & Peroni, supra note 32, at 135 (describing speech by Lawrence Fox to the ABA House of Delegates); see also George S. Swan, The Political Economy of Interprofessional Imperialism: The Bar and Multidisciplinary Practice, 1999-2001, 24 J. LEGAL PROF. 151, 189 (2000) (recounting how Fox "forecast lawyers . . . attempting to unionize" after five years under MDPs).
67. See Caryn Langbaum, Will Attorneys Vote Themselves Out of the Competition?, REG GESTAE, Oct. 2000, at 12, 15. Some of those potential partnerships are included herein simply as an example of the possibilities: "Family lawyers and social workers; environmental lawyers and geologists; business or estate planning lawyers and accountants or
Opponents, on the other hand, point out that lawyers are already making use of other disciplines within their representation of clients; these specialists simply are not sharing office space.68 Personal injury and worker's compensation lawyers and doctors work hand in hand to help clients, as do experts on any number of other endeavors. The only difference is that the nonlawyers do not share in the legal fees received, thus explaining why opponents of MDPs view these partnerships as simply an opportunity for nonlawyers to "stick their hands in the cookie jar."

As things stand today, the legal profession allows advertising of attorneys' services to the public as long as the objective and means of the advertising meet particular regulations, which each state selects through its bar associations.69 To the unsophisticated (and to some degree, even the sophisticated) consumer of legal services, the prospect of having to seek out an attorney from the marketplace can be quite confusing and alarming given that word-of-mouth referrals are still a predominant method of "advertising" even in the twenty-first century. MDPs, on the other hand, offer the consumer and potential client a certain type of name-brand recognition that attaches to the other professionals that would be associated within the MDP.70

This is most evident in the example of the "Big 5" accounting firms, which cohesively serve as one of the main forces behind relaxing the current rule against sharing fees with nonlawyers. For instance, someone may not know the name of a tax attorney in his locale (or even a firm offering those services, for that matter); however, the name Arthur Andersen or PriceWaterhouseCoopers is strongly associated with consulting and accounting services, including providing taxation advice, which is arguably a legal matter.71 To the MDP advocates, the partnering of lawyers with other professionals in a mixed setting will only benefit the client by guiding the client to all of the services in a more efficient manner in the short run and then solving a larger percentage of the client's problems over the long run.

financial consultants; antitrust lawyers and economists; medical malpractice litigators and medical illustrators; technology lawyers and information technology consultants or systems analysts; intellectual property lawyers and engineers; health care lawyers and doctors."

68. See COMMISSION BACKGROUND PAPER, supra note 23, at 12.
70. See supra note 34 (discussing Denmark's approach to MDPs and name-brand recognition).
71. See Molvig, supra note 5, at 11. In fact, one observer has commented that "more tax law [is] practiced in accounting firms than in all the U.S. law firms, and that's been the case for 20 years." Id.
MDP supporters also point to nonlawyers' efficiency in management techniques and their ability to infuse capital into the firm for further expansion and training.\textsuperscript{72} Also, an MDP may have an easier time at borrowing money at a lower interest rate in the debt market than a traditional law firm, thus making the MDP appealing from another financial aspect.\textsuperscript{73}

In addition to saving time and money for the client, advocates for MDPs point to substantive benefits to be gained from an interdisciplinary approach. The final decades of the twentieth century saw the business world refocus its paradigms onto teamwork and bridge-building. MDPs bring together teams of professionals with varying backgrounds in different disciplines to serve clients. Government and corporations—viewed as de facto MDPs by some—have already experienced proven success in this regard.\textsuperscript{74} As one commentator has suggested, clients' "legal problems, once considered in a virtual legal vacuum, can be approached multi-dimensionally, within a fuller context."\textsuperscript{75} Another has stated that lawyers "risk becoming a mere footnote in the twenty-first century" if they fail to utilize interdisciplinary methods of solving problems.\textsuperscript{76} Other professions view lawyers as lagging behind their counterparts in the ever-changing global economy. Proponents of MDPs suggest that lawyers "risk becoming dinosaurs" if they cannot find a way to accept the new working paradigm for professionals, including MDPs.\textsuperscript{77}

Those who disagree with using MDPs as a vehicle for providing legal services submit that "one-stop shopping" is just a euphemistic rationale for offering business opportunities and profit centers to capitalists.\textsuperscript{78} They also attempt to pierce the veil of this argument by suggesting that

\textsuperscript{72} See Dzienkowski & Peroni, supra note 32, at 125-26.
\textsuperscript{73} Id. at 126.
\textsuperscript{74} See Michael Gerrard, Statement of Position of Multidisciplinary Practice, Executive Committee of the Association of the Bar of the City of New York, 595 PLI/PAT 75, 80 (2000); see also Dzienkowski & Peroni, supra note 32, at 124-25 (describing how the IRS employs economists and other professionals).
\textsuperscript{75} Langbaum, supra note 67, at 16.
\textsuperscript{76} Testimony of Steven A. Bennett (Banc One) (Nov. 13, 1998).
\textsuperscript{77} Id. The urgency of addressing the relationship of legal services and MDPs is likewise characterized by proponents in other familiar phrases: "wake up and smell the roses," Michael A. Landrum, Beyond ADR: The Opportunities for Business Lawyers, BENCH & B., Oct. 2000, at 45; and "the train has left the station and [is] headed down the track," Oral Testimony of Stefan Tucker (Chair, ABA Section of Taxation) (Feb. 4, 1999).
\textsuperscript{78} See Lawrence J. Fox, Dan's World: A Free Enterprise Dream; An Ethics Nightmare, 55 BUS. LAW. 1533, 1546 (2000) [hereinafter Fox, Nightmare] (noting that "one-stop shopping provid[es] . . . convenience for the customer but, far more importantly, business extensions for the entrepreneurs").
transaction costs are not decreased as much with MDPs because innovative technology—including e-mail, faxes, conference calls, and teleconferencing—has the capacity to bring the lawyer to the forefront of the competition.79

2. Criticism of MDPs. At the other end of the MDP continuum are those opponents who believe that lawyer participation in MDPs will forfeit the profession’s “core values” and, in turn, sacrifice the client.80 These core values include such familiar ethical precepts as confidentiality, loyalty to clients, and independent judgment of the lawyer.81 Each of these concerns is addressed individually although they are heavily intertwined in the debate over MDPs.

Clients anticipate being able to speak and write candidly with their attorneys, and they expect those communications to be guarded as confidential while used for their benefit as the attorney renders her services. Moreover, the client does not expect these confidences to be used to his detriment. This is consistent with Model Rule 1.6, which generally prohibits attorneys from revealing their clients’ confidential communications unless authorized by law or necessary in the representation of that client.82 However, opponents of MDPs point to practical problems of addressing how to maintain this confidential relationship in the MDP when confidential information would be shared with nonlawyers on a regular basis. Opponents fear that the MDP’s nonlawyers that are not required to adhere to the rigors of state rules of professional conduct are less likely to cling to client confidentiality when the bottom line is at stake.83

Even when nonlawyers are not driven by the bottom line but instead respond to duties within their own profession, client confidentiality is exposed to great risk, according to opponents of MDPs. The most popular example of this is the juxtaposition of the professionals’ duties in the event the MDP undertakes an audit of the client: If the MDP

81. See Pennsylvania Preliminary Report, supra note 26; see also Litigation Con Argument, supra note 80.
82. See Model Rules of Professional Conduct Rule 1.6 (1998). This rule anticipates lawyers disclosing confidential information when it furthers the representation and the client has not instructed the lawyer to refrain from doing so. See id. cmt. 7.
83. See Litigation Con Argument, supra note 80.
were to perform the audit, it would have clear duties to disclose particular information about past dealings that an attorney would be required to keep confidential under the same circumstances. This conflict certainly casts doubt on the ability of the MDP to ensure confidentiality of the client's communications, and it is evident why this concern is shared by many opponents across the country.

Related to the idea of client confidentiality is the attorney-client privilege. The necessary elements for the privilege are (1) a communication between attorney and client (2) in which the client seeks legal advice or services. Underscoring this privilege is the lawyer's role as a legal advisor. The attorney-client privilege would not arise when a client seeks advice from a nonlawyer first because such a situation lacks a necessary element: an attorney. Thus, a client who shares information with a nonlawyer in the MDP context and believes that it is privileged would not enjoy the attorney-client privilege for those communications, even if the nonlawyer later communicated them to the attorney and the attorney offered legal advice to the client. In fact, such communication may constitute a waiver of the attorney-client privilege.

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84. See Langbaum, supra note 67, at 15 (noting that "the only irreconcilable difference" lies between the legal code of ethics mandating confidentiality and ethical precepts in auditing that require full disclosure). Langbaum suggests that this is not sufficient to foreclose all MDPs from operating within the bounds of confidentiality; rather, it should just be a "narrow limitation disallowing MDPs with both lawyers and auditors for one client." Id.; see also Terry, supra note 20, at 892.

85. See, e.g., Lawrence J. Fox, Accountant Bosses Pose Ethical Threat, NAT'L L.J., Oct. 6, 1997, at A23; James M. McCauley, The Delivery of Legal Services Through Multidisciplinary Practices (visited March 3, 2001) <http://law.richmond.edu/RJOLPI/Issues/Issue%202000spr/MCCAULEY.html>; see also ABA Section of Litigation Issues Forum, Multidisciplinary Practice Argument: Pro [hereinafter Litigation Pro Argument] (visited March 3, 2001) <http://www.abanet.org/litigation/issues/mdp/pro.html> (recognizing that "[t]he audit role of the accountant and the lawyer role as advocate are incompatible"). Another example of this tension is illustrated by a family MDP law firm in which lawyers, social workers, and health care providers team up to help clients. If a social worker or doctor discovered evidence that indicated child abuse by the client, then either would be obligated by law to report the suspicions to the appropriate authority. Conversely, a lawyer would not, and indeed could not, report this because of the rules on confidentiality. See McCauley, supra. Of course, if the lawyer reasonably believed that imminent death or bodily harm might come to someone at the hands of the client, she could disclose confidential information to the extent necessary to prevent such harm. See MODEL RULES OF PROFESSIOAL CONDUCT Rule 1.6(b) (1998).


87. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmts. 1 & 3.

88. See McCauley, supra note 85.
privilege. Opponents of MDPs urge that this does the client a disservice by limiting the availability of the attorney-client privilege and jeopardizing the client's confidences by sharing them with nonlawyers who are not subject to the same rules of professional conduct.

Moreover, critics of MDPs suggest that proponents operate only "under the guise of providing more efficient services to clients and the public at large" and that they are more interested in "sticking their hands in the cookie jar," as the familiar expression goes, to share in legal fees. Moreover, these opponents charge that consumer demand has only been fabricated or manufactured to give plausibility to accountants' arguments for MDPs. MDP advocates counter that the demand is real, citing statistics and pleas from clients that exemplify how MDPs actually are sought out in substance if not in name.

Opponents also note that the MDP paradigm is fraught with potential conflicts of interests for the various clients of the MDP and the professionals that serve them. The Model Rules of Professional Conduct prohibit an attorney from representing a client if that representation may be materially limited by either the lawyer's own interests or by his responsibilities to a third party, unless the lawyer reasonably believes that the representation of the client will not be adversely affected and the client consents after being notified of the conflict.

Furthermore, ethical rules dictate under what circumstances a lawyer may represent a client whose representation is adverse to another client, current or former. Another rule imputes an attorney's disqualification

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89. See, e.g., CALIF. EVID. CODE § 912 (providing for circumstances when privilege will be deemed waived).
90. See Fox, Nightmare, supra note 78, at 1554-57.
91. Litigation Con Report, supra note 80.
92. See Dzienkowski & Peroni, supra note 32, at 135-36 (noting how opponents point to the marketing efforts of the Big Five accounting firms to create apparent demand); see also Lawrence J. Fox, 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, 1107-08 (2000); Steven C. Krane, Written Testimony to the ABA Commission on Multidisciplinary Practice (Aug. 8, 1999) (visited March 3, 2001) <http://www.abanet.org/cpr/krane.html>.
93. See Gary L. Bakke, Where Do We Stand on MDP?, WISC. LAW., Oct. 2000, at 5, 5 (publishing letter from American corporate director seeking legal work integrated with financial and tax considerations for international business); James W. Jones, Focusing the MDP Debate: Historical and Practical Perspectives, 72 TEMP. L. REV. 989, 993-95 (1999) (recounting the contours of client demand for integration of professional services as provided by MDPs); Sheryl Stratton, ABA Rattles Unauthorized Practice of Law Saber While Debating MDPs, 86 TAX NOTES 1057 (1999).
94. See, e.g., Fox, Nightmare, supra note 78, at 1556-58.
95. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1998).
96. See id. Rules 1.7, 1.9.
from representation for conflict of interest to the attorney's firm under certain facts and circumstances. However, similar rules governing conflicts of interest for certified public accountants ("CPAs") do not require automatic imputed disqualification. To the opponents of MDPs, this is just one example of how professions outside the law may face difficulties reconciling their rules regarding conflicts of interest with the legal rules of professional conduct. Proponents, not doubting the importance of loyalty to the client, maintain that lawyers will not be any more likely to be disloyal to clients in an MDP setting. Rather, some MDP advocates argue the same rules on imputation should apply while others call for a loosening altogether of the ethical constraints on screening and firewalls.

Finally, critics of MDPs fear the loss of their professional independence as lawyers if they partner with nonlawyers in MDPs. Model Rule 5.4 prohibits attorneys from practicing in organizations that have nonlawyer corporate directors or officers or that give nonlawyers the right to direct or control the professional judgment of the lawyers. These opponents predict the drive for profits will dictate how legal matters are handled, thereby sacrificing the client and his cause and usurping the role of the client in determining the objectives of the representation under Model Rule 1.2. Lawrence Fox has written on the relationship of profits, power, and control:

"It's the money." Follow the money and you'll follow the power. Follow the power and you'll know who is in control. And as soon as the power rests with non-lawyers not trained in, not dedicated to, and not subject to discipline for our ethical principles, you will see the independence of the profession fall away.

Many opponents of MDPs stress that something about lawyers sets them apart as special from other professions:

97. See id. Rule 1.10.
99. See Utah Report, supra note 12 (calling for a "firm-wide imputation rule" if necessary).
102. See id. Rule 1.2.
The independence of the lawyer is just as critical as the independence of the judiciary. Under our system of government, lawyers are unique. We are special. We are in the Constitution. We are officers of the court. We are fiduciaries whose charge is to preserve the rule of law. We have kept the playing fields level and made sure people were honest in the market place for over 200 years. We, lawyers and judges, have provided the glue that has held the fabric of this country together, and have contributed in great measure to the success of an economic system and a democratic form of government that is the envy of the world. We have literally been and are the guardians of this Republic.104

To sum up, these opponents fear that the lawyer’s professional judgment could be overcome by her own interests or by any other improper factor.

However, advocates of MDPs suggest that lawyers do not live in a professional vacuum that insulates them from the “influence of profit” and that such a proposition “flies in the face of every recent trend.”106 Proponents point to the current economic pressures that drive traditional law firms today, and they maintain that no cognizable difference exists between MDPs and traditional law firms in that respect.106 Furthermore, MDP supporters emphasize that the practicing bar already allows lawyers to participate as in-house counsel, government lawyers, and legal services attorneys, all of which subject lawyers to some degree of supervision by nonlawyers.107

The Commission on Multidisciplinary Practice recognized how significant the fear of losing professional independence was for those who oppose MDPs and therefore recommended the formation of MDPs only when lawyers would preserve the “control and authority necessary to assure lawyer independence.”108 The Commission believed that by suggesting safeguards it would aid the MDP in preserving the professional independence of its lawyers, and the Commission’s commentary in that regard will be useful for states facing the task of how to protect this particular core value while allowing MDPs.109

106. See Litigation Pro Argument, supra note 85.
107. See Myers, supra note 105, at 12.
108. ABA Final Report, supra note 64.
109. See id.
B. Other Factors Shaping the Decision of Whether to Amend Rule 5.4

In addition to those arguments proffered by both sides, individual state bar associations will have to look beyond the legal profession and recognize external forces that will influence the MDP debate. First, lawyers must consider the breadth of their client's activities. Presently, the international business community is the clientele clamoring most loudly for MDPs and integrated services. However, as the world grows smaller, more clients will find themselves acting and thinking globally. Therefore, lawyers must consider their clients' and potential clients' needs for integrated services. Technology is another factor that will shape the debate over MDPs. The planet is shrinking as the lines of communication make for virtually instantaneous transactions and decisions. The effects of technology have been heralded most within the transactional aspect of the practice of law, but technology is relevant for litigators, too. Everything is speeding up, and the average businessman does not want to be slowed down by some form of dragged out litigation. Arbitration and mediation are increasing in popularity, and much of this dispute resolution is originating not with lawyers, but with other professional service providers, such as those who operate in MDPs. At a very minimum, lawyers cannot afford to ignore MDPs, and they would be wiser still to address the issue with both sides in mind and an eye toward the world around them.

IV. CONCLUSION

Scholars in the field of legal ethics agree that MDPs are a force with which to reckon, and as one noted commentator and MDP advocate has stated, "[T]he 'MDP' is not simply coming, it is here."110 Lawrence Fox, one of the more vocal opponents of MDPs, has apparently even acquiesced that MDPs are all around us, even if de facto in nature, by his statement that "MDPs, like sneeze-inducing pollen in the spring, are in the air."111 This analogy is probably more fitting than Mr. Fox realized. Like springtime pollen, MDPs are garnering a negative reaction from a certain bloc of persons; however, to carry the analogy one step further, such a reaction is often the price paid to enjoy the more positive benefits associated with the subject of disagreement. Similar to the person who must take his allergy medication when the trees begin to bloom in March and April, state bar associations must now look for

111. Fox, Nightmare, supra note 78, at 1554.
a remedy that will help the legal profession secure its core values while
enjoying the blossoms and benefits that can be gained from MDPs.
Hopefully, the state bar associations will address the issue of MDPs with
an air of optimism that will enable them to avoid being blinded by
vestiges of paternalism and economic protectionism in making a
reasonable and balanced decision.

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