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Not If, but When and How: A Look at Existing de facto Multidisciplinary Practices and What They Can Teach Us about the Ongoing Debate

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Not “If,” but “When” and “How”: A Look at Existing De Facto Multidisciplinary Practices and What They Can Teach Us About the Ongoing Debate

INTRODUCTION..... 481

I. THE HISTORY OF THE MDP DEBATE..... 484

II. THE PRESENT (UNCERTAIN) STATE OF MDP LAW AND VARIOUS JURISDICTIONAL APPROACHES..... 489

 A. *Model Rule 5.4 and its Ambiguous Language* 489

 B. *The Development of MDPs Internationally*..... 493

 1. Canada 493

 2. South Africa and Australia..... 494

 3. Europe 495

 C. *Various Domestic Approaches* 497

III. THE NEGATIVES AND POSITIVES OF MDPs. 499

 A. *Arguments Against MDPs* 499

 1. Professional Independence..... 499

 2. Confidentiality 500

 3. Conflicts of Interest..... 501

 4. Regulation 503

 B. *Arguments in Support of MDPs*..... 504

 1. Meeting Client Demand 504

 2. Providing More Efficient, Less Costly Services 505

 3. Keeping Pace with the Globalization of the Economy 506

 4. Getting Involved Before It Is Too Late 506

IV. PRESENT DE FACTO MDPs AND OTHER ANCILLARY BUSINESSES AND WHAT THEY CAN TEACH US ABOUT THE FUTURE OF MDPs 506

 A. *Large Professional Service Firms*..... 507

 B. *Boutiques* 510

 1. Boston Law Collaborative, LLC..... 510

 2. The Boston Medical Center’s Family Advocacy Program..... 513

 3. Other Ancillary Cooperative Businesses..... 515

CONCLUSION—WHERE SHOULD WE GO FROM HERE? 516

INTRODUCTION

The issue has been described as “the most important question to

face the legal profession,"¹ an "Armageddon,"² and a "salvation."³ Despite the vastly differing views, multidisciplinary practices ("MDPs") have the potential to revolutionize the legal profession. Many thought the American Bar Association's ("ABA") House of Delegates' resounding rejection of a proposal to allow MDPs in July 2000 was a crushing victory for opponents of MDPs.⁴ Yet even after the Enron-Arthur Andersen scandal (which many consider an additional argument against MDPs),⁵ the battle over whether lawyers should be allowed to practice and share fees with non-lawyer professionals in MDPs continues to rage. While the ABA does not approve of most forms of MDPs, proponents continue to be vocal. Several jurisdictions, including New York and Washington, D.C., now allow limited professional collaborations.⁶

Contrary to the ABA's initial hopes, the MDP debate is not over. The creation of professional practice partnerships, such as those between lawyers and accountants, mental health professionals or physicians, is seen by many as the vanguard of an inevitable professional revolution.⁷

Despite the ABA's rejection of MDPs, lawyers and other professionals have found ways to work together without violating state law or professional ethical responsibilities. The most noted context in which lawyers and non-lawyers collaborate to provide professional services is in the Big Five (now the Big Four) accounting firms.⁸ The Big Five Boom, the first instance in which large

1. Karel Ourednik IV, *Multidisciplinary Practice and Professional Responsibility After Enron*, 4 FLA. COASTAL L.J. 167, 167 (2003); see also Robert A. Stein, *Multidisciplinary Practices: Prohibit or Regulate?*, 84 MINN. L. REV. 1529, 1529 (2000) (noting that resolving of the issue whether to regulate or prohibit MDPs will affect nearly all lawyers).

2. J. Emery Baker, *Multidisciplinary Practice: Armageddon or Salvation?*, ARIZ. ATT'Y, May 2000, at 24.

3. *Id.*

4. John Gibeaut, "It's a Done Deal": House of Delegates Vote Crushes Chances for MDPs, A.B.A. J., Sept. 2000, at 92.

5. See Ourednik, *supra* note 1, at 170 (noting that the lawyers at Arthur Andersen were involved in the demise of Enron).

6. See *infra* Part II.C.

7. See Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1473 (2000).

8. See *infra* Part IV.A. The Big Five include Ernst & Young LLP, Deloitte & Touche LLP, PriceWaterhouseCooper, KPMG LLP, and Arthur Andersen LLP. While Arthur Andersen collapsed in the wake of the Enron scandal, this Comment refers to the Big Five generally, as all five professional service firms have contributed to the MDP debate. The author only refers to the Big Four when discussing the current or future impact of these large professional firms.

accounting firms directly employed lawyers, was primarily driven by corporate client demand for professional service firms and “one-stop shopping” to accommodate their complex, interdisciplinary needs.⁹

Smaller collaborations of lawyers and non-lawyers also provide various professional services in a one-stop shopping format.¹⁰ These boutiques generally focus on individuals and their personal issues such as medical care, elder law,¹¹ financial planning, and family disputes like child custody and divorce.¹² The professionals involved are often lawyers, mental health professionals, physicians, and financial planners.¹³ While both large and small “de facto MDPs” are restricted by state rules of professional conduct,¹⁴ as long as client demand for MDPs increases, professionals (lawyers and non-lawyers alike) will find ways to offer such services, and the push for the legalization of MDPs will continue.

In exploring the intense and important debate over whether lawyers should be allowed to participate in MDPs, this Comment will show that MDPs do and should continue to benefit the legal profession, but only in a limited capacity. Regulation should depend not only on the size of the firm but also on the professions participating, the services rendered, and the clientele involved. Furthermore, a complete overhaul of the Model Rules of Professional Conduct (“Model Rules”), as has been suggested,¹⁵ would be more harmful than beneficial to the legal profession. Part I recites a brief history of the MDP debate. Part II discusses the difficulties surrounding the present ban of MDPs in Model Rule 5.4 as well as

9. See Gianluca Morello, *Big Six Accounting Firms Shop Worldwide For Law Firms: Why Multi-discipline Practices Should Be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190, 238 n.299 (1997).

10. See *infra* Part IV.B.

11. See M. Courtauld McBryde, Comment, *The Future of Multidisciplinary Practices in North Carolina: Love 'Em or Hate 'Em, North Carolina's Only Option is to Regulate Them*, 36 WAKE FOREST L. REV. 193, 195 n.13 (2001).

12. See Steven Keeva, *A Multidoor Law Office*, A.B.A. J., Oct. 2003, at 96 (discussing Boston Law Collaborative, a multidisciplinary dispute resolution firm, and services it provides).

13. See *infra* Part IV.B.

14. Although the ABA's Model Rules of Professional Conduct are not binding on any jurisdiction, they have been adopted by roughly forty states in some capacity. L. Harold Levinson, *Collaboration Between Lawyers and Others: Coping With the ABA Model Rules After Resolution 10F*, 36 WAKE FOREST L. REV. 133, 133 n.1 (2001). Unless specific state rules of professional responsibility are mentioned, this Comment is referring to the Model Rules of Professional Conduct.

15. See ABA COMM. ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES (1999) [hereinafter 1999 REPORT], <http://www.abanet.org/cpr/mdpreport.html> (last visited Dec. 5, 2004) (on file with the North Carolina Law Review).

various domestic and international jurisdictional approaches. Part III explores the primary arguments of opponents and proponents of MDPs. In examining present de facto MDPs, as well as other ways in which professionals can work together, Part IV details examples: both professional service firms¹⁶ that represent large corporations, and small boutiques, which include other professionals in addition to accountants, and whose primary clients are individuals and small businesses. Ultimately, this Comment concludes that small MDPs that provide services for individual clients can and should work in the United States. A blind, unquestioning acceptance of MDPs, however, would be harmful to the profession; rather, as the ongoing debate shifts from “if” and “when” to “how,” the legal community should take advantage of the lessons that can be learned from current de facto MDPs.

I. THE HISTORY OF THE MDP DEBATE

The ABA defines an MDP as:

[A] partnership, professional corporation, or other association or entity that includes lawyers and non-lawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. . . . [I]t also includes an arrangement by which a law firm joins with one or more other professional firms to provide services, including legal services, and there is a direct or indirect sharing of profits as part of the arrangement.¹⁷

The two key components of this definition—partnerships between lawyers and non-lawyers who provide legal and non-legal services, and profit sharing (a.k.a. fee splitting)—have long been proscribed by professional responsibility principles. The first express prohibitions on lawyer/non-lawyer partnerships and fee sharing arose in 1928 when Canons 33 to 35 were added to the original 1908 Canons of Professional Ethics.¹⁸ Canon 33 provided that partnerships between lawyers and non-lawyers should not be formed if part of the

16. The term “professional service firm” is not a term of art. It is used in this Comment to refer to large firms such as the Big Five that handle a variety of corporate work.

17. 1999 REPORT, *supra* note 15.

18. See Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Service from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 240–41 (2000).

partnership consisted of the practice of law.¹⁹ Canon 34 proscribed lawyers from fee splitting with non-lawyers.²⁰ The Model Code of Professional Responsibility strengthened these prohibitions by expressing them in mandatory rather than precatory language.²¹ The 1983 Model Rules of Professional Conduct also clearly prohibit a lawyer from fee sharing and forming partnerships with non-lawyers.²² Recent economic trends, however, have caused many to rethink these longstanding prohibitions.

The MDP debate is the result of a variety of domestic and global economic changes in the past decade, most significantly the expansion of the Big Five accounting firms both domestically and overseas.²³ Also fueling the debate are “[t]he collapse of the professionalism paradigm in the late twentieth century, the globalization of the world economy, the substantive convergence of law and law-related disciplines, and the complex needs of individual and corporate clients for advice that draws on those converging disciplines.”²⁴

In response to these compelling new forces, the ABA House of Delegates created the Commission on Multidisciplinary Practice (“Commission”) in 1998 to “determine what changes, if any, should be made to the ABA Model Rules of Professional Conduct with respect to the delivery of legal services by professional services firms.”²⁵ The twelve-person Commission, made up of lawyers, judges and academics,²⁶ was employed “to study and report on the extent . . . and the manner in which professional service firms operated by accountants and other [non-lawyers] are seeking to provide legal services to the public.”²⁷ Thus, the ABA’s primary goal was to determine if lawyers were aiding these firms in the unauthorized

19. 1908 CANONS OF PROF’L ETHICS Canon 33 (1928).

20. *Id.* at Canon 34.

21. MODEL CODE OF PROF’L RESPONSIBILITY DR 3-103; DR 3-102; DR 5-107 (1969); see also George C. Harris and Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn From the Medical Profession’s Shift to a Corporate Paradigm*, 70 FORDHAM L. REV. 775, 779–82 (2001) (discussing the precatory terms of the initial prohibitions).

22. See MODEL RULES OF PROF’L CONDUCT R. 5.4 (2004) [hereinafter MODEL RULES]. For a more complete history of the progression of professional responsibility, see generally Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411 (2005).

23. McBryde, *supra* note 11, at 195.

24. Daly, *supra* note 18, at 222.

25. See 1999 REPORT, *supra* note 15.

26. See Ourednik, *supra* note 1, at 173.

27. See 1999 REPORT, *supra* note 15, at App. C.

practice of law, and if so, to prevent it.²⁸

The Commission scrutinized the effects of MDPs on clients, lawyers, accountants, and the rules of professional conduct—particularly with respect to conflicts of interest and client confidentiality.²⁹ In August of 1999, after significant investigation, hearings, and discussions,³⁰ the Commission issued its unanimous³¹ Recommendation and Report to the ABA House of Delegates. The Commission recommended that MDPs be permitted, subject to certain restrictions.³² These restrictions included: (1) guidelines for lawyer-controlled MDPs,³³ (2) policies that placed the onus on lawyers to ensure that other professionals followed the Model Rules,³⁴ (3) five possible models of MDPs,³⁵ and (4) a hypothetical

28. 1999 REPORT, *supra* note 15.

29. One scholar noted that the Commission focused its studies on four basic questions:

First, how would clients be harmed or benefited by amending the Model Rules to permit lawyers to enter into MDPs? Second, how would the lawyers' independent professional judgment be impaired by allowing these arrangements? Third, how different are the standards that govern the conduct of accountants and accounting firms? Fourth, if the Model Rules were amended to permit MDPs, what changes should be made in the rules to preserve client confidentiality and avoid conflict of interest?

Stein, *supra* note 1, at 1540–41.

30. The depth of the Commission's study was significant:

[T]he Commission . . . heard sixty hours of testimony from fifty-six witnesses from around the world and received written and oral communications from numerous others. Testimony and/or written materials [were] presented by U.S. and foreign lawyers, consumer advocates, representatives of four of the five largest accounting firms in the world, law professors, chairs of ABA sections and standing committees, officers of foreign and domestic bar associations, ethics counsel of foreign and domestic bar associations, small business clients, the American Corporate Counsel Association and in-house counsel of international corporations.

1999 REPORT, *supra* note 15.

31. Many were surprised that the Commission produced a unanimous report. See Stein, *supra* note 1, at 1541.

32. See ABA COMM. ON MULTIDISCIPLINARY PRACTICE, RECOMMENDATION TO THE HOUSE OF DELEGATES (1999) [hereinafter 1999 RECOMMENDATION], <http://www.abanet.org/cpr/mdprecommendation.html> (last visited Dec. 5, 2004) (on file with the North Carolina Law Review). The provisions urging that restricted MDPs be permitted are contained in Recommendation 3.

33. *Id.* The provisions regarding lawyer-controlled MDPs are contained in Recommendation 12.

34. *Id.* In Recommendation 8, conflicts of interest and imputation are discussed. Recommendation 10 requires lawyers "to ensure . . . [a] non-lawyer's conduct is compatible with the professional obligations of the lawyer."

35. The models are (1) the Comparative Model; (2) the Command and Control

“Model Rule 5.8” that outlined a regulatory program for state courts to oversee MDPs controlled by non-lawyers.³⁶

The Commission’s proposal was supported by several rationales. First, the Commission cited heavy client demand coupled with a complementary interest of lawyers, noting that individual and corporate clients as well as lawyers from a variety of practice areas supported MDPs.³⁷ Second, the Commission recognized that the prevalence of MDPs made regulation a more viable option than a latent attempt at prohibition.³⁸ The Commission specifically noted the “increasing number of U.S. lawyers with significant practice experience [who were] leaving law firms to join . . . the Big [Five].”³⁹ It also warned “that additional care must be taken to assure that [those lawyers are] not aiding the unauthorized practice of law.”⁴⁰ Third, the Commission felt that it was not compromising the “core values” of the legal profession⁴¹ and made it clear that lawyers were still bound by the Rules of Professional Conduct.⁴²

The Commission issued its Recommendation and Report to the House of Delegates in the ABA’s annual meeting in 1999.⁴³ After an “impassioned” discussion, the vote on the Commission’s proposal was

Model; (3) the Law-Related Services/Ancillary Business Model; (4) the Contract Model; and (5) the Fully Integrated Model. Stuart S. Prince, *The Bar Strikes Back: The ABA’s Misguided Quash of the MDP Rebellion*, 50 AM. U. L. REV. 245, 262–63 (2000). For detailed descriptions of the five models see *id.* at 263; 1999 REPORT, *supra* note 15, at App. C2–C4; Marc N. Biamonte, *Multidisciplinary Practices: Must a Change to Model Rule 5.4 Apply to All Law Firms Uniformly?*, 42 B.C. L. REV. 1161, 1170–72 (2001).

36. See 1999 REPORT, *supra* note 15, at App. A6–A10; see also 1999 RECOMMENDATION, *supra* note 32 (outlining proposed actions an MDP must take to allow court regulation in Recommendation 14).

37. See 1999 REPORT, *supra* note 15 (“[T]he Commission has concluded that there is an interest by clients in the option to select and use lawyers who deliver legal services as part of a multidisciplinary practice . . . [and] that a complementary interest exists among many U.S. lawyers.”).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* The Commission’s first Recommendation was that “[t]he legal profession should adopt and maintain rules of professional conduct that protect its ‘core values.’ ” 1999 RECOMMENDATION, *supra* note 32. Loyalty, competence, confidentiality and most importantly independent professional judgment are the legal profession’s “core values” according to the Commission. Schneyer, *supra* note 7, at 1471. The core values were also specifically enumerated in the House of Delegates’ rejection of the Commission’s proposal. See ABA HOUSE OF DELEGATES, RECOMMENDATION 10F, at <http://www.abanet.org/cpr/mdprecom10f.html> (last visited Dec. 5, 2004) (on file with the North Carolina Law Review); Levinson, *supra* note 14, at 142–43 (enumerating Recommendation 10F’s inventory of core values to be protected).

42. 1999 REPORT, *supra* note 15.

43. Stein, *supra* note 1, at 1543.

postponed until a later meeting of the House.⁴⁴ The postponement was intended to allow more time for the Commission, as well as individual state bar associations, to study the impact of MDPs.⁴⁵ Instead, the anti-MDP faction had bought itself time to grow.⁴⁶ When the House reconvened in July 2000, the Commission issued another diluted report.⁴⁷ This time, however, the debate never even made it to the House floor, as the delegates overwhelmingly rejected the Commission's proposal by a 3-to-1 margin.⁴⁸ Even though many supporters sought a further extension of time so that states could continue their individual studies of MDPs,⁴⁹ the Commission was disbanded. The House then adopted Resolution 10F—a provision which emphatically enforces the Model Rules' position prohibiting the sharing of fees, ownership, and control with non-lawyers.⁵⁰

Despite the lopsided vote, proponents of MDPs roundly criticized the House. Some were upset by the way the House handled the vote. One ABA delegate called the House's view "shortsighted" and referred to the opposing delegates as "a lynch mob."⁵¹ He also blasted the House for subverting innovative client service in favor of protecting the guild.⁵² Other critics of the vote were more concerned that the vote would trivialize the ABA's position in the legal profession as the MDP debate would likely move to state bar associations. One critic called the vote "a move that could balkanize the profession by leaving each state to decide the question on its

44. *Id.* at 1543–44.

45. *Id.* at 1544.

46. Robert R. Keatinge, *Colorado and Denver in The House: MDP Declared Heresy by The ABA House of Delegates*, 29 COLO. LAW. 48, 50–51 (Sept. 2000) (discussing the "anti-MDP Jihad" that "generated a combination of xenophobic fervor and fear within the House" between the time of the debate and the vote).

47. Compare 1999 RECOMMENDATION, *supra* note 32, with ABA COMM. ON MULTIDISCIPLINARY PRACTICE TO THE ABA HOUSE OF DELEGATES, REPORT TO THE HOUSE OF DELEGATES (2000), <http://www.abanet.org/cpr/mdpfinalrep2000.html> (last visited Dec. 5, 2004) (on file with the North Carolina Law Review). The 1999 Recommendation was fifteen paragraphs long and discussed important issues, such as imputation (par. 8) and requirements for non-lawyer controlled MDPs (par. 14). On the other hand, the 2000 Recommendation contained five paragraphs and did not elaborate on any details.

48. Gibeaut, *supra* note 4, at 92 (noting that the final vote was 314 to 106).

49. Keatinge, *supra* note 46, at 51.

50. Levinson, *supra* note 14, at 135.

51. Keatinge, *supra* note 46, at 48.

52. *Id.* at 48 ("[W]hile the rest of the world, legal and non-legal, is focusing on innovative ways of solving legal problems for clients, the House has chosen to focus on turning the legal profession into a protected guild, limiting the manner in which attorneys may resolve their legal clients' problems.").

own.”⁵³ Yet another proponent of MDPs wrote, “this profoundly anti-experimental stance may only encourage MDP supporters to leave the fractious ABA on the sidelines while they pursue legalization elsewhere.”⁵⁴ At the time of the vote the incoming President of the ABA, Martha W. Barnett, expressed her opinion of the debate’s future, saying, “[r]egardless of what we did here today, this debate is not going to go away.”⁵⁵ Ms. Barnett and others were remarkably prescient in their assertions: the push for MDPs remains strong even without the endorsement of the ABA, as the states create their own studies on how to handle the issue.⁵⁶

II. THE PRESENT (UNCERTAIN) STATE OF MDP LAW AND VARIOUS JURISDICTIONAL APPROACHES

As mentioned at the outset, the ABA’s rejection of the Commission’s proposal was a “crushing victory [that] was *supposed* to end the debate.”⁵⁷ The ABA’s endorsement of Resolution 10F solidified its position that the Model Rules, particularly Rule 5.4, were not going to be amended to allow MDPs. With every jurisdiction except Washington, D.C. having a comparable version of Model Rule 5.4, the law seemed to be settled.⁵⁸ So why then does the debate continue? This Section elaborates on three reasons why, despite the apparent closure created by Resolution 10F, the arguments surrounding MDPs continue: first, the ambiguity of the terminology in the current Model Rules; second, the emergence of MDPs abroad; and third, the various regulatory approaches developed by different jurisdictions within the United States.

A. *Model Rule 5.4 and its Ambiguous Language*

The importance of Model Rule 5.4 cannot be understated. It has

53. Gibeaut, *supra* note 4, at 92–93. Indeed, this seems to be what is happening now. See *infra* Part II.C.

54. Schneyer, *supra* note 7, at 1475. Not only that, but in its haste, “the House . . . put itself and the rest of the ABA in the awkward position of not being able to participate in future discussion of MDP.” Keatinge, *supra* note 46, at 52.

55. Martha W. Barnett as quoted by Gibeaut, *supra* note 4, at 93.

56. See, e.g., ABA CTR. FOR PROF’L RESPONSIBILITY, MDP INFORMATION BY STATE, at http://www.abanet.org/cpr/mdp_state_summ.html (last visited Dec. 5, 2004) [hereinafter MDP INFORMATION BY STATE] (describing states’ progress on studying MDPs) (on file with the North Carolina Law Review).

57. Burnele V. Powell, *The Lesson of Enron for the Future of MDPs: Out of the Shadows and Into the Sunlight*, 80 WASH. U. L.Q. 1291, 1291 (2002) (emphasis added).

58. See Laurel S. Terry, *A Primer on MDPs: Should the “No” Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 871 n.2; Stein, *supra* note 1, at 1537.

been called "the linchpin of a well-ordered profession,"⁵⁹ and "all that differentiates lawyers from mere businessmen."⁶⁰ Although other Model Rules play a role in the ban on MDPs,⁶¹ Model Rule 5.4 is the cornerstone of the prohibition on lawyers practicing law with, and for, non-lawyers. Entitled "Professional Independence of a Lawyer," the Rule states that:

(a) A lawyer or law firm shall not share legal fees with a non-lawyer. . . .

(b) 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. . . .

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for profit, if: a non-lawyer owns any interest therein . . . a non-lawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or a non-lawyer has the right to direct or control the professional judgment of a lawyer.⁶²

It is of particular relevance that Model Rule 5.4 specifically prohibits a lawyer from "shar[ing] *legal fees* with a non-lawyer,"⁶³ and from "form[ing] a *partnership* with a non-lawyer if any of the activities of the partnership consist of the *practice of law*."⁶⁴ Model Rule 5.4 also forbids a lawyer to practice law under the control of a non-lawyer.⁶⁵ Remembering that the two main aspects of an MDP are sharing fees and creating a partnership with a non-lawyer while practicing law, Model Rule 5.4 clearly targets MDPs that are based on the ABA's standard definition.

Model Rule 5.4, however, is not as clear as it may appear. It is

59. Burnelle V. Powell, *Looking Ahead to the Alpha Jurisdiction: Some Considerations that the First MDP Jurisdiction Will Want to Think About*, 36 WAKE FOREST L. REV. 101, 116 (2001).

60. *Id.* at 115 (citing Burnelle V. Powell, *Flight from the Center: Is It Just or Just About the Money?*, 84 MINN. L. REV. 1439, 1455 (2000)).

61. See, e.g., MODEL RULES, *supra* note 22, R. 1.6, 1.7, 1.10 (prohibiting lawyers from sharing confidential information regarding clients and from representing clients if representation will lead to a conflict of interest).

62. *Id.* R. 5.4.

63. *Id.* R. 5.4(a) (emphasis added).

64. *Id.* R. 5.4(b) (emphasis added).

65. See *id.* R. 5.4 (d).

couched in several undefined or underdefined terms,⁶⁶ the most significant of which are “legal fees,” “partner,” and “practice of law.” Model Rule 1.5, which governs fees, does not define the term “legal fees.”⁶⁷ Model Rule 1.5 only cites factors to be considered in determining such fees⁶⁸ and contains restrictions for fee splitting among lawyers.⁶⁹ The term “legal fees” can be interpreted in two ways, both of which involve additional unidentified terms: (1) fees generated by the “practice of law” and (2) fees in exchange for “legal services.” The difference in these interpretations causes uncertainty as to what constitutes a “legal fee.”⁷⁰ L. Harold Levinson explains that “legal services” is broader than the “practice of law,” in that legal services include not only the traditional practice of law but also “sporadic and indirect services to clients.”⁷¹

More uncertainty arises when other professionals are considered. For example, it could be argued that a psychiatrist generates “legal fees” when he suggests to a client that it might be better for his psyche if he pursues a divorce; or that a financial planner generates “legal fees” when he urges his client to write a will. While proscribing the sharing of legal fees between professionals, Model Rule 5.4 does little to clarify which fees are in fact legal fees.

“Partner” is also left undefined by Model Rule 5.4.⁷² According to Model Rule 1.0, “‘partner’ denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.”⁷³ The terms “partnership” and “practice of law,” however, are not defined by the Model Rules.⁷⁴ Under the definition given in Model Rule 1.0, it would be possible for a lawyer and a non-lawyer to work together as long as there is no explicit partnership agreement between them. Model Rule 5.4 could then be easily circumvented by an implied

66. Levinson, *supra* note 14, at 136 (listing nine terms in Model Rule 5.4 that are undefined or cloudy).

67. See MODEL RULES, *supra* note 22, R. 1.5. Nor does the terminology section or any other part of the Model Rules. Levinson, *supra* note 14, at 136, 150.

68. MODEL RULES, *supra* note 22, R. 1.5(a)(1) to (8).

69. *Id.* R. 1.5(e). Sections (b), (d), and (e) discuss the manner in which fees should be communicated, contingent fees, and a prohibition on certain types of contingencies, respectively.

70. See Levinson, *supra* note 14, at 150 (explaining how “practice of law” differs from “legal services” in the context of legal fees).

71. *Id.*

72. *Id.* at 136.

73. See MODEL RULES, *supra* note 22, R. 1.0(g).

74. See *id.*; see also Levinson, *supra* note 14, at 136 (listing terms that are not defined by the Model Rules).

agreement between a lawyer and another professional, something other than a formal “partnership.” This was not the intent of the ABA when it promulgated Model Rule 5.4 and then reinforced it with the adoption of Recommendation 10F. In adopting Recommendation 10F, the ABA sought to solidify the prohibition against lawyers and non-lawyers sharing practices and fees.⁷⁵

The other major undefined term in Model Rule 5.4 is “practice of law.” This term has regularly troubled the ABA and lawmakers. Even though unauthorized practice of law (“UPL”) statutes have been adopted in every state but Arizona,⁷⁶ federal and state legislators, judges, and bar associations have not been able to come up with a satisfactory definition.⁷⁷ The difficulty in defining “practice of law” was also an issue in the ABA House during the MDP debate.⁷⁸ During the same meeting that the House defeated the Commission’s Report and adopted Resolution 10F, it created the ABA Task Force on The Model Definition of the Practice of Law (“Task Force”).⁷⁹ The Task Force was called upon to come up with an acceptable definition of the “practice of law” so that UPL could be prosecuted more easily. There was little success, however, as those who testified before the Task Force claimed that defining “practice of law” was “an impossible task.”⁸⁰ Instead, the Task Force proposed that, “every jurisdiction adopt [its own] definition of the ‘practice of law.’”⁸¹ Thus, an integral concept behind MDPs is left to the states to determine individually, many of which have varying definitions.⁸² The lack of clarity within the terminology of Model Rule 5.4 provides an

75. See Levinson, *supra* note 14, at 135 (noting that the “immediate target” of Resolution 10F was to counter the Commission’s proposal).

76. McBryde, *supra* note 11, at 196 (citing Ronald J. Huefner & Stephen Kellogg, *Attorneys and CPAs: Cooperation or Confrontation?*, C.P.A. J., June 1, 1999, at 41, 44); see, e.g., N.C. GEN. STAT. § 84-4 (2001) (UPL statute).

77. See McBryde, *supra* note 11, at 196 (noting that the definition varies from state to state). McBryde discusses UPL statutes as they relate to MDPs and notes that many critics “argue that the best way to deal with the MDP phenomenon is to more strictly enforce the UPL statutes.” *Id.* at 197–98. However, efforts to tighten the screws on the Big Five through UPL statutes have thus far been ineffective. *Id.* at 197.

78. Fred Rodgers, *Midyear Meeting of the ABA House of Delegates Held in Seattle, February 2003*, 32 COLO. LAW. 29, 29 (2003) [hereinafter Rodgers, *Midyear Meeting*].

79. Fred Rodgers, *Preview of 2003 House of Delegates Agenda Items: August Annual Meeting in San Francisco*, 32. COLO. LAW. 53, 53–54 (2003) [hereinafter Rodgers, *Preview*].

80. Rodgers, *Midyear Meeting*, *supra* note 78, at 29.

81. Rodgers, *Preview*, *supra* note 79, at 54.

82. See ABA website at http://www.abanet.org/cpr/model_def_home.html (last visited Dec. 5, 2004) (providing links to several states’ proposed definitions) (on file with the North Carolina Law Review).

easy target for those who wish to criticize it and a loose grasp upon those who wish to evade it, bringing into question the relevance of the rule.

B. *The Development of MDPs Internationally*

Another reason the MDP debate has not disappeared is because such practices are becoming prevalent around the world. Burnele V. Powell concludes that the “world . . . has already moved well past where the U.S. legal profession is today.”⁸³ Indeed, one of the reasons the MDP debate surged in the latter half of the 1990s was because so many American-educated and trained lawyers were going to work for one of the Big Five domestically *and* abroad, where MDPs are generally allowed.⁸⁴ In 1999, there were four jurisdictions worldwide that expressly permitted some form of MDP.⁸⁵ Now, there are several, including Canada, Australia, South Africa, France, Spain, the Netherlands, Germany, and Switzerland.⁸⁶ As will be illustrated below, many of the MDPs that have sprung up in these countries have done so in conjunction with the Big Five.

1. Canada

Similar to the ABA, in 1997 the Canadian Bar Association (“CBA”) created a committee to clarify the CBA’s position regarding “the globalization of the legal practice and the trend towards multidisciplinary practices.”⁸⁷ The CBA developed seven possible regulatory approaches for MDPs.⁸⁸ One month after the ABA took its stance against its own Commission, the CBA adopted Resolution 00-03-A in which it resolved that fee sharing and MDPs should be

83. Powell, *supra* note 59, at 128.

84. Siobhan Roth, *ABA Report: What Now? Plan for Law Firm-Accounting Hybrids Faces Internal Heat, Political Hurdles*, LEGAL TIMES, June 14, 1999, at 1, 12. At least one scholar has noted that the reason it is so easy for American lawyers and law school graduates to go abroad is that European legal education is quite comparable to American legal education. John E. Sexton, “*Out of the Box*” *Thinking About the Training of Lawyers in the Next Millennium*, 33 U. TOL. L. REV. 189, 191 (2001). This is true in that the primary focus of each educational system is the development of “thinking like a lawyer”—a skill that is not impeded by international boundaries and jurisdictions.

85. See Terry, *supra* note 58, at 883 (Germany, the Netherlands, part of Canada, and New South Wales, Australia).

86. See *infra* Parts II.B.1–3.

87. SPECIAL COMM. ON THE INT’L PRACTICE OF LAW, MULTI-DISCIPLINARY PRACTICES: AN INTERIM REPORT (Aug. 1998), *available at* http://www.cba.org/CBA/MDP/PDF/InterimReport_Eng.pdf (last visited Dec. 5, 2004) (on file with the North Carolina Law Review).

88. For a brief synopsis of these seven approaches, see Ourednik, *supra* note 1, at 177–79.

allowed.⁸⁹ However, the CBA stopped short of allowing fully integrated MDPs. In an amendment to Resolution 00-03-A, the CBA mandated that MDPs be “effective[ly] control[led]” by lawyers.⁹⁰ It further emphasized that lawyers should “not practice in MDPs with other service providers having conflicting ethical responsibilities.”⁹¹ While some territories (such as Ontario) subscribe to the CBA model, others (such as Quebec) fully endorse MDPs.⁹²

Even before this decision by the CBA, Ernst & Young had established a law office in Ontario.⁹³ Although it is completely made up of lawyers, and the lawyers do not technically share their fees with accountants, the firm (Donahue & Partners) is a member of Ernst & Young International, Ltd., and has to pay the parent corporation a management fee.⁹⁴ Now that fee sharing is permitted, however, Donahue & Partners is less restricted in its practice of law.

2. South Africa and Australia

MDPs have also been legalized in South Africa and Australia. In Johannesburg, an investment bank acquired all but the litigators from the Edward Nathan firm.⁹⁵ Before 1947, Australian law mandated that lawyers control 51% of the MDP, but these requirements have since been relaxed.⁹⁶ Subsequently, the Australian Competition and Consumer Commission has recommended that territories repeal prohibitions on MDPs, although only New South Wales has done so.⁹⁷

89. CAN. BAR ASS'N AUGUST 2000 RES. 00-03-A (2000), http://www.cba.org/cba/epiigram/november2000/Resolution_00-03-A.asp. (last visited Dec. 5, 2004) (on file with the North Carolina Law Review).

90. See CAN. BAR RES. 01-01-M § 1(a) (2001), at http://www.cba.org/CBA/News/2001_releases/01-02-19_resolution.asp (last visited Dec. 5, 2004) (stating “‘Effective control’ means that the lawyer or lawyers in an MDP can, by way a [sic] partnership agreement or other contractual arrangement . . . ensure continuing compliance with the core values, ethical and statutory obligations, standards and rules of professional conduct of the legal profession.”) (on file with the North Carolina Law Review).

91. *Id.* § 2(b). The Resolution gives the example of a lawyer and an auditor as professions that have conflicting responsibilities. *Id.* See also *infra* notes 149–56 and accompanying text.

92. See A.J. Noble, *Ernst & Young Already Manages A “Captive” Law Firm in Toronto. Is This the Dawn of the Profession’s Future?*, 21 AM. LAW. 51 (1999).

93. *Id.*

94. *Id.*

95. Siobhan Roth, *Bar Going Nowhere Fast on MDPs*, LEGAL TIMES, Feb. 21, 2000, at 1.

96. See PROF’L CONDUCT AND PRAC. RULES R. 40, 40.1 to 40.5 (Law Society of New South Wales 1995), at <http://www.lawsociety.com.au/page.asp?partid=719> (last visited Dec. 5, 2004) (detailing multidisciplinary partnership requirements for New South Wales) (on file with the North Carolina Law Review); see also Terry, *supra* note 58, at 884–85.

97. Ourednik, *supra* note 1, at 182–83, (citing Steven Mark, *Harmonization or*

The typical MDP in New South Wales consists of lawyers, accountants, insurance consultants, migration consultants, and a few others.⁹⁸ Despite the legalization of MDPs, however, the Big Four have not yet begun to fully tap the potential of 35,000 Australian lawyers.⁹⁹

3. Europe

Proponents of MDPs often look to Europe to find examples of the partnerships' success.¹⁰⁰ MDPs are allowed in various capacities across Europe. Switzerland allows fully-integrated MDPs.¹⁰¹ Even though MDPs have existed in Germany since as far back as the 1960s,¹⁰² in 1982 the German Constitutional Court, the Bundesverfassungsgericht, indirectly declared that lawyers actually have a constitutional right to be partners in MDPs.¹⁰³ France, Spain, and Ireland also allow MDPs.¹⁰⁴

Not all European countries are so supportive of an integrated system, however. The Netherlands, while allowing lawyers to affiliate with notaries, tax consultants, and patent agents, does not permit accountant-lawyer MDPs.¹⁰⁵ This ban was upheld by the European Court of Justice in 2002.¹⁰⁶ There has also been significant opposition to MDPs by law firms in Britain. In testimony before the ABA Commission, one professor cited a survey of 350 corporations in England, of which eighty-eight percent "do not want an amalgamation of their now independent lawyers and accountants."¹⁰⁷ Yet, because England does not define the practice of law and does

Homogenization? The Globalization of Law and Legal Ethics—An Australian Viewpoint, 34 VAND. J. TRANSNAT'L L. 1173 (2001)).

98. Ourednik, *supra* note 1, at 183.

99. *Id.* at 182–83.

100. See Stephanie Francis Cahill, *MDP Free Europe? European High Court Rule Against Multidisciplinary Practice*, 1 A.B.A. J. E-REPORT 8, 8 (2002); Ourednik, *supra* note 1, at 184.

101. David Rubenstein, *How The Big Six Are Practicing Law in Europe*, CORP. LEGAL TIMES, Nov. 1997, at 32.

102. See Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV. 1547, 1560 (2000).

103. *Id.* The court held that regulations limiting the ability of a German tax advisor to join with non-tax advisors were unconstitutional. Scholars have argued that this decision applies to lawyers as well as tax advisors. *Id.*

104. Prince, *supra* note 35, at 267.

105. Cahill, *supra* note 100, at 8.

106. *Id.*

107. Biamonte, *supra* note 35, at 1183 (quoting Bernard Wolfman, FEBRUARY 2000 HEARING TESTIMONY ON MDP at 2, available at <http://www.abanet.org/cpr/wolfman4.html> (last visited Dec. 5, 2004) (on file with the North Carolina Law Review)).

not prevent non-lawyers from engaging in it,¹⁰⁸ there is little to prevent lawyers and non-lawyers from working together.

The Big Five have been expanding in Europe for several years as a result of the more lenient MDP rules in many countries. In 1997, Ernst & Young already had lawyer affiliates in sixteen European countries.¹⁰⁹ It also owns the largest legal practice in Switzerland.¹¹⁰ Arthur Andersen was allied with the largest law firms in both Spain and England.¹¹¹ PriceWaterhouseCoopers ("PWC") has 300 lawyers in thirty-three European countries,¹¹² as well as roughly 2,850 lawyers worldwide.¹¹³ Deloitte & Touche has legal practices in France, Austria, Belgium, the Netherlands, and to a lesser extent in Spain.¹¹⁴ KPMG's global legal arm, KLegal, including 3,000 lawyers in sixty countries worldwide, however, was recently disbanded for fear of "continued" fallout from the Sarbanes-Oxley Act.¹¹⁵ Despite added pressure from the Sarbanes-Oxley Act and the SEC, PWC, Deloitte & Touche, and Ernst & Young have no intentions of following KPMG's lead.¹¹⁶

Even with the increased regulation by the SEC in the wake of the Enron collapse, most of the Big Four continue to capitalize on the relaxed rules of other jurisdictions by participating in MDPs abroad. The international growth of MDPs, especially in Europe, has led many American lawyers to continue supporting accountant-lawyer MDPs in the United States, so that their firms can stay competitive in the global market.¹¹⁷

108. Stein, *supra* note 1, at 1536.

109. Rubenstein, *supra* note 101, at 32 (listing France, Spain, the Netherlands, Italy, Germany, Belgium, Austria, Bulgaria, the Czech Republic, Greece, Hungary, Italy, Poland, Portugal, the Slovak Republic and Sweden as all having some sort of MDPs connected to Ernst & Young).

110. *Id.*

111. *Id.* Although independently run, the law firms (Garrett & Co. in London and J & A Garrigues, Anderson y Cia S.R.C. in Madrid) provide legal services for Arthur Andersen's clients. *Id.*

112. *Id.*

113. Molly McDonough, *KPMG Cuts Off Global Legal Arm*, 66 A.B.A. J. E-REPORT 2 (2003).

114. Rubenstein, *supra* note 101, at 32.

115. McDonough, *supra* note 113. See Sarbanes-Oxley Act, Pub. L. 107-204, § 201, 116 Stat. 771, 771-72 (codified at 16 U.S.C.A. § 78j-1 (West Supp. 2004)). The statute prohibits accounting firms from issuing audit and non-audit services, such as legal services, to clients simultaneously. 15 U.S.C.A. § 78j-1(g)(8).

116. McDonough, *supra* note 113.

117. See generally Rubenstein, *supra* note 101 (noting that support of MDPs in the U.S. is driven largely by competitive considerations); see also Cahill, *supra* note 100, at 8 (detailing growth of MDPs in European countries).

C. Various Domestic Approaches

Because the ABA fulfills only an advisory function (i.e., it has no direct authority over lawyers in the United States), the individual states, through their courts and legislatures, are the sole regulators of professional ethics.¹¹⁸ At the request of the ABA Commission, many states have studied, or are studying, the impact MDPs might have on their own jurisdictions.¹¹⁹ Results from these independent state studies have varied.¹²⁰ Although no state has thus far explicitly allowed fully-integrated MDPs, some jurisdictions, particularly Washington, D.C. and New York, allow some sort of arrangement for lawyers and non-lawyers to work together.

Washington, D.C. is the only jurisdiction that allows fee sharing and partnership agreements between lawyers and non-lawyers.¹²¹ Although it permits MDPs, the D.C. rule only allows partnership agreements that are “structured as a law firm that provides legal services.”¹²² Thus, the partnership cannot perform any services other than legal services—its sole purpose must be to render legal services. For example, an accountant can be a partner at a law firm but only in order to assist in the firm’s tax practice.¹²³ Likewise, an economist can help with a law firm’s antitrust practice, and a psychologist can assist in family law related matters, but neither can render their own traditional professional services.¹²⁴ Furthermore, these fee sharing and interdisciplinary partnerships are only allowed if both the lawyers and the non-lawyers practice in D.C.¹²⁵

Despite its unique view, the D.C. exception to the ban on MDPs has not resulted in many law firms having partners who are non-lawyers.¹²⁶ Two reasons have been given for the lack of interest by professionals to take advantage of the D.C. Rule. First, the “sole purpose” clause significantly limits other professionals from joining the firm.¹²⁷ Second, because many D.C. law firms have offices in other jurisdictions, they are precluded from participating in such arrangements.¹²⁸ Despite these limitations, Washington, D.C. is a

118. Ourednik, *supra* note 1, at 170.

119. See MDP INFORMATION BY STATE, *supra* note 56.

120. *Id.*

121. See D.C. RULE OF PROF’L CONDUCT 5.4 (2000); Ourednik, *supra* note 1, at 175.

122. Ourednik, *supra* note 1, at 176.

123. Stein, *supra* note 1, at 1538.

124. *Id.*

125. Ourednik, *supra* note 1, at 176.

126. *Id.*

127. Stein, *supra* note 1, at 1539; Prince, *supra* note 35, at 264.

128. Stein, *supra* note 1, at 1539; Prince, *supra* note 35, at 265.

pioneer in MDP legislation and regulation and will be looked to as an example by other states that decide to permit MDPs.

New York, one of the states that supported Recommendation 10F and the resistance against the ABA Commission, has since lessened its strong opposition to MDPs.¹²⁹ In response to a 400-page report that studied MDPs, the New York State Bar Association adopted provisions that rejected fully-integrated MDPs, but supported "side-by-side" arrangements between lawyers and non-lawyers.¹³⁰ The revised provisions require that sole responsibility for legal work rest with the lawyer, and prohibit interference with the attorney-client privilege.¹³¹ Pursuant to the provisions, an attorney's communications with his clients are to remain confidential,¹³² and lawyers must provide their clients with a "Statement of Client's Rights."¹³³ Notwithstanding the restrictions, however, lawyers and non-lawyers in New York apparently can collaborate side-by-side to render their professional services to clients.

Washington, D.C. and New York are not the only jurisdictions that have weighed in on the issue of MDPs. Most state bar associations have, at a minimum, set up a committee to study MDPs.¹³⁴ As many proponents of a permissive rule on MDPs predicted, however, states are widely split. While at least six state bar associations—California, Colorado, Washington, D.C., Georgia, Maine, and South Dakota—are pro-MDP (either recommending support for MDPs or are waiting for a vote), twenty-five have rejected MDPs outright.¹³⁵ Fifteen states have either postponed their studies or are still waiting on a vote; the remaining nine states never established a committee to do so in the first place.¹³⁶ This fracture among the various states has ensured that the MDP debate will continue. As a result of the scattered state approaches to the MDP debate, the growing international support, and the ambiguity of the

129. Corinne N. Lalli, *Multidisciplinary Practices: The Ultimate Department Store for Professionals*, 17 ST. JOHN'S J. LEGAL COMMENT. 283, 289, 302 (2003).

130. *Id.* at 289–90. The revised provisions became effective in November 2001. *Id.* at 292.

131. *Id.* at 292–93, (citing John Caher, *New York State Bar Chief Will Grapple With MDP's*, N.Y. L.J., June 1, 2000, at 1).

132. *Id.*

133. *Id.*; see also N.Y. COMP. CODE R. & REGS. CODE OF PROF'L. RESPONSIBILITY § 1205.4 (Mary C. Daly ed., 2002) ("[A] lawyer shall provide the client with a statement of client's rights").

134. See MDP INFORMATION BY STATE, *supra* note 56.

135. *Id.*

136. *Id.* A North Carolina task force issued a report in September 2000 supporting lawyer controlled MDPs, but no action is pending. *Id.*

rules prohibiting MDPs, both opponents and proponents of MDPs have significant support for their arguments.

III. THE NEGATIVES AND POSITIVES OF MDPs

A. *Arguments Against MDPs*

Those in support of the current ban on fee and control sharing between lawyers and non-lawyers generally claim that they are trying to preserve the “core values” of the legal profession. Opponents of MDPs insist that MDPs will erode the independent judgment of lawyers and the independence of the legal profession as a whole. They also contend that confidentiality and the attorney-client privilege will be compromised. Other primary arguments include that MDPs will create insurmountable conflicts of interest and that regulation of MDPs will be too difficult. This Section discusses, in turn, each of these arguments against the construction of MDPs.

1. Professional Independence

The lawyer’s ability to exercise professional judgment free from outside influence has long been a cornerstone of the legal profession.¹³⁷ The importance of independence to the legal profession can be illustrated by the fact that the concepts of professional and judgmental independence are reiterated at least seven times in the Model Rules.¹³⁸ Professional independence is further emphasized by Resolution 10F.¹³⁹ Opponents of MDPs argue that this independence will erode if lawyers work under the supervision of non-lawyers.¹⁴⁰ Most opponents assume that there is a direct correlation between non-lawyers’ control of a partnership and the lawyers’ loss of independent judgment. If other professionals start to bring more money to the partnership, then they will likely be able to exert more control over firm policies and might compromise lawyers’ judgment.¹⁴¹ Similarly, opponents argue that non-lawyer controlled

137. Biamonte, *supra* note 35, at 1176.

138. MODEL RULES, *supra* note 22, Preamble, R. 1.7, 2.1, 4.2, 5.4, 5.7, and 8.2.

139. See Levinson, *supra* note 14, at 142 (citing the Resolution for the proposition that independent professional judgment benefits the public interest); see also *supra* note 50 and accompanying text (discussing Resolution 10F).

140. The Commission noted that this was the “most frequently raised concern” in its investigation. 1999 REPORT, *supra* note 15.

141. Biamonte, *supra* note 35, at 1176 (citing L. Harold Levinson, *No: Keep the Profession Distinctive*, A.B.A. J., May 1990, at 39) (arguing that such an occurrence would dilute normative values of the legal profession); Terry, *supra* note 58, at 891–92 (“The concern is that lawyers ultimately would follow the dictates of their employers, who don’t

firms will “strip” lawyers of their independent judgment because lawyers will have to “consider other client needs such as business strategy, medical problems or family issues instead of only legal considerations.”¹⁴²

Opponents also worry that other professions will invade the legal profession and that the legal profession will lose its identity, independence, and ethical responsibility if MDPs are allowed. Many see the Big Five as already infringing on the legal profession because they offer both auditing and consulting services, the latter of which look very similar to tax services.¹⁴³ The concern about other professions obtaining traditionally legal work is not limited to accounting firms. Many other practice areas are also threatened by MDPs, as “we could soon have title companies openly practicing real estate law, [and] banks practicing estate planning and probate law.”¹⁴⁴ Members of the legal profession rightly fear the loss of their service niche.

Another potential ramification of the loss of professional independence is that the legal profession’s commitment to pro bono work might be sacrificed as non-lawyers may be more interested in generating profits than they are with creating access to justice and the legal system.¹⁴⁵ Furthermore, “non-lawyers, in their interpretation of [the Model Rules] are more likely to be influenced by economic considerations and are less likely to uphold the integrity of the legal profession.”¹⁴⁶

2. Confidentiality

Currently, Model Rule 1.6 provides that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”¹⁴⁷ This confidentiality requirement does not discriminate against persons to whom the lawyer can disclose information—he cannot disclose it to anyone unless one of

understand client needs, rather than following the lawyers’ own judgment.”).

142. Prince, *supra* note 35, at 258–59.

143. 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, 1097–98 (2000); Stein, *supra* note 1, at 1534.

144. Stein, *supra* note 1, at 1530.

145. Lawrence J. Fox, *Dan’s World: A Free Enterprise Dream; An Ethics Nightmare*, 55 BUS. LAW. 1533, 1552–53 (2000).

146. Lalli, *supra* note 129, at 299–300.

147. MODEL RULES, *supra* note 22, R. 1.6(a). Rule 1.6 continues by outlining specific situations in which an attorney may disclose a client’s information such as to prevent serious injury or bodily harm or to prevent a crime from being committed. *Id.* R. 1.6(b).

the exceptions applies.¹⁴⁸ This prohibition would, therefore, forbid lawyers from confiding in other professionals within the MDP without the client's consent: a fact that would make doing business together quite challenging.¹⁴⁹

Opponents argue that altering the Model Rules to allow MDPs will also create significant confusion for the client. This will be especially true in situations where the client divulges information to multiple professionals, some of whom are bound by a duty of confidentiality—like lawyers, doctors and psychiatrists—and others who are not—such as financial planners, accountants in some situations, and social workers.¹⁵⁰ For example, if a lawyer learns of past child abuse, he cannot disclose the information without the client's consent. On the other hand, a mental health professional has an obligation to disclose such information to government authorities.¹⁵¹ Opponents claim that the client will unlikely be able to distinguish when the attorney-client (or another) privilege applies and when it does not. The more the professional services are mixed and the more distinctions between them are blurred, the larger the confusion will be for the client as to whether confidentiality is required.¹⁵²

3. Conflicts of Interest

A related problem is the increased likelihood of conflicts of interest. The conflicts of interest that could arise in MDPs come in two forms: conflicts between different professional obligations and conflicts between devotion to the client and devotion to the

148. MODEL RULES, *supra* note 22, R. 1.6.

149. One may question how lawyers are able to disclose privileged client information to secretaries or paralegals without violating the attorney-client privilege, yet would not be able to divulge similar information to other professionals within the same MDP. Most state responsibility codes charge attorneys with the responsibility of ensuring that non-attorney staff members follow the same rules of ethics that apply to attorneys. See *id.* R. 5.3 (non-lawyer assistants must follow the same rules of ethics as lawyers). This rule, as it stands now, does not apply to other professionals, only to assistants. See *id.* R. 5.3 cmt. 1. Thus, consent is needed to divulge protected information to other professionals, but is not needed to disclose the same information to secretaries and paralegals.

150. See, e.g., Ourednik, *supra* note 1, at 173 (discussing concerns that the client will not know when privileges apply).

151. See 1999 REPORT, *supra* note 15 (noting the obligation of a mental health professional to disclose suspected child abuse); see also David A. Hoffman and Richard N. Wolman, *Multidisciplinary Practice: Three Dimensional Client Services*, 48 MASS. PSYCH 14, 16–17 (2004) (discussing the mandatory reporting requirements for mental health professionals).

152. Michael Traynor, *Some Open Questions About Attorney-Client Privilege and Work Product in a Multidisciplinary Practice*, 36 WAKE FOREST L. REV. 43, 45 (2001).

partnership.

The conflicting duties of the lawyer and the mental health professional is one example of competing professional obligations. Another common example of conflicting professional duties is the lawyer's duty of confidentiality as opposed to the auditor's obligation of public disclosure.¹⁵³ This fundamental conflict between lawyers and CPAs was described by the Supreme Court in *United States v. Arthur Young & Co.*¹⁵⁴ as follows:

[T]he private attorney's role [is] as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a public responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.¹⁵⁵

While the accountant must maintain "total independence from the client" and "owes ultimate allegiance" to the public as well as to clients, the lawyer must embrace the client's needs and owes allegiance only to the client and the profession.¹⁵⁶

A related argument is that the imputation disqualification¹⁵⁷ would have to be completely abandoned with the advent of large MDPs because it would be almost impossible, especially in big accounting firms, to avoid conflicts of interest internal to the firm.¹⁵⁸ While this dilemma is apparent in large law firms today, it is more

153. Biamonte, *supra* note 35, at 1179; Prince, *supra* note 35, at 260; Stein, *supra* note 1, at 1533.

154. 465 U.S. 805 (1984).

155. *Id.* at 817-18.

156. *Id.*

157. See MODEL RULES, *supra* note 22, R. 1.10 (proscribing imputation conflicts); see also Ourednik, *supra* note 1, at 173 (discussing the potential for imputation conflicts in large accounting-based MDPs).

158. See Biamonte, *supra* note 35, at 1184-85 (arguing that members of the Big Five (now the Big Four) cannot effectively follow the Model Rules, due to size constraints); Fox, *supra* note 143, at 1110 (discussing the possibility that an MDP may represent a client and an adversary without the knowledge of either).

manageable to construct a “firewall” between the firm and the lawyer in a law firm of 500 attorneys than it would be in a 1,000 person service firm with a variety of professionals and their potentially conflicting duties.

Conflicts of interest are also more likely to arise, opponents argue, between a lawyer’s duty of loyalty in representation and his duty to the professional partnership. The Model Rules require that a lawyer base his decisions on the rule of law in the best interest of the client.¹⁵⁹ A partnership agreement with other professionals, on the other hand, would create a duty of loyalty to the other professionals involved.¹⁶⁰ As a result, lawyers in non-lawyer-controlled MDPs might be forced to base their decisions on partnership demands rather than on the rule of law.¹⁶¹ For example, “a lawyer in an MDP may feel pressure to refer a client to other professionals in the same firm although the client may be better served by someone outside the firm.”¹⁶² This would obviously violate Model Rule 1.7, which forbids a lawyer from representing a client when the representation might be limited by a lawyer’s interest or responsibility to others.¹⁶³

4. Regulation

Opponents also argue that there is no effective way to enforce MDP regulations.¹⁶⁴ The most commonly suggested solution has been to have state courts regulate MDPs.¹⁶⁵ However, even some proponents agree that this would be too arduous and difficult a task for three reasons. First, the courts have little or no experience

159. See, e.g., MODEL RULES, *supra* note 22, Preamble, cmt. 2 (requiring zealous advocacy), R. 1.4, cmt. 5 (citing the duty to act in the client’s best interest).

160. As prescribed by general agency law and fiduciary duty principles.

161. Prince, *supra* note 35, at 257.

162. Morello, *supra* note 9, at 226. This predicament is generally avoided in large law firms because often the firm, rather than the individual lawyer, often retains the client’s business. Thus, in most cases, the representation does not change even if one lawyer refers the client to a lawyer in another department with the same firm. Such a solution would be untenable in an MDP. A non-lawyer-controlled MDP could not engage the client for all its service needs because doing so would likely violate UPL statutes and the Model Rules in that other professionals would be determining the scope of legal representation.

163. MODEL RULES, *supra* note 22, R. 1.7(b), cmt. 1.

164. See, e.g., Written Reply of Sydney M. Cone III (June 22, 1999), at <http://www.abanet.org/cpr/cone3.html> (last visited Dec. 5, 2004) (arguing that the enforcement provisions advocated in the REPORT, including administrative audits and judicial oversight, are inadequate to ensure compliance with the Model Rules) (on file with the North Carolina Law Review).

165. This was the Commission’s suggestion as to how to regulate non-lawyer-controlled MDPs. 1999 REPORT, *supra* note 15.

regulating multidisciplinary issues.¹⁶⁶ Thus, there is no template for regulation. Second, the courts are often “reactive enforcers,” in that they only get involved *after* a complaint has been filed.¹⁶⁷ Third, the dearth of judicial funds available to enforce ethics provisions will prohibit effective progression of regulation.¹⁶⁸ As a result, enforcing MDP regulations would be “procedurally unrealistic.”¹⁶⁹ Furthermore, since the ABA alone has not been able to prohibit accounting firms from providing some legal services, it is unlikely that conflicting views of several professional regulatory boards¹⁷⁰ would be able to regulate fully-integrated MDPs.

B. Arguments in Support of MDPs

In addition to trying to discredit the arguments to the contrary, proponents of MDPs have cited many reasons why the creation of professional partnerships would benefit the legal profession. These arguments are more varied than their counterparts and include: meeting client demand, providing better client services, keeping up with other professions and the rest of the world, and regulating them before it is too late, as *de facto* MDPs are already spreading.

1. Meeting Client Demand

According to the Commission's Report, the primary reason for allowing and regulating MDPs is to meet increased client demand.¹⁷¹ With rapid growth in technology and the globalization of the economic and legal markets, “the advice a client needs must draw upon the talented resources of all . . . professions in order to be effective.”¹⁷² As businesses and lifestyles become more integrated, so too must the professional services that are provided. Clients of all

166. See, e.g., Schneyer, *supra* note 7, at 1492 (asserting that, because most interference risks have been pre-empted by discouraging the conditions under which they may arise, there is little judicial precedent for dealing with the unique issues raised by MDPs).

167. *Id.* at 1481–82. Judicial regulation of MDPs, however, would likely require “active enforcement” due to the novelty of the entities. *Id.*

168. *Id.*

169. *Id.*

170. Regulatory boards include the ABA, the American Institute of Certified Public Accountants (which promulgates its Code of Professional Conduct), and the American Psychological Association (which promulgates its Ethical Principles of Psychologists and Code of Conduct). See Ourednik, *supra* note 1, at 168 n.7.

171. 1999 REPORT, *supra* note 15; see also Lalli, *supra* note 129, at 296 (noting that consumer demand is the “strongest force driving this trend forward,” and that “[o]ur nation has long since relied on consumer demand to drive the market and acceptance of the MDP trend should not be any different”).

172. Stein, *supra* note 1, at 1531.

sizes and needs are now looking for integrated services and one-stop shopping. Large corporations with legal, financial, and tax issues seek advice from several professionals and would benefit from integrated legal services.¹⁷³ New generations of individual clients expect and demand easy satisfaction of their professional service needs.¹⁷⁴ The elderly, in particular, have a significant need for integrated professional services.¹⁷⁵ Although some opponents argue that client demand is a "myth,"¹⁷⁶ and while proponents realize that MDPs may not be the best solution for every client in every legal situation, allowing MDPs will simply create another option for the client.

2. Providing More Efficient, Less Costly Services

Another popular argument proffered by proponents is that MDPs will increase the quality of service provided to clients in a variety of ways.¹⁷⁷ With better coordination and easier communication between service providers, costs (for both professionals and clients) will decrease and services will become more efficient and easier to access.¹⁷⁸ A more diverse selection of professional services will result in better consumer protection for clients.¹⁷⁹ Larger networks among professionals will also increase "the speed with which attorneys respond to client issues."¹⁸⁰ Finally, using one firm for an entire transaction or personal issue will "provide the client a higher degree of trust and confidence that all aspects of the transaction will be understood and handled appropriately."¹⁸¹

173. Jim Kelly, *Long Arm of the Law: The Big Five May be Right That Clients Want Them to Move into Legal Services*, FIN. TIMES, Sept. 9, 1999, at 29; Prince, *supra* note 35, at 253-54.

174. Stein, *supra* note 1, at 1531-32.

175. See Ourednik, *supra* note 1, at 189-90 (explaining how and why the elderly would benefit from being able to only have to travel to one service provider for assistance with estate planning and financial advice).

176. Fox, *supra* note 143, at 1108.

177. Biamonte, *supra* note 35, at 1166.

178. McBryde, *supra* note 11, at 194 (citing 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, 1183 (2000)). The costs that will supposedly decrease include transaction, research, contracting, coordination, monitoring, and information costs. Lalli, *supra* note 129, at 297.

179. McBryde, *supra* note 11, at 213.

180. Biamonte, *supra* note 35, at 1166.

181. *Id.*; see also John S. Dzienkowski & Robert J. Peroni, *Shaping the Future of Law: ABA's Multidisciplinary Practice Proposals Will Stymie the Growth of MDPs, Golden Age is Over*, LEGAL TIMES, Aug. 2, 1999, at 27 (arguing that the "extra" regulation proposed by the ABA is unnecessary and will create inefficiencies for corporations that have to seek

3. Keeping Pace with the Globalization of the Economy

Proponents also cite the need to keep pace with accounting firms domestically and large integrated professional service firms globally. Already, "[a]ccounting firms are vigorously seizing the opportunity to satisfy client demand for [the] newly developed market niche"¹⁸² of one-stop shopping. Thus, while big law firms in the United States are able to create large networks of lawyers, they are dwarfed by the accounting firms that have offices in almost every major city in the country and around the world.¹⁸³ Proponents argue that giving lawyers access to this enlarged network is essential if the legal profession is going to stay on the cusp of the internationalization and expansion of professional services.¹⁸⁴ As MDPs are already allowed in many European countries and Canada, proponents seek to "harmonize the legal practice into the new economic reality."¹⁸⁵ If the United States' legal profession is going to stay globally competitive, MDPs seem to be a requisite.

4. Getting Involved Before It Is Too Late

Another argument in support of MDPs is that MDPs are already here,¹⁸⁶ and if the legal profession is going to survive, it must be able to regulate MDPs on its own terms. The ABA has already jeopardized its ability to regulate MDPs by leaving the issue to be debated by the states individually. If the states do not begin regulating them soon, however, MDPs will control themselves or business will move elsewhere. Proponents feel that the legal profession is quickly being passed by the professional-service-providing industry,¹⁸⁷ and that if U.S. lawmakers do not embrace the MDP revolution, then the legal profession will be left withering in its wake.

IV. PRESENT DE FACTO MDPs AND OTHER ANCILLARY BUSINESSES AND WHAT THEY CAN TEACH US ABOUT THE FUTURE OF MDPs

Although fully-integrated MDPs are prohibited in the United States, lawyers and non-lawyers are finding ways to work together in

services from multiple providers).

182. Lalli, *supra* note 129, at 287.

183. Biamonte, *supra* note 35, at 1166.

184. Prince, *supra* note 35, at 254.

185. Stein, *supra* note 1, at 1531.

186. See, e.g., *infra* Part IV (presenting examples of current MDPs).

187. Powell, *supra* note 59, at 128.

de facto MDPs. While these partnerships and practices are not technically MDPs under the ABA's definition, they involve lawyers working alongside accountants, mental health professionals, physicians, financial consultants, workplace managers, and/or other professionals. De facto MDPs come in the form of large, professional service firms with corporate clients and smaller, more individual-service-based boutiques. This Section of the Comment examines some of these de facto MDPs that exist today despite the MDP ban. It discusses how they either meet or dispel concerns and expectations in order to illustrate what regulators should require and forbid as MDPs push their way into the professional service sector in the United States. The arguments for MDPs, specifically satisfying client demand and enhancing the quality of service, apply to almost all types of MDPs. However, the small individual client-supportive firms more easily dispel the concerns regarding MDPs. Thus, future regulators will be better off following the examples of the boutiques rather than the large professional service firms.

A. *Large Professional Service Firms*

It is no secret that large accounting firms have invaded the legal profession in the United States. One outraged member of the legal profession has described the actions of the Big Five¹⁸⁸ as "a frontal assault on the legal profession"¹⁸⁹ and a "guerilla war."¹⁹⁰ The Big Five have appropriated work, lawyers, and clients from the legal profession at an astonishing rate.¹⁹¹ These self-proclaimed "professional service firms" practice tax, ERISA, employment, mergers and acquisitions, and other consulting services,¹⁹² all of which have been traditionally practiced solely in law firms. In fact, some professional service firms have even represented clients in federal district court and federal claims court.¹⁹³ Furthermore, the Big Five have hired a significant number of lawyers. As early as 1997, the Big Five each employed hundreds of lawyers.¹⁹⁴ Since then, the number

188. For consistency's sake, the author uses the term "the Big Five" despite Arthur Andersen's recent collapse. See *supra* note 8.

189. Fox, *supra* note 143, at 1097.

190. *Id.* at 1107.

191. See, e.g., *id.* at 1097 ("[T]he accounting firms have hired thousands of lawyers who leave their law firms on Friday and show up on Monday doing the exact same thing for the exact same clients, but now as employees of the non-lawyer Big [Five].").

192. *Id.* at 1097.

193. Stein, *supra* note 1, at 1534-35.

194. See Elizabeth MacDonald, *Lawyers Protest Accounting Firms' Hiring*, WALL ST. J., Aug. 22, 1997, at B8 (noting that Ernst & Young had hired 800 tax lawyers; PWC had

has grown significantly. If measured by the number of lawyers employed in 2000, Arthur Andersen was the biggest law firm in the United States with 1,800 lawyers.¹⁹⁵ The numbers have undoubtedly continued to increase as now the legal staffs of the Big Four are expanding by about thirty percent a year.¹⁹⁶

Large professional service firms are not keeping their legal practice secret from the public. In 2000, Arthur Andersen placed a full-page ad in the *New York Times Magazine* which promoted its "Legal Services."¹⁹⁷ Ernst & Young advertises its construction litigation support services on its web page.¹⁹⁸ Ernst & Young even launched its own law firm, McKee, Nelson, Ernst & Young, in early 2000.¹⁹⁹ The other professional service firms have also advertised litigation support and merger and acquisition services.²⁰⁰

The Big Five practice law even though Model Rule 5.4 proscribes lawyers from "practic[ing] with or in the form of a professional corporation or association authorized to practice law for a profit" if the entity is owned or controlled by a non-lawyer.²⁰¹ Regulators have been unsuccessful at keeping large accounting firms from providing what appear to be legal services in part because of the Supreme Court's decision in *Goldfarb v. Virginia Bar*.²⁰² *Goldfarb* held that "non-public bar associations are subject to federal antitrust laws, and as such, not permitted to limit competition between lawyers and non-lawyers."²⁰³ Skeptics, on the other hand, say that the Big Five are too big to regulate and the lawyers within them are simply "blatantly violating" the rules.²⁰⁴

Although the Big Four may not be MDPs per se, they are clearly a major force in the MDP debate. Not only were they one of the

hired 500; and Arthur Andersen had hired 1,000).

195. Tia Breakley, Note, *Multidisciplinary Practices: Lawyers and Accountants Under One Roof?*, 2000 COLUM. BUS. L. REV. 275, 298 (2000).

196. Sexton, *supra* note 84, at 191-92.

197. Fox, *supra* note 143, at 1107.

198. See Ernst & Young website, at http://www.ey.com/global/Content.nsf/US/AABS_-_Specialty_Advisory_-_IDS_-_Services_-_Construction_Litigation.html (last visited Dec. 5, 2004) (on file with the North Carolina Law Review).

199. Fox, *supra* note 143, at 1100; see also Lawrence J. Fox, *New Firm: Wolf in Sheep's Clothing*, NAT'L L.J., Jan. 24, 2000, at A23 (discussing the new firm).

200. See, e.g., Deloitte Touche & Tohmatsu website, at <http://www.deloitte.com> (last visited Dec. 5, 2004) (listing "legal" under the firm's service tabs) (on file with the North Carolina Law Review).

201. MODEL RULES, *supra* note 22, R. 5.4(d). See Powell, *supra* note 59 and accompanying text.

202. 421 U.S. 773 (1975).

203. Ourednik, *supra* note 1, at 185 (citing *Goldfarb*, 421 U.S. at 792-93).

204. Fox, *supra* note 143, at 1097.

primary reasons that the ABA Commission was created in the first place,²⁰⁵ but they are also the primary reason the House of Delegates rejected the Commission's proposal and affirmed the stance taken in Rule 5.4.²⁰⁶ Each of the primary arguments against MDPs discussed above applies to, and is accentuated by, large professional service firms. In addition to infringing upon practice areas and luring lawyers away from law firms, the Big Four are encroaching on the independence of the legal profession, especially in terms of influencing lawyers' decisions.²⁰⁷ It is more likely that a lawyer's independent judgment will be compromised in a large firm where the lawyer pulls less weight than in a smaller MDP like the ones described below. The problem with conflicting duties of confidentiality is also most readily apparent in the lawyer-accountant partnership as the lawyer has a duty of confidentiality while the accountant has a duty to disclose.²⁰⁸ Although the Big Four are wary of the problem and are trying to resolve it,²⁰⁹ this is still the largest obstacle facing lawyer-accountant MDPs. Finally, as a result of their sheer size, enforcing imputation in the Big Four would be nearly impossible,²¹⁰ as would regulating the conflicting professions.

The advantages of MDPs are also less significant in large professional service firms than in the boutiques described below. Cost effectiveness, while important to corporations, will likely have a larger, more intimate impact on a single mother of three in a divorce proceeding. While large corporate clients are certainly aware of cost reduction, the care and facility of one-stop shopping will have a more immediate benefit to an elderly man who has difficulty driving or an apprehensive employee who has just lost her job and must still provide for her family. While one-stop shopping helps large corporate clients satisfy their desires, they at least have access to such services, even if that means working with multiple firms. Individuals, on the other hand, especially poorer ones, do not always have easy access to needs such as safe, affordable housing, personal financial planning, and psychological counseling, to name a few.

While some argue that regulation of MDPs would have

205. See *supra* notes 25–28, 39 and accompanying text.

206. Biamonte, *supra* note 35, at 1188.

207. See *supra* Part III.A.1 and accompanying text.

208. See *supra* Part III.A.2 and accompanying text.

209. See Biamonte, *supra* note 35, at 1179–80 (discussing how members of the Big Five consider strategic maneuvers to avoid confidentiality and conflict of interest problems within the firm).

210. *Id.* at 1184–86 (arguing that “[t]here is no practical way that the Big Five . . . can ever adopt the legal profession’s requirement of imputation”).

prevented catastrophes such as Enron,²¹¹ each of the arguments against MDPs applies to large lawyer-accountant MDPs.²¹² Furthermore, the advantages of MDPs discussed above do not apply to large professional service firms and their clients with the same effect as they do to the smaller, individual client-based boutiques discussed below. As large lawyer-accountant MDPs also appear to be one of, if not the, primary reasons that the ABA rejected the Commission's proposal in July 2000, the legal profession runs a great risk by allowing MDPs that include accountant-lawyer partnerships, particularly the large, corporate client service firms. This does not mean, however, that MDPs as a whole should be discarded.

B. Boutiques

While the large accountant-lawyer de facto MDPs seem to embody all of the negative concerns surrounding the allowance of professional partnerships, smaller, lawyer and non-accountant de facto MDPs exhibit ways to counter the negatives and embrace the positives, setting an example for future regulators. As a result of the size and services offered, MDPs such as Boston Law Collaborative, LLC, and the Boston Medical Center's Family Advocacy Program demonstrate important client services that would be unavailable without lawyers and non-lawyers working together.²¹³

1. Boston Law Collaborative, LLC

Boston Law Collaborative, LLC ("BLC") calls itself a "multidisciplinary law firm"²¹⁴ that is "fully permissible under the existing ABA rules."²¹⁵ BLC consists of seven attorneys, a psychologist, a financial planner, and a workplace consultant.²¹⁶ The

211. See Powell, *supra* note 57, at 1299 (arguing that "if the legal profession had put the multidisciplinary practice safeguards in place two years ago when it had the opportunity to do so, Enron would probably not have happened").

212. See Ourednik, *supra* note 1, at 169 (noting that the "problem ethical areas including confidentiality, independence, conflict of interest, and assurance that all providers of legal services adhere to and are governed by the rules of ethics," existed at Arthur Andersen, which in turn led to the demise of Enron).

213. Although both of these particular case studies are from the Boston area, their geographical location is merely a coincidence. They are meant to exemplify small, individual-based de facto MDPs, rather than define the jurisdiction's position regarding MDPs.

214. See Boston Law Collaborative, LLC website, at <http://www.bostonlawcollaborative.com> (last visited Dec. 5, 2004) [hereinafter BLC website] (on file with the North Carolina Law Review).

215. Hoffman and Wolman, *supra* note 151, at 14.

216. See BLC website, *supra* note 214.

primary practice areas are family law, employment law and business law;²¹⁷ the professionals generally deal with common individual problems such as divorce, child custody, job loss, and partnership disputes.²¹⁸ The members of BLC have their own practices but work together to provide a “full range” of services in the fields of law, mediation, psychology and finance.²¹⁹

A smaller, interdisciplinary arrangement is advantageous to both the professional and the client. The system provides the professionals with a “three-dimensional” way of seeing the clients’ problems and understanding their needs.²²⁰ Working together provides the professionals with a better perspective on how they can help the client, as lawyers and CPAs are not qualified to treat psychological issues for their clients and may not always understand the complex dynamics of a workplace.²²¹ Similarly, a psychiatrist may not understand the legal issues that surround a patient’s dilemmas. Ease of communication between professionals leads to more effective resolution and increased familiarity with other professional perspectives, thus broadening the trust and understanding of the other professionals.²²² This collaborative style is more easily facilitated in a small firm like BLC than in a large MDP firm.

As a result of the efficiency and ease of collaboration among professionals, the client in turn receives a more “holistic” legal experience. At BLC, the objective is “to make clients feel seen, heard and cared for in an emotionally respectful atmosphere.”²²³ The client is not left to deal with the emotional stresses that come with divorce, old age and job loss without the aid of a professional who is trained to deal with such stressors. Instead, the client can rely on professionals who understand each other’s work and her specific problems. Because the sorts of everyday legal problems dealt with by BLC can be both emotionally stressful and financially precarious, the collective advice from a variety of professionals who are working together to understand the client’s needs is much less taxing on the client than individual opinions from different professionals who do not normally work with each other.²²⁴ On the other hand, because a

217. *Id.*

218. Hoffman and Wolman, *supra* note 151, at 14.

219. BLC website, *supra* note 214.

220. *See* Hoffman and Wolman, *supra* note 151, at 14.

221. *Id.* at 16.

222. *Id.* at 14.

223. Keeva, *supra* note 12, at 96.

224. Hoffman and Wolman, *supra* note 151, at 15. Furthermore, the client is less likely to receive conflicting advice from professionals who work together. *Id.*

corporate client typically seeks services in a different context, it may not fully appreciate the emotional advantages of an integrated legal experience.

The familiarity of BLC's professionals with each other and each other's profession would be much more difficult in a 1,000 person firm. Simply as a matter of size, members of larger law firms and professional service firms are less able to interact with other members. Cross-professional interaction and understanding are easier to achieve in a smaller setting.

In addition to embodying many of the advantages of an MDP, BLC has also found ways to remain fully lawful under Model Rule 5.4 and counter most concerns of MDP opponents. Each profession in BLC maintains a separate business entity and charges and collects its own fees for services rendered.²²⁵ Thus, it appears to comply with the prohibition on fee sharing and partnerships. No member of BLC votes on any aspect of the practice of a differing profession; thus, professional judgment is preserved. Each professional asks the clients for waivers of confidentiality if they believe that consultation with another professional will be advantageous to the client.²²⁶ If the client decides not to sign such a waiver and a consultation with another professional is needed, the professionals may collaborate, but they refrain from giving any identifying information about the client in their discussions.²²⁷ The firm also makes a practice of informing the client at the outset of consultation which information and conversations are confidential and which are not, so as to avoid the conflict of duty of the mental health professional to disclose and of the lawyer to keep client confidences.²²⁸ Once again, waivers of confidentiality and avoidance of internal imputation conflicts would be much more difficult to obtain in a large professional service firm.

By staying within the Model Rules and dispelling the major critiques of professional partnerships, BLC is able to serve a certain type of client: the individual. While *de facto* MDPs such as BLC will not necessarily be the best choice for every individual client, it provides those clients who are looking for interdisciplinary help the

225. Keeva, *supra* note 12, at 96; *see also* BLC website, *supra* note 214. Each profession also maintains separate filing systems and separate computer systems to protect confidentiality. *Id.*

226. *Id.* These waivers of confidentiality are not mandatory by any means and only pertain to waiving the privilege so that other professionals at BLC can be privy to information.

227. Hoffman and Wolman, *supra* note 151, at 16.

228. *Id.*; *see also supra* notes 150–52 and accompanying text.

ability to obtain integrated services.²²⁹

2. The Boston Medical Center's Family Advocacy Program

Since 1993, lawyers and pediatricians have worked together at the Boston Medical Center ("BMC") in the Family Advocacy Program ("FAP") to help treat and prevent illness and injury, primarily for poor children.²³⁰ Recognizing that there is a direct correlation between low-income and inadequate health care, the FAP helps poor families "access safe and affordable housing, nutrition and income support, education placements, supplemental social security income, and resolutions to domestic violence complaints."²³¹ By incorporating three attorneys into its clinical treatment team, the FAP is able take advantage of the multidisciplinary aspects of the various professions to better provide for the patient.²³²

Made up of mental health professionals, pediatricians, and lawyers, the clinical treatment team assesses patients' needs and develops appropriate plans of action for children suffering the effects of trauma.²³³ One of the attorneys' jobs is to provide training and legal assistance to the pediatricians.²³⁴ The presence of the attorney is crucial to the success of the team because it:

[A]llows clinicians to move beyond the traditional treatment modalities of in-office therapy and psychopharmacology and to assist families in changing or overcoming environmental stressors—such as substandard housing; inadequate income; custody, guardianship and visitation concerns; special education

229. For client feedback and praise, see Keeva, *supra* note 12, at 97 (discussing a specific client's reaction to the services rendered).

230. Pamela Tames et al., *The Lawyer Is In: Why Some Doctors Are Prescribing Legal Remedies For Their Patients, And How the Legal Profession Can Support This Effort*, 12 B.U. PUB. INT. L.J. 505, 505 (2003).

231. BOSTON MEDICAL CENTER, at http://www.bmc.org/development/bmc%20programs/family_advocacy.html (last visited Dec. 5, 2004) (on file with the North Carolina Law Review).

232. See Tames et al., *supra* note 230, at 505 (stating that "since 1993, lawyers have helped pediatricians at BMC and affiliated community health centers prevent illness, injury and malnutrition").

233. *Id.* at 510.

234. See FAMILY ADVOCACY PROGRAM, *Job Opening for Staff Attorney*, at <http://www.bmc.org/pediatrics/special/fap/jobs.html> (last visited Dec. 5, 2004) (outlining the role the lawyers play in the FAP) (on file with the North Carolina Law Review); see also Tames et al., *supra* note 230, at 506 (arguing that "the pediatric setting is a natural choice to implement advocacy interventions with poor families" because [p]ediatricians "are well-positioned to perform preventative screening for psycho-social issues that may be remedied by legal advocacy").

access; and immigration status issues.... [A]rmed with essential information about the family's legal rights, clinicians are more likely to address these issues with a patient's family and feel secure in the knowledge that if a family needs help, a referral to FAP for legal assistance is easily accessible.²³⁵

In addition to assisting other professionals, FAP lawyers also counsel individual families whose children are patients at BMC. Primarily through free walk-in clinics, FAP lawyers assist in matters relating to family law, domestic violence, and a host of other problems that typically plague indigent families.²³⁶ By offering such services, the FAP "helps low-income families meet their basic needs, thus increasing the likelihood of family stability and child health."²³⁷

Public interest programs such as FAP do not present the same threats, such as stolen practice areas, that traditionally concern the opponents of MDPs.²³⁸ Issues of confidentiality and conflicts of interest are addressed with waivers and upfront instructions to the clients/patients about limitations on privileges.²³⁹ Likewise, professional independence is maintained because even with the collaboration, the lawyers practice law and the pediatricians practice medicine; there is no crossing of practice area boundaries.

While mitigating concerns about some of the negative aspects of MDPs, the FAP also provides many of the benefits of MDPs, as well as additional access to justice. The legal services rendered by FAP are low-cost because they are provided primarily to poor families. The collaboration between the lawyers and doctors translates into more efficient service, as the two professions become accustomed to each other's jargon, culture, and customs.²⁴⁰ Not only is the alliance geared towards low-cost, effective service, but it is also "consistent with the legal profession's core value of public service."²⁴¹ FAP creates access to the justice system that would otherwise be unavailable to many indigent clients. Thus, in FAP, the advantages of allowing MDPs are met: the service is cost effective and efficient, the

235. Tames et. al., *supra* note 230, at 510.

236. See FAMILY ADVOCACY PROGRAM, *Family Services*, at http://www.bmc.org/pediatrics/special/fap/family_services.html (last visited Dec. 5, 2004) (listing the types of services offered by the walk-in clinics) (on file with the North Carolina Law Review).

237. Tames et. al., *supra* note 230, at 508.

238. *Id.* at 508-09.

239. See *id.* at 524-25 (discussing confidentiality complications and how they are normally managed).

240. *Id.* at 509.

241. *Id.* at 508.

market demand is met, and the quality of service for the patient is better than it otherwise would be. At the same time, the core values of the legal profession are preserved and every effort is made to avoid confidentiality conflicts of interest, since the doctors do not impinge on the lawyers' line of work.

3. Other Ancillary Cooperative Businesses

The systems employed by BLC and FAP are not the only ways in which lawyers and non-lawyers can work alongside each other without violating Rule 5.4. Professionals are not prohibited from sharing office suites in hopes of generating walk-in clients as long as certain guidelines are followed:²⁴² each profession must keep a separate computer system;²⁴³ the various professionals can advertise together as long as it is clear that each is a separate entity;²⁴⁴ and professionals can also refer clients to one another if there is no referral fee or expectation of reciprocal referrals.²⁴⁵ While several ethical issues surround office sharing arrangements,²⁴⁶ such a cooperation of professionals has the same advantages as the boutiques described above. Lawyers and non-lawyers can also work together in a partnership if they do not practice law, such as in an "ancillary business" governed by Model Rule 5.7.²⁴⁷

As they exist today, de facto MDPs—whether one of the Big Four, a boutique such as BLC or FAP, or another office sharing arrangement—are the sole measuring stick that proponents and opponents have to judge potential future regulation. Most of the arguments, however, have been hypothetically based. As state bar associations continue to study the effects of MDPs on society and the legal profession, they should keep in mind how publicly important MDPs such as BLC and FAP can be. Future regulators should also take note of how efficiently collaborations like these are able to dispel opponents' concerns and expand on the advantages of MDPs. At the same time, regulators should not overlook the enhanced concerns that large, financially driven, lawyer-accountant MDPs embody.

242. Levinson, *supra* note 14, at 146.

243. *Id.* at 148–49.

244. *Id.* at 146–47. The use of a common trade name and partnership appearance violates Resolution 10F and Model Rule 5.4. *Id.* at 148.

245. *Id.* at 146.

246. *See id.* at 146–49 (discussing various ethical issues surrounding office sharing arrangements).

247. Rule 5.7 is beyond the scope of this paper, however.

CONCLUSION—WHERE SHOULD WE GO FROM HERE?

The MDP debate is not going away. Even though MDPs have been re-banned by the ABA and several states, pressure to allow such collaborations continues. Such endorsement alone suggests that the battle will carry on and that proponents will persist until MDPs are permissible in the United States. Proponents have not given up yet—what is to stop them now?

If the MDP issue is going to continue until there is some sort of regulation permitting professional partnerships, there are three approaches regulators can take: (1) do nothing, permitting interested lawyers to find ways to get around the rules, and let the Big Four overshadow the legal profession; (2) allow MDPs of all shapes and sizes, as was the Commission's approach in the late 1990s; or (3) regulate MDPs to take advantage of their benefits to the public while restricting their shortcomings and potential harm to the profession.

The first option is not preferable because eventually a large part of the corporate legal profession will be completely controlled by the Big Four, as accounting firms continue to envelop practice areas and lure lawyers away from law firms. The Commission in 1999 and 2000 already proposed the second option. While it received praise, the proposal was rejected for fear that much of the legal profession would be compromised or completely consumed by the large accounting firms and international businesses.

The best way to achieve the third option is to begin regulation slowly. Learning from *de facto* MDPs and altering the rules little-by-little will prove more beneficial to the profession in the long run. The ABA should allow certain combinations of professionals—pediatricians and lawyers, financial consultants and lawyers, and with the proper restrictions psychologists and lawyers—to work together in size-restricted settings. While some have argued that a simple distinction between large and small MDPs is all that is needed,²⁴⁸ this distinction only scratches the surface of the issue. Rulemakers should also consider the client base and the purpose of the MDPs they permit. Allowing MDPs that serve individual clients and benefit the public at large will not only be easier to monitor and regulate, but also be more widely accepted by the legal profession, as the majority of lawyers work in small firms with individual clients. It is already clear how these types of MDPs can avoid the concerns and threats to the “core values” expressed by opponents. Likewise, it is evident that

248. Biamonte, *supra* note 35, at 1189–91 (arguing that MDPs operated by small firms would not raise some of the problems feared by the opposition).

doing so would be much more difficult, if not impossible, in large, corporate client professional service firms. Thus, it only makes sense to allow those MDPs that help the public and do not harm the legal profession. The MDP revolution is upon us, and while we should embrace the benefits it can bring, we should not cede the entire profession to a concept that has limited applicability.

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