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## **A PRIMER ON MDPS: SHOULD THE “NO” RULE BECOME A NEW RULE?\***

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#### INTRODUCTION

The title of the Phyllis W. Beck Chair in Law Symposium was "New Roles, No Rules?" One of the "new roles" addressed at this Symposium is that of a lawyer who works in an MDP (a multidisciplinary partnership with nonlawyers).<sup>1</sup>

1. The term *MDP* sometimes is used as an abbreviation of the term *multidisciplinary partnerships* between lawyers and nonlawyers and sometimes as an abbreviation of the term *multidisciplinary practice* between lawyers and nonlawyers. Compare, e.g., Laurel S. Terry & Clasina B. Houtman-Mahoney, *What If? The Consequences of Court Invalidation of Lawyer-Accountant Multidisciplinary Partnership (MDP) Bans*, in *PRIVATE INVESTMENTS ABROAD* (June 17, 1998) [hereinafter *What If?*] (manuscript *passim*, on file with author) (discussing *multidisciplinary partnership* bans), with *ABA President Philip S. Anderson Appoints Commission on Multidisciplinary Practice* (Aug. 4, 1998) (visited Nov. 29, 1999) <<http://www.abanet.org/media/aug98/multicom.html>> (discussing appointment of committee on *multidisciplinary practice*). This news release is part of the ABA Commission on Multidisciplinary Practice Homepage. See *ABA Commission on Multidisciplinary Practice Homepage* [hereinafter *Commission Homepage*] (visited Dec. 1, 1999) <<http://www.abanet.org/cpr/multicom.html>>.

As the Reporter to the ABA Commission on Multidisciplinary Practice ("the Commission") has

Even though working in an MDP is perhaps a “new role” for a lawyer, it is not accurate to say that there are “no rules” governing this situation. The current rule is unequivocal: if a lawyer provides legal services, then the lawyer may not provide legal services in an MDP setting.<sup>2</sup>

This Article examines whether the current prohibition should be replaced with a new approach that sets the conditions under which lawyers may work in an MDP setting. This Article provides an introduction to, and overview of, the many issues related to MDPs. Consistent with my designated role at the Beck Symposium, the focus is breadth, not depth. Indeed, virtually all of the issues referred to in this Article could appropriately be discussed, in and of themselves, in an in-depth law review article. Because the work of the ABA Commission on Multidisciplinary Practice (“the Commission”) is under consideration in many states and may be discussed at the ABA 2000 Annual Meeting, I hope this survey or one-stop shopping approach to MDP issues and the work of the Commission will prove useful.

Given the length of this Article, a brief overview may be useful. The Commission recommended that the long-standing U.S. ban on MDPs be lifted, provided certain conditions are met.<sup>3</sup> I endorse the Commission’s views. The Commission hearings,<sup>4</sup> together with extensive anecdotal evidence, convince me

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observed, multidisciplinary *practice* refers to an activity, whereas multidisciplinary *partnership* refers to the legal relationships among those providing the services. See Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS (forthcoming 2000) (manuscript at 10 & n.15, on file with author). Unless noted otherwise, this Article uses the term MDP to refer to multidisciplinary partnerships or fee-sharing arrangements. It makes little sense to focus on multidisciplinary practice because most commentators endorse the principle of providing multidisciplinary practice services and because the fight is about the proper legal relationships that may be used to provide such services.

2. ABA Model Rule of Professional Conduct 5.4, which has been adopted in every jurisdiction except the District of Columbia, forbids a practicing lawyer from being a partner with, or sharing legal fees with, nonlawyers. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1999); see also *What If?*, *supra* note 1, at 32 & 68-69 n.60 (discussing adoption of Model Rule 5.4 and United States’ regulation of lawyers).

3. See *infra* Part VI.B for a discussion on why regulation is the best solution.

4. The term *hearings* refers to the three sets of public hearings held by the Commission prior to issuing its *Report*, as well as the hearings subsequent to June 1999. The pre-*Report* hearings were held in November 1998, February 1999, and March 1999. To date, the post-*Report* hearings were held in August 1999, October 1999, and February 2000.

This Article relies extensively on this testimony before the Commission and other materials submitted to it. All of the testimony and much of the other material is found on the Internet, as links from the homepage of the ABA Commission on Multidisciplinary Practice. See *Commission Homepage*, *supra* note 1.

Because the homepage is easy to cite and locate, the remainder of this Article will omit the webpage citations in order to make the Article easier to read. For witnesses who personally appeared before the Commission, this Article will include the date of testimony. The reader can locate this testimony by selecting the appropriately dated hearings from the *Commission Homepage*, *supra* note 1. Once the reader locates the appropriate hearing, the reader can simply click on the link to the witness and materials identified. I have used the names, titles, and item descriptions on the *Commission Homepage*, *supra* note 1.

In addition to the hearing testimony, this Article regularly cites to written comments not

that there is an MDP phenomenon (i.e., a significant number of lawyers are now working outside of law firm settings, doing work that would be considered the practice of law if done by lawyers in a traditional law firm).<sup>5</sup> Because of the current absolute MDP ban, these lawyers have taken the position that they are not “practicing law” and therefore are not violating the MDP ban.<sup>6</sup>

Regulators can respond to the MDP phenomenon in one of three ways: they can ignore it; they can attempt to stop it; or they can regulate it.<sup>7</sup> In my view, the last option is the only viable, desirable option.

If a regulator ignores the MDP phenomenon, the result will be parallel worlds of lawyers. One set of lawyers will practice in a traditional law firm setting and will be regulated through the ethics rules. The other set of lawyers will practice in an MDP setting, which necessarily requires that lawyer to assert that he or she is not practicing law with nonlawyers. Consequently, that lawyer may ignore those ethics rules which apply only in connection with a lawyer’s practice of law. I consider this dual world of lawyers unhealthy.

The second option is to try to stop the MDP phenomenon through use of unauthorized practice of law (“UPL”) provisions. Even assuming this is a desirable option, it is an available option only if one is able to define the “practice of law” with sufficient clarity that it can be enforced in an exclusive, criminal sense. This is doubtful. As one of the commentators at this Symposium previously explained:

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presented at any of the hearings. These materials also are accessible from a link on the *Commission Homepage*, *supra* note 1, entitled “written comments.” These items are cited hereinafter as “Written Comments Not Presented at Hearings, Comment of [name and identification, if any, as it appears on the webpage].”

A third set of items consists of the written replies to the Commission’s June 1999 *Report* to the ABA House of Delegates. These materials also are accessible as a link from the *Commission Homepage*, *supra* note 1, entitled “written replies.” These items are cited hereinafter as “Written Replies to the Commission, Reply of [name and identification, if any, as it appears on the webpage].”

Finally, this Article contains frequent citation to the testimony and supporting materials I provided to the Commission during my March 12, 1999 testimony and my July 1999 written reply to the June 1999 Commission Report to the ABA House of Delegates. All of these materials, except the written reply and oral testimony, appear in the ABA 25TH NATIONAL CONFERENCE ON PROFESSIONAL RESPONSIBILITY, SUPPLEMENTARY COURSEBOOK MULTIDISCIPLINARY PRACTICE (June 3, 1999) (on file with author). The page numbers cited refer to the pages in this book. These items are hereinafter referred to as Written Remarks of Laurel S. Terry (Mar. 12, 1999); Oral Testimony of Laurel S. Terry (Mar. 12, 1999); Terry Appendix A: Issue Checklist (Mar. 12, 1999); Terry Appendix B1-B7 (Mar. 12, 1999); Written Replies to the Commission, Reply of Laurel S. Terry. Appendices B1-B7 are charts that summarize the testimony of Commission witnesses concerning the issues identified on the Issue Checklist; these charts permit one to examine the testimony of all witnesses with respect to a single issue.

Although the terms *witness* and *testimony* are used throughout this Article, the individuals who “testified” before the ABA were not under oath, nor was the proceeding an official one. The terms are used in the legislative sense often used in the U.S. and have no formal or legal significance.

5. See *infra* notes 30-41 an accompanying text for a discussion of the MDP phenomenon and ABA conclusions.

6. See *infra* Part VI.B for a discussion of the current MDP ban. See also *infra* notes 30-41 and accompanying text for a discussion of the MDP phenomenon.

7. See *infra* Part VI.B for a more detailed discussion of these three options.

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## A PRIMER ON MDPS

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... [T]he definition of the “practice of law” is frustratingly illusive. Indeed aside from a few obvious functions (like the filing of pleadings in court or the rendering of formal opinions), it is almost impossible to define with precision what constitutes the practice of law in the United States today, at least in any exclusive sense. While it is certainly possible to list the hundreds of things that lawyers do, as bar counsel and many courts have discovered, it is very difficult to come up with a comprehensive list of many things that *only* lawyers can do. To cite but a few examples: [contract negotiation, lobbying, tax and estate planning are considered legal services when performed by a lawyer, but few would argue that nonlawyers cannot do this.]

Stated differently, the scope of the “legal monopoly” in the U.S.—*i.e.*, those activities that *only* lawyers may engage in—is fairly narrow and arguably getting narrower. Thus, any regulatory scheme that is premised on a tightly drawn exclusive definition of lawyering is likely to be either too narrow to be much good in a regulatory sense or too broad to be enforceable. I would accordingly be very suspicious of any regulatory approach to dealing with the MDP concept that depends for its effectiveness on a precise definition of the “practice of law.”<sup>8</sup>

Because I agree with this conclusion and have not heard anyone offer a satisfactory definition of the “practice of law” that can be used in an exclusive sense and defended on a principled basis if vigorously challenged, the second option of trying to stop the MDP phenomenon does not seem viable. Consequently, the remaining option is to permit MDPs but regulate MDP lawyers in the best possible manner, so as to maximize the chance of protecting clients and the public interest.

This Article summarizes the regulatory issues, analyzes the MDP Commission *Report* according to those issues, and provides my analysis of the Commission’s work. Section I begins with a review of the current U.S. rules regarding MDPs and their history. Section II provides an overview of the MDP phenomenon. Section III places the U.S. approach to MDPs in a global context by summarizing MDP developments and responses elsewhere in the world. Section IV analyzes the common regulatory questions that have emerged in the U.S. and elsewhere. Section V examines the work of the Commission. Section VI articulates the rationales for recommending a change in the current prohibition of MDPs. Section VII identifies those aspects of the Commission’s *Report* with which I disagree. Section VIII concludes by describing the post-Commission shakeout and offers observations about the future.

### I. THE CURRENT U.S. RULES REGARDING MDPS

In the U.S., partnerships and fee-sharing arrangements between lawyers and nonlawyers are banned. ABA Model Rule of Professional Conduct 5.4, like its predecessors DR 3-102 and DR 3-103, prohibits a lawyer from forming a partnership with a nonlawyer if the partnership will engage in activities

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8. Written Remarks of James W. Jones (APCO Associates, Inc.) (Feb. 6, 1999).

constituting the practice of law or the sharing of legal fees with a nonlawyer.<sup>9</sup> ABA Model Rule 5.4 lists three exceptions to the no partnership/no fee-sharing rule: these exceptions permit payment to a lawyer's estate; sale of a law practice; and participation of nonlawyer employees in a compensation or retirement plan based on profit sharing.<sup>10</sup>

Interestingly, the Comment to ABA Model Rule 5.4 provides only one rationale for this rule: it observes that the traditional limitations on sharing fees "are to protect the lawyer's independence of judgment."<sup>11</sup> Commentators cite as additional rationales concerns that fee sharing would undermine lawyer confidentiality and create conflicts of interest.<sup>12</sup> Professor Mary Daly, who is the reporter for the ABA Commission on Multidisciplinary Practice, recently summarized the history of Rule 5.4 and the bases for these additional rationales:

The original Canons of Professional Ethics adopted by the ABA in 1908 barred neither fee sharing nor partnership with nonlawyers. Those prohibitions did not formally enter the professional responsibility pantheon until the adoption of Canons 33 through 35 in 1928. Canon 33 outlawed partnerships between lawyers and nonlawyers "where a part of partnership business consists of the practice of law." Canon 34 permitted the division of legal fees, but only with other lawyers. Canon 35 warned lawyers against being "controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer . . ." From 1928 to the present, regulatory authorities have successfully invoked these provisions and their Model Code and Model Rules successors to prevent the establishment of MDPs that offered legal services to the firm's clients.

The report accompanying the amendments is silent as to the precise reason for their adoption, although it acknowledged "a substantial difference of view in the profession respecting its recommendations as to partnerships, and division of fees . . ." In words that resonate with those exchanged in the current MDP debate, one dissenter commented, "[A]side from professional policy, I think that there is nothing inherently 'unethical' in the formation of partnerships between lawyers engaged in certain kinds of work and an expert engineer, student of finance or some other form of expert." A leading scholar has concluded that the prohibitions reflect the public policy expressed in then existing statutes, case law, and ethics opinions. Their adoption is part-and-parcel of the unauthorized practice of law movement that began to flourish in the 1920's.

When the ABA adopted the Code of Professional Responsibility in 1969, it left the prohibitions in Canons 33-35 basically unchanged. To

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9. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1999) (stating rule for professional independence of lawyers).

10. *Id.*

11. *Id.* at Rule 5.4 cmt.

12. See *infra* notes 136-47 and accompanying text for a discussion of rationales concerning fee sharing.

some extent, they are strengthened by the historical commentary to the Code and the presence of Ethical Considerations addressed to the prohibited conduct, both of which accept without question the traditional justifications pressed in case law and ethics opinions. Those justifications include competence, preservation of independent professional judgment, and the existence of a lawyer-regulatory scheme for the public's protection.<sup>13</sup>

Unlike many of the ABA Model Rules, Model Rule 5.4 has been adopted virtually intact in most states.<sup>14</sup> Indeed, the District of Columbia ("D.C.") is the only jurisdiction that has departed in substance on the MDP issue from the ABA Model Rule; D.C.'s rule permits fee sharing and partnerships between lawyers and nonlawyers provided the partnership has as its *sole* purpose the provision of legal services to clients.<sup>15</sup> This D.C. rule, however, provides little practical guidance on the regulation of MDPs because it appears to be seldom used.<sup>16</sup> D.C. Ethics Counsel Susan Gilbert has offered two reasons for the infrequent use of D.C. Rule 5.4. First, the requirement that the partnership have the provision of legal services as its "sole purpose" is different than what many of the currently proposed MDPs are interested in.<sup>17</sup> In addition, ABA Ethics Committee Formal Opinion 91-360 narrowed the scope of the rule even further by concluding that a multi-jurisdictional law firm having a D.C. office cannot have a nonlawyer partner in that office. Ms. Gilbert concluded that when the multi-jurisdictional firms are eliminated, the rule is available only to D.C.-based boutique law firms that identify a specific need (i.e., the need for an accountant to do tax work or the need for an office manager).<sup>18</sup> There has been no disciplinary action under D.C. Rule 5.4(b).<sup>19</sup> In short, the D.C. experience on its revision of Rule 5.4 offers little on the difficulty or ease of regulating MDPs.

Although the MDP ban in Model Rule 5.4 has been adopted throughout the country, this traditional ban has faced one serious challenge. In 1980, the ABA Commission on Evaluation of Professional Standards, which drafted the Model Rules of Professional Conduct and is known as the Kutak Commission, proposed a version of Rule 5.4 that would have allowed fee sharing and MDPs when four conditions were satisfied: (1) there was no interference by the nonlawyer with the lawyer's professional judgment or the client-lawyer relationship; (2) client

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13. Daly, *supra* note 1, at 36-38 (footnotes omitted).

14. See, e.g., STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND REGULATIONS 308-09 (1999) (indicating only few state variations); ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 91:402 ("With one exception (the District of Columbia), few significant variations from Model Rule 5.4(b) or (d) have arisen in the states that have based their ethics rules on the Model Rules."). The *Lawyers' Manual* describes the small variations in the rules of North Carolina, Illinois, Oklahoma, Washington, Florida, Kentucky, Utah, and the District of Columbia. *Id.*

15. See D. C. RULES OF PROFESSIONAL CONDUCT Rule 5.4(b)(1) (1999). For the legislative history of D.C. Rule 5.4, see Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 392-400 (1988).

16. See Terry Appendix B1 at 2 (Mar. 12, 1999), *supra* note 4, at Threshold Issues, Item F.

17. See Testimony of Susan Gilbert (D.C. Bar) (Nov. 12, 1998).

18. See *id.*

19. See *id.*

confidences were protected; (3) the arrangement did not violate the advertising or solicitation rules; and (4) the arrangement did not involve an improper fee.<sup>20</sup> The Commission set forth the traditional explanations for the fee-sharing ban, but concluded that “the assumed equivalence between employment and interference with the lawyer’s professional judgment is at best tenuous.”<sup>21</sup> After pointing out other contexts in which regulators once opposed lawyer-nonlawyer affiliations on UPL grounds but then changed positions, the Commission concluded: “[t]he exceptions to per se prohibitions on legal service arrangements involving nonlawyers have substantially eroded the general rule, leading to inconsistent treatment of various methods of organization on the basis of form or sponsorship. Adherence to the traditional prohibitions has impeded development of new methods of providing legal services.”<sup>22</sup>

The Kutak Commission’s proposed rule was rejected during the February 1983 ABA Midyear Meeting. Interestingly, many commentators have concluded that the “fear of Sears” is what killed the Kutak Commission’s proposed rule,<sup>23</sup> although this ground is not cited in *The Legislative History of the Model Rules of Professional Conduct*.<sup>24</sup> The “fear of Sears” phrase derives from the affirmative

20. See AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 159-63 (1987) [hereinafter THE LEGISLATIVE HISTORY] (presenting proposed rule where lawyer may be employed by organization controlled by nonlawyers); MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.5 (Discussion Draft Jan. 30, 1980) (presenting rule where four same factors must be met for lawyer to practice with firm controlled by nonlawyers); AMERICAN BAR ASSOCIATION COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, PROPOSED FINAL DRAFT MODEL RULES OF PROFESSIONAL CONDUCT 175-78 (May 30, 1981) [hereinafter PROPOSED FINAL DRAFT] (presenting rule for lawyers to be employed in firm controlled by nonlawyers).

The “Kutak Commission” is the name commonly used to refer to the ABA Commission on Evaluation of Professional Standards. The Chair of this Commission was Robert J. Kutak of Omaha, Nebraska, who died shortly before the ABA Meeting at which the text of the Model Rules was approved. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 61 & n.72 (Prac. ed. 1986) (discussing Chairman of Commission, Robert J. Kutak, and membership of Commission).

21. PROPOSED FINAL DRAFT, *supra* note 20, at 177.

22. *Id.* at 178. The “lay organizations” cited included legal services organizations, lawyer-referral services, prepaid legal insurance plans, and corporate counsel.

23. See, e.g., ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 437 (3d ed. 1996) [hereinafter ANNOTATED MODEL RULES] (“The prohibition of Rule 5.4(b) has been the subject of criticism similar to that directed at the prohibition of Rule 5.4(a) regarding fee-sharing with a nonlawyer.”); Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules*, 40 HASTINGS L.J. 577, 595-96 (1989) (summarizing criticisms of rule, including “fear of Sears”); Daly, *supra* note 1, at 39 & n.93 (citing Andrews *supra*); Gilbert & Lempert, *supra* note 15, at 383 (“Quite literally, a ‘fear of Sears’ predominated—a concern that nationwide retailers like Sears, Roebuck and Company might swoop into legal practice.”).

24. See THE LEGISLATIVE HISTORY, *supra* note 20, at 160 (stating opponents’ arguments to asserted amendment, which does not mention “fear of Sears” ides). According to *The Legislative History*:

The proponents of the amendment [to change the Kutak-proposed rule] pointed out that the proposed rule represented a significant departure from existing law and argued that such a departure was neither constitutionally mandated nor warranted by circumstances. They

answer and subsequent reaction to a question posed at the February 1983 Midyear Meeting; the question was whether the Kutak Commission proposal would allow Sears to open a law firm.<sup>25</sup>

From the defeat of the Kutak Commission's proposed rule until quite recently, there has been virtually no serious reconsideration of the MDP ban in ABA Model Rule 5.4.<sup>26</sup> For example, the ABA Ethics 2000 Commission had not initially identified Rule 5.4 as one of the rules most pressingly requiring reexamination.<sup>27</sup> In August 1998, however, then-ABA President Philip Anderson announced the formation of a new ABA Commission on Multidisciplinary Practice.<sup>28</sup> Among other things, its assignment was to recommend whether any changes should be made to the current MDP ban found in Model Rule 5.4.<sup>29</sup> This examination of the current MDP ban in Model Rule

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contended that ownership and management of a law practice by nonlawyers, as would be permitted under the proposed rule, was potentially harmful. A nonlawyer, motivated by a desire for profit, would be unable to appreciate the ethical considerations involved in representing a client, and further would not be subject to any regulation or control. In the view of the amendment's proponents, the predecessor Model Code provisions defining and restricting the way in which law may be practiced ensured compliance with the Rules of Professional Conduct, guaranteed the independence of a lawyer, and also allowed for experimentation in methods of delivering legal services.

*Id.*; see also Gilbert & Lempert, *supra* note 15, at 384-92 (providing more detailed and "behind the scenes" history of Kutak proposal).

25. See Gilbert & Lempert, *supra* note 15, at 392 ("Professor Hazard has a strong memory of one question that was asked of him: 'Does this rule mean that Sears, Roebuck will be able to open a law office?' When he answered 'yes' to this question, the debate came quickly to a close and the General Practice Section's version was adopted.").

26. North Dakota proposed adopting the Kutak Commission version of Rule 5.4, but this was rejected by the North Dakota Supreme Court. See *id.* at 400-03 (noting North Dakota Supreme Court offered no reason for rejection); see also GILLERS & SIMON, *supra* note 14, at 308-09 (discussing state variations of Model Rule 5.4 including North Dakota).

27. See generally *Ethics 2000-Commission on the Evaluation of the Rules of Professional Conduct* (visited Nov. 29, 1999) [hereinafter *Ethics-2000 Homepage*] <<http://www.abanet.org/cpr/ethics2k.html>> (indicating workplans do not show Rule 5.4 as one of first rules addressed until formation of Commission). Recently, however, in order to put the issue before the Ethics 2000 Commission, one of its reporters drafted a revised version of Model Rule 5.4 which lifted the MDP ban. The proposed rule apparently was similar to D.C. Rule 5.4, discussed *supra* note 15, except that it would have allowed MDPs if "a" purpose of the MDP was the provision of legal services, deleting the D.C. requirement that the MDP have as its "sole purpose" the provision of legal services. A motion to have the Ethics 2000 Commission state that its position was to leave Model Rule 5.4 unchanged was tabled. See American Bar Association, *Center For Professional Responsibility Commission on Evaluation of The Rules of Professional Conduct, Minutes* (Oct. 15-17, 1999) (visited Apr. 5, 2000) <<http://www.abanet.org/cpr/101599mtg.html>>.

28. See *ABA President Philip S. Anderson Appoints Commission on Multidisciplinary Practice* (Aug. 4, 1998) (visited Nov. 29, 1999) <<http://www.abanet.org/media/aug98/multicom.html>> (announcing formation of commission on multidisciplinary practice by ABA).

29. The mandate of the newly-formed Commission was as follows:

The incoming president of the American Bar Association, Philip S. Anderson, today announced appointment of a Commission on Multidisciplinary Practice to examine such trends as international accounting firms purchasing law firms.

"Since the early 1990s, the Big-5 accounting firms have been acquiring law firms in Europe, and have added legal services to their list of client offerings. In the U.S., accounting firms are

5.4 was prompted by what can be called the "MDP phenomenon."

## II. THE MDP PHENOMENON

As a result of the spate of publicity during the last eighteen months, many U.S. lawyers have now heard the term "MDP."<sup>30</sup> They have learned that a significant number of lawyers now work in one of the Big Five firms.<sup>31</sup> In November 1999, a leading journal reported that excluding tax lawyers, 6,362 lawyers worked for the Big Five firms.<sup>32</sup> This journal integrated the statistics of

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recruiting partners from leading law firms to work on complex corporate issues for accounting firm clients," said Anderson, of Little Rock, Ark.

"These developments raise new issues for lawyers and their clients," said Anderson.

"This commission has a mandate to look at these issues from the standpoint of the public's best interests. While all lawyers are required to place their clients' interests above their own, this commission must set aside the financial interests of the profession and ensure that the public interest is served. I am confident that the members of the commission will do that," he said.

The commission is directed to study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public.

Additionally, the commission will analyze:

The experience of clients, foreign and domestic, who have received legal services from professional service firms and report on international trade developments relevant to the issue;

Existing state and federal legislative frameworks within which professional service firms may be providing legal services, and recommend any modifications or additions to that framework that would be in the public interest;

The impact of receiving legal services from professional service firms on a client's ability to protect privileged communications and to have the benefit of advice free from conflicts of interest; and

Application of current ethical rules and principles to the provision of legal services by professional service firms, and recommend any modifications or additions that would serve the public interest.

*Id.*

30. See generally *American Bar Association Commission on Multidisciplinary Practice Bibliography* (visited Dec. 16, 1999) <<http://www.abanet.org/cpr/multicombibliography.html>> (listing publications and Internet links on multidisciplinary practice). A LEXIS search in the U.S. news file for the past year, searching for the terms "multidisciplinary practice or multidisciplinary partnership" yielded four hundred stories. While some of these are mere references to individuals who are on MDP committees, this volume of articles within the past year has contributed to a much broader exposure of the term MDP and the issues. See generally *What If?*, *supra* note 1 (citing numerous articles on MDP phenomenon).

31. The term *Big Five* refers to Arthur Andersen L.L.P. ("Andersen"), Deloitte & Touche L.L.P. ("Deloitte & Touche"), Ernst & Young L.L.P. ("Ernst & Young"), KPMG Peat Marwick L.L.P. ("KPMG"), and PricewaterhouseCoopers L.L.P. ("PricewaterhouseCoopers"). For the sake of neutrality, this Article will refer to these five firms as the "Big Five" firms. Opponents of the MDP phenomenon tend to refer to these firms as the "Big Five accounting firms;" the firms refer to themselves as "professional services" firms.

32. See *IFLR1000 50 Largest Law Firms in the World* [hereinafter *50 Largest Firms*] (visited Nov. 9, 1999) <<http://www.lawmoney.com/homepage/news/data/top50.asp>> (showing PricewaterhouseCoopers/Landwell with 1735 lawyers, Andersen Legal Services with 1718, KPMG with 1264, Ernst &

the Big Five firms with the statistics from traditional law firms; as a result, the listing of the ten largest law firms worldwide included three of the Big Five.<sup>33</sup> Four of the Big Five ranked within the largest twenty law firms.<sup>34</sup> Two years earlier, this same journal reported that almost 2,500 lawyers worked as tax lawyers for three of the Big Five firms.<sup>35</sup>

This ranking is consistent with other data. A 1998 article in the *American Lawyer*, for example, listed statistics for “The Global 50” law firms; a separate set of figures gave the statistics for “accounting firms.”<sup>36</sup> But if one combined this data, three of the Big Five firms ranked among the ten largest law firms and four of the Big Five firms were among the fifteen largest law firms. Indeed, one of the Big Five firms recently adopted a new brand name to use in connection with its offering of legal services. On October 11, 1999, PricewaterhouseCoopers announced that its network of lawyers would be associated into a single firm called Landwell and that it plans to be one of the world’s top five global law firms within five years.<sup>37</sup>

Many of the Big Five lawyers included within this data work outside the U.S. Consequently, some commentators believe that Europe is simply different and that one can avoid the MDP phenomenon in the U.S.<sup>38</sup> I disagree. Although the MDP phenomenon has been visible longer in Europe than in the U.S.,<sup>39</sup> the MDP phenomenon appears to have significant momentum in the U.S. In November 1999, for example, several lawyers from King & Spaulding left

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Young with 954, and Deloitte & Touche with 691). “The Big Five are registered in the rankings only for their non-tax lawyers.” *Clifford Chance World’s Largest Firm, Big Five Close Behind* (visited Nov. 9, 1999) <<http://www.lawmoney.com/public/search/PreviewStory.asp?StoryNum=3165>>.

33. See *50 Largest Firms*, *supra* note 32 (indicating PricewaterhouseCoopers was ranked third, Andersen was ranked fourth, and KPMG was ranked seventh).

34. See *id.* (indicating Ernst & Young was ranked sixteenth, in addition to those firms cited *supra* note 33).

35. Phillippa Cannon, *The Big Six Move In*, INT’L FIN. L. REV., Nov. 1997, at 5. These statistics showed tax and non-tax lawyers working for three of Big Five firms; KPMG and Ernst & Young did not provide figures that were segregated by tax and non-tax work. See also *What If?*, *supra* note 1, at 7-6 (containing chart summarizing statistics provided in Cannon article).

36. *The Global 50*, AM. LAW., Nov. 1998, at 46-47.

37. See *PricewaterhouseCoopers Unifies Law Firm Branding* (visited Oct. 18, 1999) <[http://www.lawmoney.com/homepage/display\\_story/previewstory.asp?storyNum=3137](http://www.lawmoney.com/homepage/display_story/previewstory.asp?storyNum=3137)> (announcing consolidation of PricewaterhouseCoopers network of lawyers into one firm, Landwell); see also *PricewaterhouseCoopers Explains its Law Firm Branding* (visited Dec. 1, 1999) <<http://www.lawmoney.com/public/search/previewstory.asp?StoryNum=3164>> (discussing relaunching of PricewaterhouseCoopers international legal network); *Landwell Adds South African Law Firm* (visited Dec. 1, 1999) <[http://www.lawmoney.com/homepage/Display\\_Story/Previewstory.asp?StoryNum=3482](http://www.lawmoney.com/homepage/Display_Story/Previewstory.asp?StoryNum=3482)> (discussing Landwell’s addition of South African firm of Bell Dewar & Hall).

38. See, e.g., Phyllis W. Beck Chair in Law Symposium Remarks of Lawrence J. Fox, (Nov. 12, 1999).

39. See, e.g., *What If?*, *supra* note 1, § 7.02 (comparing MDP developments and publicity in Europe with relative lack of activity and publicity in U.S. and also identifying 1997 and 1998 U.S. conferences that addressed MDPs, which were some of first U.S. conferences to do so); Charles W. Wolfram, *Multidisciplinary Partnerships in the Law Practice of European and American Lawyers*, in LAWYERS’ PRACTICE AND IDEALS: A COMPARATIVE VIEW 301-16 (1999) (summarizing pre-1997 MDP developments in Europe and Australia).

their firm in order to form the new law firm of McKee Nelson Ernst & Young, which is affiliated with Ernst & Young.<sup>40</sup> According to the press release, the new law firm plans to expand to a full-service law firm, expects to have as many as fifty lawyers within the first year, will not engage in fee or profit sharing with Ernst & Young, will be financed by a loan from Ernst & Young, will lease contiguous space with the accounting firm's D.C. office, and may contract for administrative services.<sup>41</sup>

In August 1999, Big Five firm KPMG announced a strategic alliance for state and local tax work with the West Coast law firm Morrison & Foerster, Chicago firm Horwood Marcus & Berk Chartered, and University of Georgia Professor Walter Hellerstein.<sup>42</sup> On another front, the world's largest law firm was created in 1999 by the merger of U.K. firm Clifford Chance, U.S. firm Rogers & Wells, and Germany's firm Pünder, Volhard, Axel & Webster. Because Pünder is an MDP, New York lawyers presumably are now partners with nonlawyer partners in Germany.<sup>43</sup> And in early 1999, the new chair of Pillsbury Madison & Sutro pushed for relaxation of the no-MDP rule, convinced that clients want MDPs.<sup>44</sup>

The increased number of lawyers practicing in Big Five firms has come about not only through mergers with existing firms or practices, but also through recruitment of individual lawyers<sup>45</sup> and law school graduates. Indeed, some

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40. See *Ernst & Young Launches First Domestic Law Firm*, TAX NOTES, Nov. 8, 1999, at 719 ("Described in a November 3 news release as 'an alliance' and a 'venture,' the D.C.-based law firm is being co-founded by legal heavyweights . . . . Housed in Ernst & Young's Washington office, the firm will be called McKee Nelson Ernst & Young L.L.P."); Jonathan Groner & Siobhan Roth, *Envisioning A Big 5 Law Firm*, LEGAL TIMES, Oct. 25, 1999, at 1 ("For the past several weeks, company representatives have been negotiating with lawyers in the D.C. and Atlanta offices of King & Spaulding to create a business that could, for the first time, allow it to provide clients a full array of legal services . . . ."); Tom Herman, *Ernst & Young Will Finance Launch Of Law Firm in Special Arrangement*, WALL ST. J., Nov. 3, 1999, at B10 ("The new law firm is headed by William S. McKee and William F. Nelson, both former partners at King & Spaulding, an Atlanta law firm.")

41. See *Ernst & Young LLP Announces Alliance with New Washington, D.C.-based Law Firm* (visited Nov. 11, 1999) <[http://www.ey.com/global/gcr.nsf/US/11-02-99\\_-\\_Release\\_-\\_News\\_Room\\_-\\_Ernst\\_&\\_Young\\_LLPLP](http://www.ey.com/global/gcr.nsf/US/11-02-99_-_Release_-_News_Room_-_Ernst_&_Young_LLPLP)> (announcing Ernst & Young's new "alliance" with law firm).

42. See *Morrison & Foerster Hitches Tax Practice to KPMG*, INT'L FIN. L. REV., Sept. 1999, at 5 (stating alliance is first of its kind for U.S. law firms); Martha Neil, *As Firm Here Forges Alliance with CPAs*, CHICAGO DAILY L. BULL., Aug. 9, 1999, at 1, available in LEXIS NEWS file (reporting Horwood, Marcus & Berk Chartered's alliance with KPMG).

43. See, e.g., *Clifford Chance Becomes the World's Largest Firm*, INT'L FIN. L. REV., Aug. 1999, at 31 (discussing merger with opinions of competitors and clients); JUVE HANDBUCH 1998/99, WIRTSCHAFTSKANZLEIEN, RECHTSANWÄLTE FÜR UNTERNEHMEN 428 (Juve Verlag 1998) (reporting 219 of 284 service providers at Pünder, Volhard, Axel & Webster were lawyers).

44. See *New Pillsbury Madison Chair Aims for MDP*, INT'L FIN. L. REV., Feb. 1999, at 4 (quoting Pillsbury Madison Chair, "It is so obvious that the market wants this.")

45. See *Baker & McKenzie Loses Tax People to Big Five* (visited June 10, 1999) <<http://www.lawmoney.com/public/news/hotnews/news9906/news990609.4.html>> (reporting departure of six partners to Big Five firms; two of these lawyers assumed positions of heads of international tax groups at Deloitte & Touche and PricewaterhouseCoopers.); *Ernst & Young Scoops Leading Canadian Lawyer* (visited Feb. 26, 1999) <<http://www.lawmoney.com/public/news/hotnews/news9902/news990225.2.html>> (reporting departure of lawyers from leading firms Strikeman Elliott and Bennett

recent reports indicate that as many as twenty percent of graduates at some law schools are going to Big Five firms.<sup>46</sup>

So what do these lawyers working in a Big Five setting do? In addition to their traditional services of auditing, tax advice, and business management, lawyers in Big Five firms provide: estate planning; litigation support (including dispute resolution efforts and front-end services, such as investigation and discovery); valuation and business planning advice (including issues of environmental and labor law compliance and employee benefits issues); and financial planning.<sup>47</sup>

According to testimony before the ABA Commission on Multidisciplinary Practice, these lawyers are quite careful to tell their customers that they are not providing legal services and that they do not hold themselves out as lawyers.<sup>48</sup> At one conference, for example, a lawyer working in a Big Five firm said that he did not practice tax law, but practiced "tax."<sup>49</sup> This limitation is not surprising; a lawyer who admits sharing fees with a nonlawyer is subject to discipline and possible loss of his law license.<sup>50</sup>

Although Big Five lawyers deny that they practice law, they appear to do the same type of work that they did while working in a traditional law firm.<sup>51</sup>

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Jones Verchere as well as statement of departing lawyer who said he may not be last to leave law firm for Big Five because attraction of international practices will be hard to resist); *Ernst & Young Takes on Law Firms* (visited Apr. 16, 1999) <<http://www.lawmoney.com/public/news/hotnews/news9904/news990413.2.html>> (reporting hiring by Ernst & Young of Glen Kohl, tax group chair of Wilson Sonsini Goodrich & Rosati; James Eads, former general counsel for AT&T; Robert Ackerman of Mayer, Brown & Platt and former director of IRS advance pricing agreement program; Prentiss Willson, former managing partner of Morrison & Foerster's San Francisco office).

46. See, e.g., New York State Bar Association, *Report of Special Committee on Multi-Disciplinary Practice and the Legal Profession* n.52 (Jan. 8, 1998) ("The placement office of the New York University School of Law estimates that 20% of its recent graduating classes have been hired by the Big Five."), available on Commission Homepage, *supra* note 1; Written Remarks and Oral Testimony of Abbie F. Willard (Assistant Dean of Career Services, Georgetown University Law Center) (Feb. 5, 1999) (discussing Big Five recruiting practices at Georgetown and other U.S. law schools).

47. *What If?*, *supra* note 1, 7-4 n.5.

48. See Oral Remarks of Roger Page (Deloitte & Touche) (Mar. 11, 1999); Oral Remarks of Irwin Treiger and William J. Lipton (Co-Chairs, National Conference of Lawyers and Certified Public Accountants) (Mar. 11, 1999) (stating U.S. accounting firms do not hold themselves out as providing legal services).

49. Ronald E. Friedman, *Multidisciplinary Partnerships: Attorneys Working in Professional Service Firms*, in ABA 24TH NATIONAL CONFERENCE ON PROFESSIONAL RESPONSIBILITY COURSEBOOK, Tab 1, at 4-8 (May 28-30, 1998) (indicating attorneys in personal services firms do not practice law, they practice tax).

50. See *supra* notes 2, 14, 15, 27 and accompanying text for a discussion of ABA Model Rule 5.4, which sets forth the principles in force throughout the country. A violation of an ethics provision such as Rule 5.4 can expose a lawyer to discipline and possible loss of the lawyer's license. See, e.g., MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 10 (1996) <<http://www.abanet.org/cpr/disenf/rule10.html>> (enumerating such sanctions as disbarment, suspension, probation, reprimand, and admonition for acts of misconduct).

51. See, e.g., Oral Remarks of Irwin Treiger and William J. Lipton (Co-Chairs, National Conference of Lawyers and Certified Public Accountants) (Mar. 11, 1999) (stating U.S. accounting firms have lawyers working for them doing things that would traditionally be thought of as providing

ABA Commission Witness Ward Bower, president of the legal consulting firm Altman, Weil, Pensa, Inc., found conservative the estimate that one-half billion dollars of legal fees are currently included in consulting bills.<sup>52</sup>

There have been a few highly publicized efforts to pursue unauthorized practice of law charges against Big Five lawyers, but to date these efforts have been unsuccessful.<sup>53</sup> Thus, there are a large number of lawyers practicing in Big Five firms doing things that if done in a traditional law firm setting would be considered the practice of law; and this number is only increasing. As a result, the MDP phenomenon is real.

This discussion of MDPs, like much of the public discussion, has focused on lawyers working in Big Five firms. But as the Commission learned, lawyers practicing in smaller communities and smaller firms also are interested in forming MDPs.<sup>54</sup> (Lawyers practicing in smaller communities or small firms will be referred to as *Main Street* lawyers, in contrast with *Wall Street* lawyers.<sup>55</sup>) Indeed, some have predicted that if the ABA Model Rules of Professional Conduct were changed to permit MDPs, there would be as many Main Street MDPs as Wall Street MDPs.<sup>56</sup> In analyzing whether the ban on MDPs should be lifted, one must consider the impact of any changes and regulation upon Main Street clients and lawyers as well as Wall Street clients and lawyers. A Main

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legal services).

52. See Testimony of Ward Bower (Altman Weil) (Nov. 12, 1998).

53. See, e.g., Testimony of William Elliott (Kane, Russell, Coleman & Logan) (Nov. 13, 1998) (describing unsuccessful efforts of Texas UPL committee against Andersen); ABA Commission on Multidisciplinary Practice, *Updated Background and Informational Report and Request for Comments* n.30 and accompanying text [hereinafter *Updated Background Report*] (visited Dec. 15, 1999) <<http://www.abanet.org/cpr/febmdp.html>> (commenting on dismissal of Virginia UPL investigation against unnamed Big Five firm). The *Updated Background Report* is found as a link from the *ABA Commission Homepage*, *supra* note 1.

54. See, e.g., Oral Testimony of Lynda Shely (State Bar of Arizona and ABA Standing Committee on Client Protection) (Feb. 5, 1999).

55. See generally Mary C. Daly, *Practicing Across Borders: Ethical Reflections for Small-Firm and Solo Practitioners*, THE PROF. L. 123 (1995) (focusing on the ethical issues facing small firm lawyers engaged in international work as distinguished from the problems of large firm lawyers); Appendix: Issue Checklist, *infra*, at Item I(C).

56. See, e.g., Testimony of Ward Bower (Altman Weil) (Nov. 12, 1998) (stating that in England, Main Street lawyers like idea of MDPs); Oral Remarks of Neil Cochran (Dundas & Wilson C.S.) (Feb. 4, 1999) (finding MDPs are of value to Main Street clients); Oral Testimony of John Dzienkowski (Professor, University of Texas School of Law) (Feb. 5, 1999); Oral Remarks of Richard Miller (General Counsel, AICPA) (Mar. 12, 1999); Oral Remarks of Wayne Moore (Director, AARP) (Mar. 11, 1999); Testimony of M. Peter Moser (ABA Standing Committee on Ethics and Professional Responsibility) (Nov. 13, 1998) (stating that MDPs are issue for all, not just big firm lawyers); Oral Remarks of Roger Page (Deloitte & Touche) (Mar. 11, 1999) Oral Testimony of Larry Ramirez (Chair, ABA General Practice, Solo and Small Firm Section) (Feb. 6, 1999); Oral Testimony of Lynda Shely (State Bar of Arizona and ABA Standing Committee on Client Protection) (Feb. 5, 1999) (finding MDPs are of value to Main Street clients); Oral Testimony of Sidney Traum, David Ostorve, and Philip D. Brent (American Association of Attorney-CPAs) (Feb. 5, 1999); Oral Testimony of James Turner (Executive Director, H.A.L.T.) (Feb. 5, 1999); Testimony of M. Elizabeth Wall (Cable & Wireless) (Nov. 12, 1998); Oral Remarks of Lora H. Weber (Consumers Alliance of the Southeast) (Mar. 11, 1999).

Street MDP phenomenon may not have been what prompted the formation of the Commission; nevertheless, if Model Rule 5.4 is revised to permit MDPs and adopted by individual states, then there likely will be significant development of Main Street MDPs.

### III. GLOBAL RESPONSES TO MDPS

Because the MDP phenomenon is occurring on a global scale, bar association and regulatory responses have occurred not just in the U.S., but globally as well. An extensive analysis of these developments is beyond the scope of this Article, but a brief summary is useful to better understand the issues and to place the U.S. responses in context.<sup>57</sup>

#### A. Jurisdictions Expressly Permitting MDPS

At least four jurisdictions have regulations that expressly permit some form of MDPS. These jurisdictions are Germany, the Netherlands, the Law Society of Upper Canada, and the territory of New South Wales, Australia.<sup>58</sup> Germany and the Netherlands permit full integration between lawyers and certain identified categories of nonlawyers. In Germany, the categories include patent lawyers, tax advisors, auditors, and notaries.<sup>59</sup> The Netherlands also permits full integration between lawyers and certain categories of nonlawyers, including tax advisors and notaries, but not auditors.<sup>60</sup> The Netherlands' exclusion of auditors is currently on appeal before the Dutch court in the case of *Wouters v. Arthur*

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57. For a more detailed discussion of various bar association and regulatory responses to MDPS, see Terry Appendix B1 (Mar. 12, 1999), *supra* note 4 (summarizing IBA, UIA, CCBE, French, Dutch, German, and Australian approaches to MDPS, organized according to 40 issues).

58. See, e.g., Written Remarks of Dr. Hans-Jürgen Hellwig (Vice-President, Deutscher Anwaltverein) (Feb. 4, 1999) (describing Germany's regulation of MDPS); Testimony of Thomas O. Verhoeven (Oppenhoff & Rädler) (Nov. 13, 1998) (same); *What If?*, *supra* note 1, § 7.04 (describing Netherlands regulation SV 93, which permits lawyer to form partnership with certain nonlawyers whose profession has been recognized by Netherlands Bar Association; recognized categories of nonlawyers included tax advisors and notaries, but not auditors); Testimony of Andrew Scott (Law Institute of Victoria) (Nov. 13, 1998) (describing New South Wales, Australia's regulation of MDPS, as well as proposed policies by Law Council of Australia and Law Council of Victoria, Australia). *But see* ABA Commission on Multidisciplinary Practice, *Final Report, Appendix C—Reporter's Notes*, at 4 & 12 nn. 11 & 15 and accompanying text [hereinafter *Reporter's Notes*] (visited Sept. 24, 1999) <<http://www.abanet.org/cpr/mdpappendixc.html>> (stating “[o]nly Switzerland permits the establishment of a fully integrated MDP” and “it appears that the Law Society of New South Wales, Australia is the only regulator that has adopted ethics rules specifically directed to multidisciplinary practice”). Despite this statement, this author believes that the Netherlands' SV 93 and Germany's Bundesrechtsanwaltsordnung § 59a constitute ethics rules specifically directed to MDPS. This author has written an article on Germany's regulation of MDPS as part of a February 2000 Symposium at the University of Minnesota. See Laurel S. Terry, *German MDPS: Lessons to Learn*, 84 Minn. L.Rev. 1547 (2000) (forthcoming).

59. See Testimony of Thomas O. Verhoeven (Oppenhoff & Rädler) (Nov. 13, 1998) (discussing Bundesrechtsanwaltsordnung § 59a).

60. See *What If?*, *supra* note 1, § 7.04 [2][b]6 (discussing SV 93, which permits partnerships between lawyers and patent lawyers, tax advisors, notaries, but not auditors).

*Andersen and Price Waterhouse*.<sup>61</sup> Because the Dutch appellate court has referred certain antitrust issues to the European Court of Justice, a ruling is not expected soon.<sup>62</sup> To my knowledge, this Dutch case is the first case in which MDP regulations have been challenged.

Similar to the Dutch rule, the New South Wales' regulation of MDPs had been under a cloud until it was recently amended. Section 48G of the Legal Profession Act of 1987 expressly regulates MDPs. This provision states: "A barrister or solicitor . . . may be in partnership with a person who is not a barrister or solicitor, except to the extent (if any) that the regulations, barristers rules, solicitors rules or joint rules otherwise provide."<sup>63</sup>

Until December 1999, the Solicitors Rules required, inter alia, that the lawyers "maintain effective control of the legal practice and delivery of legal services."<sup>64</sup> Lawyers had to maintain majority voting rights in the affairs of the partnership and receive not less than 51% of the gross income earned by the partnership.<sup>65</sup> On June 24, 1997, the New South Wales Attorney General asked the Legal Profession Advisory Council ("the Council") to examine the issues related to the Solicitors Rules regarding MDPs; the Attorney General has the power to declare barristers and solicitors rules inoperative if they "impose restrictive or anti-competitive practices" which are not in the public interest, or if the rules are otherwise not in the public interest.<sup>66</sup> The Council advised the Attorney General that the Solicitors Rules were indeed anti-competitive and against public policy; the Council further decided that the statute should be amended to omit the reference to the Solicitors Rules in order to avoid further

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61. See also *European Court to Rule on MDPs* (visited Aug. 26, 1999) <<http://www.lawmoney.com/public/news/hotnews/news9908/news990826.4.html>> ("According to the [Dutch] Bar, the companies are breaking professional rules by allowing lawyers and accountants to work together in multi-disciplinary partnerships (MDPs).").

62. See *id.* ("The ECJ is to decide whether national Bar rules in the Netherlands contravene European competition laws."). For a discussion of the lower court Dutch case, which upheld the lawyer-auditor partnership ban, see generally *What If?*, *supra* note 1, § 7.04; see also *Dutch Bar Dispute on MDPs Grinds to Conclusion* (visited May 31, 1999) <<http://www.lawmoney.com/public/news/hotnews/news9812/news981218.5.html>> (presenting viewpoints of both sides in *Wouters*); *Dutch Bar Resolves Dispute with Ernst & Young* (visited May 31, 1999) <<http://www.lawmoney.com/public/news/hotnews/news9901/news990129.1.html>> (reporting "Dutch Bar is continuing its case against rival Big Five firms PricewaterhouseCoopers and Arthur Andersen").

63. New South Wales Consolidated Acts, Legal Profession Act 1987, Sec. 48G found in <[http://www.austlii.edu.au/au/legis/nsw/consol\\_act/lpa1987179](http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa1987179)> (visited Apr. 5, 1999).

64. See *Professional Conduct and Practice Rules (Solicitors' Rules), Rule 40, Multi-disciplinary Partnership (section 48G), History of Amendments to Rule 40* [hereinafter *Solicitors Rules*] (visited April 8, 2000) <<http://www.lawsocnsw.asn.au/resources/solrules/solrules-40.html#Heading76.html>>; see also *Solicitors Rules: Changes to Provide More Opportunities for MDPs*, LAW SOCIETY J. (New South Wales, Australia), Dec. 1999, at 36, available at <[http://www.lawsocnsw.asn.au/resources/ljsj/archive/dec1999/86\\_1.html](http://www.lawsocnsw.asn.au/resources/ljsj/archive/dec1999/86_1.html)> (visited Apr. 9, 2000).

65. See *id.* (citing Solicitors Rules 40.1.1 and 40.1.6, NEW SOUTH WALES GOVERNMENT).

66. Legal Profession Advisory Council, *Legal Profession Advisory Council Reports: Multidisciplinary Partnerships, Preamble* (visited Dec. 16, 1999) <<http://www.lawlink.nsw.gov.au/lpac.nsf/pages/paper2>>. The Council is a statutory body that advises the Attorney General on matters related to the legal profession.

promulgation by the Solicitors of rules that would hinder MDPs.<sup>67</sup> The Attorney General agreed that the rules were anticompetitive.<sup>68</sup> The revised Solicitors Rules, which became effective in December 1999, eliminated the lawyer majority control requirement and are much more liberal, permitting MDPs so long as five requirements are met.<sup>69</sup> Interestingly, the Law Society of Upper Canada recently adopted a model that shares many similarities with the now-revoked New South Wales' Solicitors Rules. After an extensive study, the Law Society of Upper Canada recently adopted a by-law that allows nonlawyer partners in firms provided that the main business remains the provision of legal services.<sup>70</sup>

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67. The entire recommendation of the Council was as follows:

1. The Legal Profession Advisory Council considers rules 40.1.1 and 40.1.6 of the Solicitors Professional Conduct and Practice Rules are restrictive and not in the public interest or not otherwise in the public interest, in that such rules adversely discriminate against non-solicitor partners in a multidisciplinary partnership and would effectively act as a bar to the formation of such partnerships, which is against the spirit of the Legal Profession Act and contravenes competition policy generally and therefore the Advisory Council recommends that the Attorney General declare such rules inoperative; and
2. It is further recommended by the Advisory Council so as to ensure that no further rules are promulgated that would hinder the formation of multidisciplinary practices, sections 48F(1) and 48G(1) of the Legal Profession Act, 1987 should be amended by deleting the reference to the 'Solicitors Rules or joint rules' where it occurs in each section.

*Id.* at Recommendation. As explained *supra*, the Solicitors Rules have now been amended. Moreover, the ABA Commission recently reported that "legislation has been introduced in New South Wales, Australia that will allow law firms to incorporate, share profits with nonlawyers, and raise capital through passive investment. Shares in these law firms will float on the Australian Stock Exchange." *Updated Background Report, supra* note 53, at n.21 and accompanying text. See also Jeff Shaw, *Incorporation of Legal Practices Under the Corporations Law*, LAW. SOC. J. (New South Wales, Australia), Nov. 1999, at 67 (report by New South Wales Attorney General of legislation he would propose).

68. See National Competition Policy Review of the Legal Profession Act 1987: Chapter Ten—The Business Associations of Solicitors and Barristers (visited Apr. 10, 2000) <[http://www.lawlink.nsw.gov.au/crd.nsf/pages/ncp\\_10](http://www.lawlink.nsw.gov.au/crd.nsf/pages/ncp_10)>.

69. These rules impose an obligation on the solicitor practicing in an MDP to ensure that: (1) the solicitors have the authority and responsibility for the management of the legal practice and delivery of legal services in NSW; (2) the MDP conducts the legal practice and delivers legal services in compliance with the Legal Profession Act, the Regulations and Rules made thereunder; (3) the MDP delivers legal services in conformity with the general requirements of the law, established ethical and professional standards in relation to areas such as client privilege, conflict of interest and duties to disclose; (4) the MDP delivers legal services in a way that ensures that the ethical and professional duties of the solicitors are not affected by other members of the partnership; and (5) the services and qualifications are accurately and fairly represented to clients and potential clients. See *Solicitors Rules, supra* note 64, at Rule 40.1-40.5.

70. See *By-laws of the Law Society of Upper Canada, By-law 25—Multi-Discipline Practices* [hereinafter *By-law 25*] (visited Apr. 9, 2000) <[http://www.lsuc.on.ca/services/services\\_bylaws\\_en.html](http://www.lsuc.on.ca/services/services_bylaws_en.html)>; Materials listed under Law Society of Upper Canada Task Force on Multidisciplinary Partnerships from the "Related Links" item on the *Commission's Homepage, supra* note 1. See also The Law Society of Upper Canada, *The "Futures" Task Force—Report of the Working Group on Multi-Discipline Partnerships: Implementation Phase* (reports 1 & 2) (Apr. 30, 1999 and May 28, 1999) [hereinafter *Law Society of Upper Canada, Report*] (on file with author) (discussing implementing MDP model adopted by Convocation on Sept. 28, 1998).

*B. Jurisdictions Where MDP Regulation is Under Consideration*

In addition to the express regulation of MDPs in Australia, Germany, Upper Canada, and the Netherlands, several other jurisdictions are considering regulation of MDPs. These include the Law Society of England and Wales, various provinces in Canada, and various French regulators. Each of these is discussed briefly below.

The Law Council of Australia, an umbrella organization similar to the ABA, adopted a policy in December 1998 endorsing MDPs and calling on Australian states and territories to remove existing restrictions on lawyers' business structures.<sup>71</sup> Victoria's The Legal Ombudsman issued a report on MDPs prior to the vote of the Law Council of Australia; this report also endorsed changing the current regulations in order to permit MDPs.<sup>72</sup> Several of the Big Five firms either have or are contemplating opening new offices in Australia in order to take advantage of expected liberalization of the rules regarding MDPs.<sup>73</sup>

Although England and Wales currently do not have legislation or rules expressly permitting MDPs, that soon could change. In October 1999, the Council of the Law Society of England and Wales voted by a 93% majority to support the long-term goals set forth in the report of its MDP Working Party; the Working Party endorsed the principle of MDPs and identified seven long-term goals concerning the conditions under which MDPs should be permitted.<sup>74</sup> The

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71. See Law Council of Australia, *Policy Statement on Multi-Disciplinary Practices* (Dec. 1998) (on file with author) ("A fundamental tenet of the Law Council's approach is that the regulation of MDPs should focus on compliance by individual lawyers with their ethical standards and professional duties rather than on the regulation of the business entity.").

72. See Testimony of Andrew Scott (Law Institute of Victoria) (Nov. 13, 1998); The Legal Ombudsman, *Discussion Paper: Multi-Disciplinary Practices* 23 (Dec. 1997) (on file with author) (stating The Legal Ombudsman's approach focuses on "consumer protection regime of the *Legal Practice Act* and how best it can be maintained within an MDP context"). At the December 5, 1998 meeting of the Law Council of Australia, the Victorian Bar Council cast the only vote in opposition to the proposed policy favoring MDPs whereas the Law Institute of Victoria supported the Law Council of Australia's proposal. See Minutes of the Law Council of Australia Council Meeting (Dec. 5, 1998) (on file with author) (reporting votes discussing MDPs).

73. See *PricewaterhouseCoopers Launches Australian Law Firm as MDP Lobbying Heats Up* (Apr. 1999) (visited Nov. 8, 1999) <[http://www.lawmoney.com/homepage/Display\\_Story/PreviewStory.asp?StoryNum=274.html](http://www.lawmoney.com/homepage/Display_Story/PreviewStory.asp?StoryNum=274.html)> (reporting PricewaterhouseCoopers launched new firm in Sydney and Ernst & Young was rumored to be gearing up for expansion of its legal services as it and other Big Five practices hope to take advantage of anticipated relaxation of MDP regulations).

74. See E-mail Letter from Denise Collis, Professional Ethics Department, The Law Society, to Laurel S. Terry, Professor of Law, Penn State Dickinson School of Law (Nov. 12, 1999) (on file with author) ("The council agreed by a 93% majority to support both the long term goals and more work on the interim solutions. We will be looking to develop the interim solutions over the next year and may see how they go before going further.") and attached document, The Law Society, *Multi-Disciplinary Practices Proposals for the Way Forward: A Preliminary Report for Debate* (hereinafter Law Society, *Preliminary Report*) (on file with author) (discussing MDPs and possible proposals for dealing with them in future).

The seven long-term goals included allowing solicitors to provide legal services through any medium to anyone, while still providing the necessary safeguards to protect the public interest;

Council also voted to move forward in exploring the two interim solutions proposed by the MDP Working Party which were designed to avoid the necessity of legislative change.<sup>75</sup>

Although these interim solutions do not correspond to the five models set forth in the Law Society's October 1998 report and questionnaire to its members, called a "Consultation," the MDP Working Party and Law Society Council clearly benefited from the discussion generated by the Consultation.<sup>76</sup> Thus, after years of discussion of the MDP issue,<sup>77</sup> it appears that England and Wales are on the road to changing the relevant rules in order to permit MDPs.<sup>78</sup> The

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identifying as necessary protections the core principles of professional practice including independence, freedom of choice, conflict of interest, and confidentiality; identifying the key client protections as privilege, indemnity cover, dishonesty cover, and complaints systems; recognizing the need to concentrate on those protections that can be achieved by regulating the individual rather than the MDP entity; the emergence of new issues, including transparency; and the likely ultimate need for legislation. *Id.* ¶ 21.

75. The interim solutions were: (1) that the Solicitors Rules be amended to permit non-solicitor partners in a solicitor's firm which provides legal services and (2) that linked partnerships or "alliances," between, for example, an independent solicitor's firm and an accountancy firm be permitted. *Id.* ¶ 22; see also *UK Law Society Votes in Favour of MDPS* (visited Nov. 9, 1999) <[http://www.lawmoney.com/homepage/Display\\_story/PreviewStory.asp?StoryNumber=3242](http://www.lawmoney.com/homepage/Display_story/PreviewStory.asp?StoryNumber=3242)> (reporting Law Society's approval of MDPs).

76. See The Law Society, *Multi-Disciplinary Practices Why? . . . Why Not?: A Consultation Paper Issued by the Law Society of England and Wales* (Oct. 1998) [hereinafter *Law Society, Consultation Paper*] (on file with author; distributed at Nov. 1998 Commission Hearings). This twenty-nine page brochure was accompanied by a lengthy questionnaire and supporting memo. This Consultation predates much of the work of the ABA Commission on Multidisciplinary Practice ("the Commission") and was available to it. Alison Crawley, who is head of professional ethics for the Law Society, testified in November 1998 before the Commission and brought copies of the Consultation with her for distribution. The Commission's *Hypotheticals and Models* differ in substance from the Law Society's Consultation but share a similar approach in that both attempted to set forth possible forms of association of MDPs. See *infra* Section IV.C.1 and Section V.B.

77. The recommendations of the MDP Working Party and Law Society Council vote are the culmination of over ten years of consideration of the MDP issue. The Law Society issued consultation papers in 1987 and 1993, seeking the views of its membership about MDPs. The 1987 consultation showed that 54% favored a relaxation of the MDP ban if solicitors remained in control. In 1989, the Law Society opposed the Government's proposal to remove the statutory ban on MDPs. A 1993 consultation showed that 49% were opposed to MDPs and 43% were in favor. But in 1996, the Law Society decided that its policy of blanket opposition to MDPs could leave the profession unprepared to deal with changing market development. It created an MDP Working Party to consider how MDPs could be structured to protect the public and to consider the necessary legislative changes. That working party reported in January 1998. In October 1998, the Law Society issued a consultation paper which requested comments by the end of February 1999. Because only 272 people responded, the Law Society did not commission a detailed analytical report for publication. Thereafter, a new MDP Working Party was established, which met on three occasions from June through September 1999. This Working Party issued the preliminary report, which was the basis of the Council's vote in October 1999. See Law Society, *Preliminary Report*, *supra* note 74 (presenting summary of history of MDPs, overview of responses on Law Society's, *Consultation Paper*, and outline of proposals for future); see also Law Society, *Consultation Paper*, *supra* note 76 (presenting consultation containing possible models for MDPs and pros and cons of MDPs).

78. The Law Society of England and Wales cannot, however, effect a change in the Solicitors' Rules by itself. After a decision by the Council of the Law Society of England and Wales to make a specific change, the Master of the Rolls must concur. In some cases, the Lord Chancellor must also

July 1999 report of the Lord Chancellor's Advisory Committee on Legal Education and Conduct also concluded that "the status quo was unlikely to be maintained."<sup>79</sup>

In addition to the activity in England and Wales, France may soon revise its rules to permit MDPs in some form. The situation in France is unusual because of the merger in 1992 of the professions of *avocat* and *conseil juridique*. Although *conseil juridiques* were not licensed as *avocats* [lawyers], could not appear in a courtroom, and need not have attended law school, they performed what in the U.S. would be considered transactional legal work.<sup>80</sup> As a result of the New Reform Act of 1992, the professions of *avocat* and *conseil juridique* were merged into the profession of *avocat* and the current *conseil juridiques* were deemed *avocats*.<sup>81</sup> As a result, France now has *avocat* firms that are networked or affiliated with the Big Five firms.<sup>82</sup> Thus, although MDPs technically are not allowed in France, they exist de facto. Within the last year, the Paris Bar Council, the General Council of French Bars, and Henri Nallet, the former Minister of Justice who was appointed by the Prime Minister to submit a report on the MDP situation, have made proposals that would regularize the de facto MDP situation. All would recognize MDPs, but would establish the conditions under which lawyers could work in an MDP setting.<sup>83</sup> The July 1999 Nallet proposal ("*The Nallet Report*"), for example, would allow MDPs between lawyers and all professions; would establish a new MDP regulator; would require disclosure to this new regulator of MDP intra-firm agreements; and would continue to prohibit fee sharing between lawyers and nonlawyers.<sup>84</sup> *The Nallet Report* acknowledged the fine line between fee sharing, profit sharing, and expense sharing, but recommended that the new MDP regulator address this issue.<sup>85</sup> On July 22, 1999, the Paris Bar Council discussed *The Nallet Report*.<sup>86</sup>

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give his approval and he may request advice from the Consultative Committee, the Director General of Free Trading, and Senior Judges. See Paul Venton, *MDPs and the Future of the Profession*, in COURSE MATERIALS FOR OSNEY MEDIA CONFERENCE ON *THE THREATS AND OPPORTUNITIES OF MULTI-DISCIPLINARY PRACTICES TO THE LEGAL PROFESSION AND HOW TO PREPARE YOUR FIRM* (June 30, 1999) (on file with author) (presenting information on MDPs and effect on legal profession).

79. Neil Rose, *Take Your Partners*, LAW SOCIETY OF ENGLAND AND WALES GAZETTE (Oct. 25, 1999) (visited Nov. 11, 1999) <<http://www.lawgazette.co.uk/archives/1999-10-25/000000064.html>>.

80. See ABA Commission on Multidisciplinary Practice, *Background Paper on Multidisciplinary Practice: Issues and Developments* (Jan. 1999) [hereinafter ABA, *Background Paper*] (visited Nov. 30, 1999) <<http://www.abanet.org/cpr/multicomreport0199.html>> (discussing work of *counsel juridique* before occupation merged with *avocat*).

81. *Id.*

82. *Id.*

83. See, e.g., Oral Testimony of Bâtonnier Henri Ader (Ordre des Avocats à la Cour de Paris) (Aug. 8, 1999); Written Comments Not Presented at Hearings, *The Nallet Report*; see also Materials from Ordre des Avocats à la Cour de Paris and The Association of the Bar of the City of New York Conference on "Multidisciplinary Legal Practice: Opportunities and Challenges for the Future" (June 8, 1998) (on file with author) (discussing potential for regulation of lawyers in MDPs).

84. See Written Comments Not Presented at Hearings, *The Nallet Report*.

85. See *id.*

86. See Oral Testimony of Bâtonnier Henri Ader (Ordre des Avocats à la Cour de Paris) (Aug. 8, 1999).

According to the Bar President [Bâtonnier] Henri Ader, the Paris Bar had concerns about *The Nallet Report*, insofar as it permits lawyers to form partnerships with nonregulated individuals, but the Paris Bar approved in principle many of the provisions in *The Nallet Report*, including the requirement that the MDP law firm use a different name than the MDP firm and the principle that any sharing of fees is an attack on independence.<sup>87</sup> Meanwhile, in March 1999, the General Council of French Bars approved a provision that defined a “network” very loosely and required that advocates in a network ensure that the invoicing of services reflect the value of the *avocat’s* own services.

Canada already has seen a rule change and may soon see more, although different provinces have reacted quite differently to MDPs. Although the Law Society of Upper Canada recently adopted a by-law following the narrow D.C.-type approach, recent reports from the Canadian Bar Association and the Federation of Law Societies of Canada recommended even further deregulation.<sup>88</sup> The Federation of Law Societies of Canada, for example, has not only recommended a national approach to MDPs but also has written *Draft Model Rules for Multi-Disciplinary Practices*; these draft rules were tabled at the February 2000 meeting but are scheduled for consideration at the August 2000 meeting in Halifax.<sup>89</sup> Although it proposes many types of regulation, it would allow a fully integrated partnership of lawyers and nonlawyers.<sup>90</sup> Similarly, the Canadian Bar Association withdrew its Interim Report recommendation, which also advocated the D.C. approach, and instead endorsed the fully-integrated MDP.<sup>91</sup>

### C. Voluntary International and Regional Bar Associations with MDP Policies

The two major international bar associations—the International Bar

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87. *See id.*

88. *See* The Canadian Bar Association, *Striking a Balance: The Report of the International Practice of Law Committee on Multi-Disciplinary Practices and the Legal Profession* (August 1999) [hereinafter Canadian Bar Association, *Report*] (on file with author) (favoring regulating lawyers individually instead of regulating MDPs); Federation of Law Societies of Canada, *Multi-Disciplinary Partnerships: Report to Delegates* (Aug. 1999) [hereinafter Federation of Law Societies of Canada, *Report*] (on file with author) (recommending development for model rules for lawyers in MDPs). Both of these documents are available by clicking on the “Related Links” item on the *Commission Homepage*, *supra* note 1. The Barreau de Quebec also issued a report in June 1999. *See Résumé synthèse du Rapport du Comité du Barreau du Québec sur la multidisciplinarité entre avocats et comptables* [hereinafter *Résumé*] (visited Apr. 9, 2000) <<http://www.barreau.qc.ca/opinions/memoires/1999/resumemulti.pdf>>. *Compare Résumé, supra*, with *By-law 25, supra* note 70 (discussing By-law 25 of the Law Society of Upper Canada).

89. Federation of Law Societies of Canada, *Report, supra* note 88, at 12; *see* The Federation of Law Societies of Canada, *Draft Model Rules for Multi-Disciplinary Practices* (visited Apr. 9, 2000) <<http://www.flsc.ca/english/committees/mdp/reports/modelrule/htm>> (containing draft MDP rule); The Federation of Law Societies of Canada, *What’s New?* (visited Apr. 9, 2000) <<http://www.flsc.ca/english/whatsnew/whatsnew.htm>> (reporting on status of draft rules).

90. *See id.* at 11 (proposing full integration of lawyers and nonlawyers).

91. *See* Canadian Bar Association, *Report, supra* note 88, at 29, 37 (favoring regulating lawyers individually instead of MDPs generally).

Association (“IBA”) and the Union Internationale des Avocats (“UIA”)—have issued policy statements on MDPs; these policies do not reject the concept of MDP, but instead identify the issues regulators should consider when deciding whether to permit them.<sup>92</sup> In contrast to these policies, one of the major regional bar associations, the Council of the Bars and Law Societies of the European Community (“CCBE”), has issued a policy statement that rejects MDPs.<sup>93</sup> Although the CCBE recently reconsidered its policy banning MDPs and reported that a majority favored adoption of a more moderate version permitting MDPs under certain conditions,<sup>94</sup> it ultimately issued a policy strongly condemning MDPs.<sup>95</sup>

#### IV. COMMON REGULATORY QUESTIONS

This global response to MDPs reveals similar but complex responses and regulatory issues. This Section begins with an overview of the arguments most frequently offered for and against MDPs and continues by providing a survey of

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92. See Council of International Bar Association, *Resolution on Multi-Disciplinary Practices Adopted by the Council of International Bar Association* (Sept. 13, 1998) [hereinafter IBA, *MDP Resolution*] (on file with author) (identifying issues that regulations governing MDPs should address); Union Internationale des Avocats, *Proposed UIA-Recommended Minimum Standards for MDP's* (adopted Nov. 1999) (on file with author) (recommending guidelines governing MDPs); see also IBA *Faces Up to Multidisciplinary Partnerships*, INT'L FIN. L. REV., Oct. 1998, at 5 <<http://www.lawmoney.com/public/contents/publications/IFLR/iflr9810/12.html>> (noting IBA's resolution calling for national regulations on MDPs); Written Replies to Commission, Reply by Delos N. Lutton (U.S. National Vice President, Union Internationale des Avocats) (documenting comments of U.S. National Vice President of UIA about UIA proposal on MDPs, which was subsequently adopted at General Assembly meeting in New Delhi, India).

93. See The Council of the Bars and Law Societies of the European Community (“CCBE”), *Declaration on Multidisciplinary Partnerships* 2-3 (confirmed unanimously Nov. 29, 1996) (on file with author) (declaring MDPs should not be permitted). The CCBE has been recognized by the European Union as the representative body of lawyers in Europe. See Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code: An Analysis of the CCBE Code of Conduct* (pt. 1), 7 GEO. J. LEGAL ETHICS 1, 5-6 (1993) (providing background and history of CCBE). For a discussion of the CCBE policy, see *What If?*, *supra* note 1, § 7.03[2] and Testimony of Michel Gout (CCBE) (Nov. 12, 1998); see also CCBE, *Summary of the Questionnaire on Multidisciplinary Partnerships* (on file with author) (discussing approaches to MDPs by CCBE members).

94. See Testimony of Michel Gout (CCBE) (Nov. 12, 1998); CCBE, *Preliminary Draft of the CCBE Position Considered at the Plenary Session of April 1998* 2-3 (on file with author) (moderating CCBE's stance on MDPs).

95. See *Position of CCBE on Integrated Forms of Co-operation Between Lawyers and Persons Outside the Legal Profession*, adopted in Athens on November 12, 1999 (on file with author), available as a ZIP file at *CCBE Documents* (visited Apr. 9, 2000) <<http://www.ccbe.org/uk/homeuk.htm>>. (“CCBE consequently advises that there are overriding reasons for not permitting forms of integrated co-operation between lawyers and non-lawyers with relevantly different professional duties and correspondingly different rules of conduct. In those countries where such forms of co-operation are permitted, lawyer independence, client confidentiality and disciplinary supervision of conflicts-of-interests rules must be safeguarded.”) See also Neil Rose, *Take Your Partners*, LAW SOCIETY OF ENGLAND AND WALES GAZETTE (Oct. 25, 1999) (visited Nov. 11, 1999) <<http://www.lawgazette.co.uk/archives/1999-10-25/000000064.html>> (“However, a long-running debate within the council of Bars and Law Societies of Europe seems likely to end with little change to its opposition to MDPs.”).

the numerous issues faced by an MDP regulator.

One of the most complex tasks a regulator faces is deciding how to approach the MDP issues. The Appendix to this Article is an issue checklist that identifies forty different issues related to MDPs, grouped according to three categories: *threshold issues*, *functional issues*, and *substantive ethical issues*.<sup>96</sup>

In my view, a regulator's and reader's task is much easier if the myriad of MDP issues are grouped into these three categories. First, a regulator must decide whether to lift the MDP ban. In reaching this decision, the regulator will analyze a number of threshold issues. If, and only if, a regulator is willing to lift a MDP ban, the regulator must consider functional issues related to the manner in which an MDP may be organized and operate. The third category is the substantive ethics issues which ask how to apply traditional legal ethics concepts in the new MDP setting.

This Article introduces the reader to these key issues in the MDP debate. It is beyond the scope of this Article to provide a definitive treatment of each issue because each issue itself could be the basis for a law review article.

#### A. *Perceived Advantages and Disadvantages of MDPS*

Throughout the world, the arguments offered in support of and in opposition to MDPs have been similar. Those who favor MDPs argue, *inter alia*, that MDPs provide one-stop shopping, better service (because of the broader expertise of the service-providers and closer cooperation of an interdisciplinary team), and cost-effectiveness.<sup>97</sup> Steven Bennett, for example, testified that from his perspective as corporate counsel to one of the U.S.'s ten largest banks, clients' problems are not just "legal problems," but instead require an interdisciplinary approach.<sup>98</sup> He warned that if lawyers do not adopt a multidisciplinary approach, they risk becoming a mere footnote in the twenty-first century.<sup>99</sup>

Those opposed to MDPs argue that MDPs would impair a lawyer's independent judgment. Larry Fox perhaps best articulates this argument by stating, "he who pays the piper calls the tune."<sup>100</sup> The concern is that lawyers

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96. See Written Remarks of Laurel S. Terry (Mar. 12, 1999). I identified forty different issues that a regulator might want to consider. To review the entire issue checklist, see *infra* Appendix: Issue Checklist at the end of this Article. When I testified before the Commission, one of the principal things I tried to do was determine what issues the Commission needed to decide, in what order, what the possible answers were, and which answer I thought most sensible on each of the identified issues.

97. See, e.g., Oral Testimony of Larry Ramirez (Chair, ABA General Practice, Solo and Small Firm Section) (Feb. 6, 1999); *Reporter's Notes*, *supra* note 58, at 4 & 12 n.10 (listing testimony from Big Five representatives concerning most efficient way to provide services to clients was through integrated service entity).

98. See Testimony of Steven A. Bennett (Banc One) (Nov. 13, 1998).

99. *Id.*

100. I have heard Larry Fox orally make this remark at conferences. Although I did not find this exact language in writing, he expressed a similar sentiment during his testimony to the Commission. See Written Remarks of Lawrence J. Fox (Drinker Biddle & Reath) (Feb. 4, 1998). In his testimony Fox stated:

ultimately would follow the dictates of their employers, who don't understand client needs, rather than following the lawyers' own judgment. A related argument is that because of the loss of independence, MDPs would undermine the rule of law that is important in a democratic country.<sup>101</sup> Additional arguments are that there is a fundamental conflict between a lawyer's duty of confidentiality and an auditor's duty to the public<sup>102</sup> and between the lawyers' and accountants' handling of conflicts of interest.<sup>103</sup> An argument against MDPs, espoused more by European lawyers than U.S. lawyers, is that MDPs are bad because they would reduce the number of lawyers available from whom clients could choose.<sup>104</sup> Opponents also express a concern about the impact of MDPs on the attorney-client privilege, and issues related to protecting clients' funds and providing professional indemnity.<sup>105</sup> Perhaps most fundamentally, many opponents worry that there will be no effective way to enforce any MDP regulations.<sup>106</sup> Although these arguments are made on a global basis, the Commission's website is an excellent source to find all of the above arguments collected in one place.<sup>107</sup>

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

....

It reminds me of what happens when the biggest company in a town gets purchased by folks from far way. The new buyer may give lip service to giving back to the community. But the reality is the town will soon learn it has lost its soul.

*Id.*

101. See, e.g., IBA MDP Resolution, *supra* note 92. The Resolution states:

WHEREAS recognition of the rule of law places heavy emphasis on the necessity for adequate access to justice and lawyers form an essential element of access to justice so that the legal profession is a necessary element in the implementation of any system based on the rule of law.

....

THAT in the process [of considering MDPs], such regulators and authorities consider the possible risks to clients and the public that may be posed by MDPs, taking into account the vital role of the legal profession in upholding the rule of law.

*Id.*

102. See, e.g., Lawrence J. Fox, *Accountant Bosses Pose Ethical Threat*, NAT'L L. J., Oct. 6, 1997, at A23 (discussing difficulty of assessing and clearing conflicts in MDPs).

103. See *id.* (discussing problems in clearing conflicts in MDPs).

104. See, e.g., Law Society, *Consultation Paper*, *supra* note 76, at 17 (discussing various arguments made by opponents of MDPs); see also Law Society, *Preliminary Report*, *supra* note 73 (discussing goals and potential solutions for MDP concerns).

105. See, e.g., Law Society, *Consultation Paper*, *supra* note 76, at 18 (listing additional problems MDPs can create).

106. See, e.g., Written Reply of Sydney M. Cone, III (June 22, 1999) (visited Dec. 1, 1999) <<http://www.abanet.org/cpr/cone3.html>>.

107. See generally *Commission Homepage*, *supra* note 1 (providing links to a spectrum of opinions on MDPs).

### B. Key Threshold Issues

The threshold issues are those questions one will want to ask when deciding whether to lift an existing MDP ban. The first threshold issue is the proper standard to use when deciding whether to retain an MDP ban. Although it may seem obvious that public interest and client protection are proper bases for such a decision, the exercise is useful to remind oneself that protecting lawyers' incomes or "turf" is not a legitimate basis for regulation under the Model Rules of Professional Conduct.<sup>108</sup>

Having articulated the appropriate standards for decision making, one should next identify the core values of lawyers, if any, that must be protected in order to achieve the regulatory goals.<sup>109</sup> The values most often cited are independence, confidentiality, loyalty (avoiding conflicts of interest), and competence.<sup>110</sup>

The third threshold issue is whether to adopt the same rules for a Big Five-affiliated MDP as for a very small MDP. In other words, should there be the same rules for Main Street lawyers as for Wall Street lawyers? The fourth threshold issue is whether there is any client demand for MDPs, the extent of such demand, and the relevance of such demand. The witnesses before the ABA, for example, disagreed strenuously about the extent of client demand for MDPs and whether the demand was client or supplier driven.<sup>111</sup> Regulators must next ask whether there is any evidence that MDPs have harmed clients in those jurisdictions in which they have been offered.

The last two threshold issues may be the most important. A regulator explicitly or implicitly allocates a burden of production and persuasion; these

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108. See, e.g., Oral Testimony of Larry Ramirez (Chair, ABA General Practice, Solo and Small Firm Section) (Feb. 6, 1999) (identifying service to client as basis on which decision should be made, but observing MDPs may help solo and small firm lawyers by bringing in more clients). One of the difficulties, of course, is that the ABA serves, on the one hand, as a regulator insofar as it recommends model laws, but on the other hand, many members may expect the ABA to act as their trade representative.

109. See, e.g., Oral Testimony of Lawrence J. Fox (Drinker Biddle & Reath) (Feb. 4, 1999) (believing core values of independence, confidentiality, and loyalty must be protected). Penn State Dickinson Dean Peter Glenn has observed that these are instrumental values and that the most important core value is client service. See E-mail from Peter Glenn, Dean of Penn State Dickinson School of Law, to Laurel S. Terry, Professor of Law, Penn State Dickinson School of Law, (Dec. 2, 1999) (copy on file with author) (finding such values are instrumental values, rather than core values).

110. Interestingly, the Commission's *Report and Recommendation* did not cite competency as a core value, although this was corrected in both the Commission's *Updated Background and Informational Report and Request for Comments* and March 2000 *Draft Recommendation*. See *infra* Part VII.D for a discussion criticizing this omission.

111. Compare Oral Testimony of Lawrence J. Fox (Drinker Biddle & Reath) (Feb. 4, 1999) and Written Remarks of William M. Hannay, III (Chair, ABA International Law and Practice Section) (Mar. 11, 1999) (believing MDP issue is being driven by Big Five supply), with Testimony of Steven A. Bennett (Banc One) (Nov. 13, 1998) and Written Remarks of Stefan F. Tucker (Chair, ABA Section of Taxation) (Feb. 4, 1999) (finding supply shows there is demand); see also *Reporter's Notes, supra* note 58, at 7 (discussing demand for MDPs); Terry Appendices B1-B7, *supra* note 4, at Threshold Issues, Item F (summarizing testimony of all witnesses on this issue.); Daly, *supra* note 1, at 93-94 & nn. 240-43 (discussing solo practitioners and small firms are seeking partnerships with nonlawyers).

burdens will be placed either on those who want to change the existing MDP ban or those who want to retain the current rule. Because the issue of MDPs involves an unknown future, this allocation of the burdens may determine the ultimate answer.

The last threshold issue is whether the regulators believe that lawyers who work outside a traditional law firm setting are doing what is considered "law practice" when done by a lawyer in a law firm. As explained in greater detail below, the regulators' views on this issue may shape their views about the appropriate response to the MDP situation.

### C. Key Functional Issues if MDPs are Permitted

If a regulator decides to consider lifting an existing MDP ban, that regulator should next consider a series of functional issues.<sup>112</sup> The three types of functional issues are (1) *form of association* issues; (2) *scope of practice* issues; and (3) *functional ethics* issues.

#### 1. Form of Association Issues

The most fundamental form of association question is the legal form in which multidisciplinary practice, as opposed to multidisciplinary partnerships, may be offered. Some of the choices include: (1) allowing a fully integrated MDP, in which lawyers and nonlawyers are partners; (2) requiring ownership and control of the law firm by lawyers, but allowing an affiliation (contractually or otherwise) with a firm of nonlawyers; or (3) achieving multidisciplinary practice through cooperation of separate legal and nonlegal firms, as is currently done in the U.S. The ABA Commission *Models* discussed later in Section V.B present these options in greater detail.<sup>113</sup>

A second form of association issue asks what professions or individuals may form a partnership with a lawyer. During the Commission hearings, for example, Chair Sherwin Simmons became well known for asking whether a lawyer and a tow truck driver should be able to form a partnership.<sup>114</sup> A less frequent question, but one that raises the same issue, is whether a Nobel prize-winning economist would be an acceptable nonlawyer partner if the economist was not subject to a set of ethics rules.<sup>115</sup> Interestingly, although many U.S. lawyers are

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112. In my view, these functional issues are similar to the same functional issues that arise when in a transnational legal practice context. See generally Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 *FORDHAM INT'L L. J.* 1382 (1998) (discussing cross-border legal practice schemes such as European Union's Directives, GATS, NAFTA, and ABA and IBA Foreign Legal Consultant rules).

113. See *infra* Part V.B for a discussion of the ABA *Models and Hypotheticals*.

114. See Oral Remarks of Samuel DiPiazza (PricewaterhouseCoopers) (Mar. 11, 1999); Oral Remarks of Richard Miller (General Counsel, AICPA) (Mar. 12, 1999); Oral Testimony of Simon Potter (Member, Canadian Bar Association International Practice of Law Committee) (Feb. 6, 1999).

115. See Oral Testimony of John Dzienkowski (Professor, University of Texas School of Law) (Feb. 5, 1999) (indicating Professor Dzienkowski was asked this question.).

particularly worried about MDPs between lawyers and accountants, this is one of the few types of MDPs allowed in Germany.<sup>116</sup>

A third form of association issue asks what name the MDP may use. Many European regulators and advisors, for example, seem particularly concerned about this issue and have adopted rules which prohibit a law firm from using the MDP's name.<sup>117</sup>

A fourth form of association issue addresses the disclosure requirements, if any. There are two separate kinds of disclosure or transparency requirements that regulators might impose on MDPs. The first duty of disclosure is owed by the MDPs toward its clients.<sup>118</sup> A second type of disclosure involves disclosure to regulators of the relationship between the MDP and the affiliated lawyers. Several European provisions require this latter type of disclosure.<sup>119</sup> Many U.S. lawyers working in Brussels, for example, have agreed to comply with this second type of disclosure.<sup>120</sup>

A final form of association issue is whether to permit passive investment in a law practice or MDP.<sup>121</sup> Many lawyers oppose passive investment, but some commentators argue that if Big Five-affiliated MDPs are permitted, then the rejection of passive investment puts traditional law firms at a capitalization

116. See *infra* note 133 for a discussion of the acceptable MDPs in Germany. The anecdotal evidence I collected during my 1998-99 German sabbatical was that many German lawyers believe that lawyers and accountants, but not others, were particularly suited to form an MDP because their values and protections were so similar.

117. See, e.g., Written Remarks of Bâtonnier Henri Ader (Ordre des Avocats à la Cour de Paris) (Aug. 8, 1999) (summarizing Paris Bar's reaction to *Nallet Report*, he said, it "does approve that a law firm must have a name different from the MDP's name while the law firm must advertise the fact that it belongs to an MDP.").

118. See, e.g., Oral Remarks of Samuel DiPiazza (PricewaterhouseCoopers) (Mar. 11, 1999).

119. See ABA-Brussels Bars Agreement, art. 8, *reprinted in* Terry, *supra* note 112, at 1492. The agreement provides:

Where one or more U.S. Lawyers form a Partnership with one or more [Brussels lawyers] . . . the U.S. Lawyers participating in the Partnership . . . shall submit to [the regulatory authority] . . . information [about] the partnership agreement among themselves or, if no written agreement exists, a written confirmation that such partnership agreement does not conflict with any provisions of their agreement with the [Brussels lawyer].

*Id.*; see also Written Comments Not Presented at Hearings, *The Nallet Report, A Summary by Sydney M. Cone, III & François Berbinou*. Cone and Berbinou summarize *The Nallet Report* and quote from it saying:

Third, the Report would require that every MDP submit to the new commission, as well as to existing professional disciplinary bodies relevant to the MDP, all agreements and constitutive documents relating to the structure and operation of the MDP. According to the Report, any such agreements and documents not so submitted would be void. The Report would also give clients of the MDP access to such agreements and documents.

*Id.*

120. See Terry, *supra* note 112, at 1456-58 (discussing U.S. lawyers agreeing to disclose partnership agreements to Brussels Bar and among themselves when forming partnerships with *tableau* lawyers).

121. Passive investment means that individuals who are not practicing in the law firm or MDP may participate as owners. Passive investment would permit shares of a law firm to be sold on the stock market.

disadvantage.<sup>122</sup>

## 2. Scope of Practice Issues

The second set of functional issues addresses the appropriate scope of a lawyer's practice within an MDP setting. The most commonly suggested scope of practice limitation is that an MDP should not be able to simultaneously offer legal services and audit services to the same client.<sup>123</sup> One commentator suggested that lawyers in an MDP not be permitted to litigate.<sup>124</sup> A third limitation on a lawyer's scope of practice is that a lawyer would only be permitted to practice in an MDP if the sole or primary purpose of the MDP is to provide legal services. This is the D.C. model, which also has been adopted by the Law Society of Upper Canada.<sup>125</sup> Although the D.C. model raises form of association issues, it also raises scope of practice issues.

## 3. Functional Ethics Issues

The third set of functional issues is whether, how, and by whom, lawyers in an MDP should be regulated. If a regulator determines that the legal ethics rules should apply to MDP lawyers, the regulator faces two major choices about the conditions under which legal ethics rules would apply to the MDP lawyer. First, a regulator could decide to apply the ethics rules to a lawyer based on the lawyer's status within the MDP (i.e., ask if the lawyer is holding him or herself out as a lawyer or is employed in the MDP in order to provide legal services). Alternatively, a regulator could decide that the ethics rules apply only if the particular activity in question involves the practice of law.

Functional ethics issues also arise with respect to the nonlawyers in the MDP. A regulator might, of course, decide to take no action that affects MDP nonlawyers. Alternatively, a regulator might insist that MDP nonlawyers

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122. See Written Replies to Commission, Reply by Sydney M. Cone, III (Counsel, Cleary, Gottlieb, Steen & Hamilton) (noting that "[v]iewed from the perspective of the capitalization of legal practice, these features of the Report [forbidding passive investment] present an anomaly").

123. This type of limitation is present in the Paris Bar Policy, *supra* note 83, and Model A(1) in the Law Society, *Consultation Paper*, *supra* note 76. A legal-audit ban was cited in the IBA and UIA policies as an example of a regulation that might be particularly appropriate. See *supra* note 92 for sources discussing the IBA and UIA policies. The CCBE MDP policy refers to the legal-audit conflict as one justification for its "anti-MDPs" policy. See *supra* note 93 for a discussion of the current CCBE policy towards MDPs. The Report by The Law Society Report of Upper Canada includes a legal-audit ban. See *supra* note 70 for a discussion of this report. *Wouters v. Nova*, discussed in *What If?*, *supra* note 1, § 7.04, upheld the Netherlands Bar's refusal to approve lawyer-auditor MDPs. Witness Thomas O. Verhoeven, who practices in a German MDP, testified that his firm has adopted a voluntary legal-audit ban. Testimony of Thomas O. Verhoeven (Oppenhoff & Rädler) (Nov. 13, 1998).

124. Compare Oral Testimony of John Dzienkowski (Professor, University of Texas School of Law) (Feb. 5, 1999) (advocating litigation limitation), with Written Remarks of John Dzienkowski (Professor, University of Texas School of Law) (Feb. 5, 1999) (retracting litigation limitation on MDP lawyer's scope of practice.).

125. See D.C. RULE OF PROFESSIONAL CONDUCT 5.4 (1999) (governing MDPs in District of Columbia); Law Society of Upper Canada, *Report*, *supra* note 70 (discussing D.C. Rule).

comply with legal ethics rules in all respects. A legal regulator probably has no direct authority to establish rules for nonlawyers, but a regulator could indirectly accomplish this by saying that a lawyer is only permitted to work in an MDP if all nonlawyers use the legal ethics rules. This is the approach used in Germany's MDP rules.<sup>126</sup> Or, a regulator could decide that nonlawyers in an MDP must register with the bar, as suggested by the Consultation Paper of the Law Society of England and Wales.<sup>127</sup>

The third approach to MDP nonlawyers takes a middle ground: it requires MDP nonlawyers to use legal ethics rules in some, but not all, situations. This approach recognizes that other professionals do not want to be told that they have an absolute duty to comply with legal ethics rules, just as lawyers would not want to be told to comply with another profession's rules at the expense of their own rules. An accountant providing consulting services, for example, should not have to use the lawyers' conflict of interest rules to decide whether to accept a client, assuming that the client is not receiving or has not received legal services. Similarly, the fee and reimbursement schedule of an engineer in an MDP should not be governed by lawyers' fee rules.

On the other hand, this middle-ground approach recognizes that one cannot simply say that MDP lawyers, and only MDP lawyers, are subject to legal ethics rules. This middle-ground approach would require MDP nonlawyers to act consistently with legal ethics rules either: (1) when working at the lawyer's direction on a matter; or (2) when necessary in order for the lawyers to honor their own ethical obligations. The first of these requirements is consistent with the current legal ethics requirements. The Model Rules currently require lawyers to ensure that nonlawyer personnel comply with the lawyers' ethical obligations.<sup>128</sup> No one imagines, for example, that it would be proper for a law firm's secretary or paralegal to reveal client confidences.

The middle-ground's second provision is less traditional, but is consistent with the reasons why the legal system asks nonlawyers to obey ethics rules. One could say that in order for MDP lawyers to honor the duty of loyalty or confidentiality, the nonlawyers in an MDP should not, without client consent, accept a representation adverse to a former legal client.<sup>129</sup> Thus, this middle-

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126. See BUNDESRECHTSANWALTSORDNUNG § 59(a) (stating attorneys are permitted to associate with other professions "within framework of their professional rights"); BERUFSORDNUNG § 30 (The Berufsordnung which was adopted by the German mandatory bar association BundesrechtsanwaltsKammern (BRAK) pursuant to the authority granted in the Bundesrechtsanwaltsordnung (BRAO)); see also Testimony of Thomas O. Verhoeven (Oppenhoff & Rädler) (Nov. 13, 1999) (explaining German rules); Testimony of Dr. Hans-Jürgen Hellwig (Vice-President, Deutscher Anwaltverein) (Feb. 4, 1999) (same). For a discussion of the German approach to MDPs, see Terry, *German MDPs*, *supra* note 58.

127. See Law Society, *Consultation Paper*, *supra* note 76, at 13 (suggesting bar registration for nonlawyer owners of MDP).

128. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3 (1999) (imputing ethical standards of lawyers onto nonlawyers).

129. Commission Hypothetical 4.2 provides an example to which one could apply this second principle. One might conclude, for example, that the nonlawyers in XYZ should act consistently with the legal ethics rules when deciding whether to accept representation of Target, given that the Law

ground approach recognizes that even if it is not proper for lawyers to completely impose their rules on nonlawyers, there might be circumstances in which it would be appropriate to have MDP nonlawyers use legal ethics in order to facilitate MDP lawyers' own compliance with their rules.

The third functional ethics issue is regulation of the MDP itself. The very first witness to testify before the Commission called for a new opt-in federal mega-regulator of MDPs.<sup>130</sup> Some witnesses suggested that the MDP itself should be regulated, just as law firms in New York are regulated by having the law firm itself subject to discipline.<sup>131</sup> One of the members of the Commission, U.S. District Judge Paul Friedman, suggested a court audit procedure.<sup>132</sup>

A final functional ethics issue is what to do when the rules of different MDP professionals clash. One leading German commentator, for example, has pointed out various conflicts between the rules governing German accountants and the rules governing German lawyers; one of his solutions was to propose a new "mega-regulator" to eliminate these clashes.<sup>133</sup>

#### *D. Key Substantive Ethics Issues if MDPs are Permitted*

If a jurisdiction decides to lift its MDP ban, then it probably needs to examine all of its ethics rules to determine how they apply in the new MDP environment and whether the rules must be modified. In a U.S. context, this means that at both the ABA and state level, every single ethical rule should be reviewed to determine whether any revisions or new comments are necessary in light of the new MDP context. *Appendix A* to the Commission's June 1999

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Firm A & B already represent Raider in its efforts to take over Target. One could conclude that to do otherwise compromises the lawyer's duties of confidentiality and loyalty. See Written Remarks of Laurel S. Terry (Mar. 12, 1999), *supra* note 4, at 17.

130. See Testimony of Jim Holden (Steptoe & Johnson) (Nov. 12, 1998).

131. See generally Written Remarks of Sydney M. Cone, III (Cleary, Gottlieb, Steen & Hamilton) (Mar. 12, 1999) (discussing New York law firm discipline rule and need to create institutional culture of adherence to lawyers' values).

132. See Oral Testimony of Sydney M. Cone, III (Mar. 12, 1999). A summation of Cone's testimony reveals the position taken by Judge Friedman and Cone's response to it:

Judge Friedman proposed allowing lawyers to have multidisciplinary practices with other professionals and split fees as long as they meet the following conditions: supervision by a senior legal officer, training and other support to foster professionalism and independence of judgment in the legal division, ethics advisory run by lawyers, only lawyers tell lawyers what they can and cannot do, and the MDP being subject to an audit every five years by the highest court of the state to determine whether it can continue to function as an MDP. An MDP would be deleted from the list for failing to keep up its end of the bargain and because a full report on what it was doing was submitted by the MDP the Court would not need a big staff and could decide by a majority vote whether to allow an MDP to continue. Mr. Cone said the approach might be "all right" if, in addition to the audit every five years, the court had the power to require an audit whenever it had reasonable cause to believe it was appropriate.

*Id.*

133. See Prof. Dr. Martin Henssler, *Die Interprofessionelle Zusammenarbeit in der Sozietät* presented at DeutscherAnwalt Verein, *Forum "Zukunft der Anwaltschaft"* (Mainz Oct. 2, 1998) (on file with author).

*Report* contains possible amendments to the ABA Model Rules of Professional Conduct in the event MDPs are permitted.<sup>134</sup> As *Appendix A* and the literature demonstrate, a significant number of U.S. ethics rules might require a rule or comment change to explain how the rule should operate in an MDP context. This Article does not repeat this analysis, but instead identifies those Model Rules that require the most fundamental reconsideration.

Because I am most familiar with U.S. ethics rules, this Section refers to the ABA Model Rules. Because many countries' ethics provisions have equivalent concepts,<sup>135</sup> this discussion should be viewed as providing concrete examples of common regulatory issues.

### 1. Independence

It is indisputable that if MDPs are permitted, there is a risk that a lawyer's professional judgment could be pressured and perhaps compromised. Any loss of independence potentially has consequences not only for the individual client being served, but also for the entire society and, potentially, the rule of law in that country.<sup>136</sup> Therefore, assuming a regulator is willing to permit MDPs, one of the most pressing issues to consider is whether to adopt special rules to protect a lawyer's independence in an MDP context.

There is precedent for a specifically-tailored ethics rule. Unlike the ABA Model Code of Professional Responsibility, the ABA Model Rules of Professional Conduct includes a separate rule that provides specific guidance to corporate counsel about how to implement the traditional rules in a corporate counsel setting.<sup>137</sup> In my view, this rule has been successful and useful. Similarly, a regulator might adopt a special rule for MDP lawyers that provides guidance about how to protect independence in an MDP setting. This new rule could address issues such as direction of an MDP lawyer's judgment and who sets the MDP lawyer's compensation, among other issues.

### 2. Confidentiality

Some of the MDP regulator's most important substantive ethics decisions

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134. See ABA Commission on Multidisciplinary Practice, *Final Report-Appendix A* [hereinafter *Appendix A*] (visited Dec. 1, 1999) <<http://www.abanet.org/cpr/mdpappendixa.html>> (illustrating possible amendments to Model Rules of Professional Conduct to deal with MDPs). An earlier article on MDPs explored some of the rule amendments that should be considered if Model Rule 5.4's MDP ban were removed. See *What If?*, *supra* note 1 (cited favorably in ABA, *Background Paper*, *supra* note 80, at n.7).

135. See generally Laurel S. Terry, *An Introduction to the European Community's Code of Conduct* (pts. 1 & 2), 7 *GEO. J. LEGAL ETHICS* 1, 345 (1993) (comparing provisions of CCBE Code of Conduct and ABA Model Rules of Professional Conduct, noting many similarities).

136. See, e.g., IBA, *MDP Resolution*, *supra* note 92, ¶ 3 (stating "that in the process, such regulators and authorities [should] consider the possible risks to clients and the public that may be posed by MDPs, taking into account the vital role of the legal profession in upholding the rule of law").

137. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1999) (stating rules when organizations are clients). Part of its success, in my view, is the dialogue it has engendered.

will be the assumptions made about an MDP lawyer's duty of confidentiality. In a traditional law firm setting, the law assumes that absent client direction to the contrary, one lawyer in the firm may share information with other lawyers and nonlawyers in the law firm.<sup>138</sup> Because an MDP is a new practice setting, a regulator has no existing assumptions to draw upon. Indeed, there are several competing assumptions from which a regulator must choose.

In an MDP setting, the rule might be that lawyers may not share information with anyone, absent client consent; this is the rule that accountants use.<sup>139</sup> Alternatively, the rule might be that absent client consent, an MDP lawyer may share information only with MDP lawyers; this second approach would be consistent with the rule that currently applies to traditional law firms. A third possibility is that MDP lawyers may share information with everyone in the MDP.

There are two reasons why this decision about confidentiality is critical. From a confidentiality perspective, the assumption will determine whether a screen is required.<sup>140</sup> If information is permitted to flow among all MDP members, then there is no need to automatically put screens in place; on the other hand, if the assumption is that information must be confined to the lawyer working on the project, then a screening system must be put into place. The confidentiality assumptions selected also directly influence the conflict of interest analysis described below.

### 3. Avoiding Conflicts of Interest

Approximately six months after it was created, the Commission prepared a document called *Hypotheticals and Models*.<sup>141</sup> In addition to identifying the different legal forms used to provide multidisciplinary practice, the document

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138. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 112 cmt. g (Proposed Final Draft No. 1, 1996). This section of the final draft of the *Restatement* states:

Thus, disclosure is permitted to other lawyers in the same firm and to employees and agents such as accountants, file clerks, office managers, secretaries, and similar office assistants in the lawyer's firm, and with confidential, independent consultants, such as computer technicians, accountants, bookkeepers, law-practice consultants, and others who assist in furthering the law-practice business of the lawyer or the lawyer's firm.

*Id.*

139. See, e.g., Written Comments Not Presented at Hearings, American Association of Attorney-Certified Accountants, *Written Report and Summary* (comparing lawyer and accountant regulatory provisions); Letter from Richard I. Miller, General Counsel & Secretary, AICPA, to State Society Chief Directors 5 (Aug. 24, 1999) [hereinafter Miller letter] (on file with author). Miller noted that whereas confidential information within law firm is imputed to all lawyers, "rules governing the accounting profession are quite different. While the AICPA rules impose a duty of confidentiality, they may not impute one firm member's knowledge of confidential client information to every other member of a firm." *Id.* (citations omitted).

140. See *infra* note 146 for an explanation of the concept of imputation. Screens are efforts to avoid imputation and disqualification by separating and isolating lawyers with confidential information.

141. See *infra* Part V.B for an explanation of the models discussed in the Commission's *Hypotheticals and Models* document.

posed more than twelve different hypotheticals that raised some of the most contentious conflicts of interest issues confronting the U.S. legal profession. Indeed, if the facts of those hypotheticals were revised so that only lawyers and traditional law firms were involved, lawyers throughout the U.S. probably would still disagree about the proper resolution of those issues. However, if one carefully examines those hypotheticals, one discovers that most of them only presented one new question—the question of how the current conflicts of interest imputation rule should be applied in an MDP setting.<sup>142</sup> Despite the complexity of the Commission's hypotheticals, it has a relatively simple mechanism it can use to express its conclusion. The Commission could define the term *firm* as a mechanism for explaining how the imputation concept should apply in an MDP setting.<sup>143</sup>

A second conflict of interest issue is created by the differing standards lawyers and accountants use to determine the presence of a conflict of interest. The testimony before the Commission, along with the supplemental submissions, revealed that lawyers and accountants measure conflicts of interest quite differently.<sup>144</sup>

Professor Eleanor Myer's article in this Symposium issue addresses these differences in depth.<sup>145</sup> But for purposes of this Article, recognizing that it is a radical oversimplification, one might make the following observations about the differences between the lawyers' and accountants' rules on conflicts of interest. Lawyers recognize indirect conflicts of interest, whereas accountants only recognize direct conflicts of interest.<sup>146</sup> In addition, lawyers recognize the concept of nonconsentable conflicts, whereas accountants have no equivalent

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142. See Written Remarks of Laurel S. Terry (Mar. 12, 1999), *supra* note 4, at 17. Imputation is the principle expressed in Model Rule 1.10, which says that if one lawyer in a law firm has a conflict of interest, then that conflict is imputed, i.e., extended, to all lawyers in the law firm. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1999).

143. See Written Remarks of Laurel S. Terry (Mar. 12, 1999), *supra* note 4, at 13-18 (recommending Commission use definition of "firm" to express its conclusion about imputation).

144. See, e.g., Written Comments Not Presented at Hearings, American Association of Attorney-Certified Accountants, *Written Report and Summary* (comparing lawyer and accountant ethics); Written Remarks of Professor Linda Galler (Professor, Hofstra University School of Law) (Nov. 13, 1998); Miller letter, *supra* note 139, at 1-4 (enclosing explanation of Commission's final report with comparison of differences between lawyer and accountant rules.).

145. Eleanor W. Myers, *Examining Independence and Loyalty*, 72 TEMP. L. REV. 773, 857-68 (1999).

146. See, e.g., Miller letter, *supra* note 139, at 2-4 (comparing lawyer and accountant rules regarding directly adverse conflicts with concurrent representation and with unrelated engagements and materially limited conflicts, noting in all three situations, accounting firm could proceed although law firm could not, but noting many accounting firms would decline firm example); Oral Remarks of Roger Page (Deloitte & Touche) (Mar. 11, 1999) ("[U]nder the rules of the accounting profession today there is imputed disqualification of the firm if the clients are directly adverse. The difference in the accountant's rules is that every conflict is waivable with full disclosure and consent of the parties."); see also Written Comments Not Presented at Hearings, American Association of Attorney-Certified Accountants, *Written Report and Summary* (comparing lawyer and accountant regulatory provisions).

concept.<sup>147</sup> Third, accountants generally worry about being too closely aligned with the client, whereas lawyers generally worry about being too closely aligned with someone other than the client, such as a third-party payor, the lawyer, or another client. Although Big Five representatives testified that MDP lawyers would comply with legal ethics, they also made clear their discomfort with these rules.<sup>148</sup>

#### 4. Money and Client Protection Issues

In addition to the three substantive ethics issues discussed above, there are a number of other ethics issues an MDP regulator must confront. Indeed, representatives from several ABA entities appeared to make sure that the Commission did not lose sight of each group's perspective.<sup>149</sup> Among the many issues that the regulator must confront is how client funds will be treated (i.e., fund segregation, random audits, application of IOLTA rules, malpractice insurance) and pro bono requirements.

In sum, many world regulators are now confronting an MDP phenomenon and are facing similar regulatory issues. This development does not mean, of course, that all regulators should react similarly to MDPs or that U.S. regulators must follow the actions of regulators in Germany, France, or elsewhere.<sup>150</sup> On the other hand, U.S. regulators should recognize the similarities in many regulatory issues and be willing to try to learn from experiences outside the U.S.

### V. THE WORK OF THE ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE

#### A. Overview

In comparison to foreign responses to MDPs, U.S. regulators and advisory bodies were relatively slow to respond. But in August 1998, then-ABA President Philip S. Anderson created the ABA Commission on Multidisciplinary

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147. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a)(1) & (b)(1) (1999) (specifying that if conflict is present, lawyer must obtain client consent and must decide that representation is objectively reasonable); see also Oral Remarks of Richard Miller (General Counsel, AICPA) (Mar. 12, 1999).

148. See, e.g., Oral Remarks of Lawrence M. Hill (White & Case) (Feb. 4, 1999); Oral Testimony of James W. Jones (APCO Associates, Inc.) (Feb. 6, 1999); Oral Testimony of Kathryn Oberly (Vice Chair and General Counsel, Ernst & Young) (Feb. 4, 1999).

149. See Written Remarks of Judge Judith M. Billings (Chair, ABA Standing Committee on Pro Bono and Public Service) (Feb. 6, 1999); Written Remarks of Herbert S. Garten (Chair, ABA Commission on IOLTA) (Aug. 8, 1999); Written Remarks of Jan McDavid (ABA Antitrust Section) (Nov. 13, 1998); Oral Remarks of Joseph P. McMonigle (Chair, ABA Standing Committee on Lawyers Professional Liability) (Mar. 12, 1999); Testimony of M. Peter Moser (ABA Standing Committee on Ethics and Professional Responsibility) (Nov. 13, 1998); Written Replies to the Commission, Reply by John S. Skilton (Chair of the ABA Standing Committee on the Delivery of Legal Services); Written Comments Not Presented at Hearings, Standing Committee on Specialization, American Bar Association.

150. See, e.g., Phyllis W. Beck Chair in Law Symposium Remarks of Lawrence J. Fox, (Nov. 12, 1999).

Practice (“the Commission”).<sup>151</sup> The Commission held multi-day hearings in November 1998 and issued its *Background Paper on Multidisciplinary Practice: Issues and Developments* before the February 1999 ABA Midyear Meeting.<sup>152</sup> The Commission held additional hearings at the Midyear Meeting and held a third set of hearings in Washington, D.C. in March 1999.<sup>153</sup> The Commission issued its *Report and Recommendation* on June 8, 1999.<sup>154</sup>

The Commission’s *Report* was considered at the ABA Annual Meeting in Atlanta in August 1999. Following a debate, the House of Delegates adopted a resolution that:

[T]he American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession’s tradition of loyalty to clients.<sup>155</sup>

The Commission held additional public hearings in August 1999 at the Annual Meeting; in October 1999, in connection with the meeting of the ABA General Practice, Solo and Small Firm Section; and in February 2000, at the ABA Midyear Meeting in Dallas.<sup>156</sup> The Commission also issued an *Updated Background and Informational Report and Request for Comments* in December 1999 and a Postscript to the February 2000 Dallas Midyear Meeting.<sup>157</sup> In March 2000, the Commission posted on its webpage a *Draft Recommendation to the ABA House of Delegates*, which significantly modified and simplified the Commission’s earlier June 1999 *Recommendation* and arguably contains a lawyer-control requirement.<sup>158</sup>

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151. See ABA President Philip S. Anderson Appoints Commission on Multidisciplinary Practice (Aug. 4, 1998) (visited Nov. 29, 1999) <<http://www.abanet.org/media/aug98/multicom.html>> (announcing formation of Commission).

152. See generally *Commission Homepage*, *supra* note 1 (compiling information regarding, among other things, Commission’s papers, reports, and meetings).

153. See “Commission Hearings” heading on the *Commission Homepage*, *supra* note 1, for information concerning the Commission’s hearings.

154. See generally *Commission Homepage*, *supra* note 1 (linking to *Report and Recommendations of MDP Commission*).

155. Florida Bar Association, *Florida Bar Recommendation Statement* [hereinafter *FL Bar Recommendation*] (visited Dec. 1, 1999) <<http://www.abanet.org/cpr/flbarrec.html>>.

156. See Commission Hearings, *supra* note 153 (linking to information regarding various public hearings).

157. See Commission, *Updated Background Report*, *supra* note 53. See *Commission February 2000 Postscript to Midyear Meeting* (visited Apr. 9, 2000) <<http://www.abanet.org/cpr/postscript.html>>.

158. See *Draft Recommendation to the ABA House of Delegates* [hereinafter *Draft Recommendation*] (posted Mar. 22, 2000) (visited Mar. 23, 2000) <<http://www.abanet.org/cpr/marchrec.html>>. Instead of fifteen paragraphs, the *Draft Recommendation* contains only four paragraphs. These paragraphs are quite general. In my view, this *Draft Recommendation* asks the House of Delegates to focus on the issue of *whether* there should be MDPs under any circumstances, while delegating to the states the decision about *how* to regulate MDPs. In my view, the *Draft Recommendation* is so broadly drafted as to be ambiguous and leaves much room for disagreement.

At this time, it is unclear what further action, if any, the ABA House of Delegates will take. Despite this uncertainty, over forty state and local bar associations are now engaged in an examination of the MDP issue.<sup>159</sup> Indeed,

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For example, paragraph one states that "Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services." *Draft Recommendation, supra*, ¶ 1. Although many undoubtedly will claim that this *Recommendation* requires MDPs to have a lawyer-majority, I disagree. In my view, this paragraph is ambiguous because MDP lawyers practicing with a nonlawyer majority could argue that they nevertheless have the control and authority necessary to assure their independence. The remainder of this *Draft Recommendation* directs MDP lawyers to protect five core values (independence, confidentiality, conflicts, competence and pro bono publico obligations), *see id.* at ¶ 2; limits MDP lawyers to practicing with nonlawyer who are members of recognized professions or other disciplines that are governed by ethical standards, *see id.* at ¶ 1; continues the prohibition on passive investment and nonlawyers providing legal services, *see id.* at ¶ 4; and directs regulatory authorities to enforce existing rules and adopt such additional enforcement procedures as are necessary to implement the principles in the *Draft Recommendation* and protect the public interest, *see id.* at ¶ 3. The *Draft Recommendation* does not explicitly address the difficult issues of whether to have a ban on simultaneous legal-audit work, whether nonlawyers should be included when applying legal ethics conflict of interest imputation rules, or whether nonlawyers ever must comply with legal ethics rules.

159. A number of state and local bar associations, including Pennsylvania, North Carolina, Massachusetts, Utah, and Minnesota currently are exploring issues related to MDPs. *See generally Commission Homepage, supra* note 1 (linking to various state and state bar association internet sites discussing MDP issues); *See Commission February 2000 Postscript to Midyear Meeting, supra* note 157 (stating that over forty-one state and local bars were studying the question of whether fee sharing and nonlawyer partnership bans should be relaxed).

On March 23, 2000, the Philadelphia Bar Association reportedly became the first bar to adopt a recommendation to relax the current MDP ban. The Philadelphia Bar Association Board of Governors approved the task force recommendation that lawyer-controlled MDPs be allowed to practice without delay and that other forms be allowed only after additional study and the enactment of appropriate regulations. *See Philadelphia Bar Association, Multidisciplinary Practice Task Force Resolution* [hereinafter *Phila. Bar, Resolution*] (visited Apr. 9, 2000) <<http://www.abanet.org/cpr/pbamdpresolution.html>>. The Pennsylvania Bar Association's Multidisciplinary Practice Commission also endorsed lawyer-controlled MDPs and is awaiting a vote by the Pennsylvania Bar Association Board of Governors in May 2000. *See Pennsylvania Bar Association Multidisciplinary Practice Commission, MDP Commission Report Dated March 2000* [hereinafter *PA Bar, MDP Report*] (visited Apr. 9, 2000) <<http://www.pabar.org/mdphome.shtml>>. Both of these items are available from the "Related Links" item on the *Commission Homepage, supra* note 1.

Bar associations in California, New Jersey, and New York appear to have been among the first to examine the MDP issue. *See, e.g.,* Written Comments Not Presented at Hearings, Comment of Ethics 2000 Liaison Committee, Los Angeles County Bar Association (discussing Los Angeles County Bar Association's position on MDPs); Written Replies to Commission, Reply of State Bar of California (discussing California State Bar Association's position on MDPs); Written Comments Not Presented at Hearings, Comment of Therese M. Stewart (President, Bar Association of San Francisco) (discussing San Francisco Bar Association's position on MDPs); Written Replies to the Commission, Reply of The Association of the Bar of the City of New York (discussing New York Bar Association's position on MDPs); Written Replies to the Commission, Reply of New York County Lawyers' Association (discussing New York County Lawyers' Association's position on MDPs); New York State Bar Association, *Report of the Special Committee on Multi-Disciplinary Practice and the Legal Profession* (Jan. 8, 1999) (visited Dec. 1, 1999) <<http://www.nysba.org/whatsnew/multidiscrpt.html>> (discussing New York State Bar Association's position on MDPs); Written Replies to Commission, Reply of New Jersey State Bar Association (discussing New Jersey State Bar Association's position on

since the Commission began its hearings, and especially after issuing its *Report*, a number of state bar journals and other legal periodicals have published articles about MDPS.<sup>160</sup>

Although a number of organizations around the world have considered MDPS, the Commission's work is particularly useful for those interested in learning about MDPS. The Commission's work has been extremely "transparent."<sup>161</sup> The Commission maintains an Internet web site on which it has posted its mandate from Phil Anderson; its members; a bibliography; its background report to the ABA House of Delegates; its *Hypotheticals and Models*; the schedules of its hearings; together with all written materials submitted; summaries of the oral testimony; written comments; written replies to its report; and links to related materials.<sup>162</sup>

The Commission's work also is quite useful because of the breadth of witnesses from which the Commission heard. Because of the importance of the U.S. legal market, witnesses from around the world came to the U.S. to provide testimony.<sup>163</sup> Although some have criticized the Commission for not hearing a

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MDPS).

160. See generally, e.g., *Multidisciplinary Practice: Is it the Wave of the Future, or Only a Ripple?*, 66 DEFENSE COUNSEL J. 460 (1999) (presenting discussion on "prime issue" of MDPS); Robert Pack, *Lawyers, Nonlawyers, and the Future of the Practice of Law*, WASH. L., Sept-Oct. 1999, at 25 (discussing lawyers practicing with nonlawyers and future of practice of law with this development); Paul J. Sax, *Chair's Page* (ABA Section of Taxation), Fall 1999 (visited Nov. 17, 1999) <<http://www.abanet.org/tax/chair/chair.html>> (mentioning Section's MDP panel at one of its meetings); Massachusetts Bar Association, *Multi-Disciplinary Practice* (visited Jan. 18, 2000) <<http://www.massbar.org/mdp/index.html>> (presenting links to articles dealing with MDPS).

161. *Transparent* is a term commonly used in the international law context to mean that the work is visible and accessible.

162. See *Commission Homepage*, *supra* note 1 (linking to information on MDPS compiled by ABA).

163. On a global scale, the Commission heard live testimony from witnesses from Australia, Canada, England, France, Germany, Scotland, Sweden, and various regional or international bar associations. See, e.g., Testimony of Andrew Scott (Law Institute of Victoria, Australia) (Nov. 13, 1998); Oral Testimony of Simon Potter (Member, Canadian Bar Association International Practice of Law Committee) (Feb. 6, 1999); Testimony of J. Rob Collins (Law Society of Upper Canada) (Nov. 12, 1998); Testimony of Alison Crawley (Law Society of England and Wales) (Nov. 12, 1998); Testimony of M. Elizabeth Wall (Cable & Wireless) (Nov. 12, 1998); Dan Brennan QC (Chairman, General Council of the Bar of England and Wales) (Aug. 8, 1999); Oral Testimony of Gerard Mazet (President of the International Commission of the French National Bar Council) (Feb. 6, 1999); Oral Testimony of Bâtonnier Henri Ader (Ordre des Avocats à la Cour de Paris) (Aug. 8, 1999); Testimony of Gerard Nicolay (PricewaterhouseCoopers) (Nov. 12, 1998); Oral Remarks of Dr. Hans-Jürgen Hellwig (Vice-President, Deutscher Anwaltverein) (Feb. 4, 1999); Testimony of Thomas O. Verhoeven (Oppenhoff & Rädler) (Nov. 13, 1998); Oral Remarks of Neil Cochran (Dundas & Wilson C.S.) (Feb. 4, 1999); Elisabet Fura-Sandström (President, Swedish Bar Association) (Aug. 8, 1999); Testimony of Michel Gout (CCBE) (Nov. 12, 1998); Ramon Mullerat (Former President, Council of the Bars and Law Societies of the European Community (CCBE)) (Aug. 8, 1999); see also Testimony of Ward Bower (Altman Weil) (Nov. 12, 1998); John Craig (President-Elect, Inter-Pacific Bar Association) (Aug. 8, 1999); Delos N. Lutton (Union Internationale des Avocats (UIA) Subcommittee on Multidisciplinary Practices) (Aug. 8, 1999). In addition to the live testimony, the Commission received written comments from several foreign clients. See, e.g., Written Comments Not Presented at Hearings, Comment of Damián Gisbert (Financial Director, Kellogg's Espana, S.A.); Written

wider range of views, witnesses included consumer representatives;<sup>164</sup> bar counsel;<sup>165</sup> state and local bar representatives;<sup>166</sup> actual or potential MDP clients;<sup>167</sup> Big Five and accounting organization representatives;<sup>168</sup> lawyers working for ancillary businesses or in a nonlegal capacity;<sup>169</sup> private legal practitioners from very large firms<sup>170</sup> and very small firms;<sup>171</sup> in-house counsel;<sup>172</sup> lawyers and judges who had observed the Big Five's lawyer and nonlawyer work product;<sup>173</sup> representatives of ABA sections, committees, or other entities;<sup>174</sup>

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Comments Not Presented at Hearings, Comment of Remarks of José M<sup>a</sup> Martí (European Financial Manager, NALCO ESPANOLA, S.A. and NALCO FRANCE, S.A.R.L.); .

164. See Oral Testimony of William A. Bolger (Executive Director, National Resource Center for Consumers of Legal Services) (Mar. 11, 1999); Oral Remarks of Wayne Moore (Director, AARP) (Mar. 11, 1999); Written Remarks of James Turner (Executive Director, H.A.L.T.) (Feb. 5, 1999); Written Remarks of Lora H. Weber (Consumers Alliance of the Southeast) (Mar. 11, 1999).

165. See Testimony of Susan Gilbert (D.C. Bar) (Nov. 12, 1998); Oral Testimony of Lynda Shely (State Bar of Arizona and ABA Standing Committee on Client Protection) (Feb. 5, 1999).

166. See Testimony of James R. Silkenat (Association of the Bar of the City of New York) (Nov. 13, 1998). The following witnesses testified after the Commission issued its report: Samuel Bufford (Los Angeles County Bar Association) (Aug. 8, 1999); Steve Hoffman (President, New York County Lawyers' Association) (Aug. 8, 1999); Written Remarks of Steven Krane (New York State Bar Association) (Aug. 8, 1999); James M. Seff (State Bar of California) (Aug. 8, 1999) .

167. See Testimony of Steven A. Bennett (Banc One) (Nov. 13, 1998); Testimony of M. Elizabeth Wall (Cable & Wireless) (Nov. 12, 1998) .

168. See Written Remarks of Neil Cochran (Dundas & Wilson C.S.) (Feb. 4, 1999); Written Remarks of Samuel DiPiazza (PricewaterhouseCoopers) (Mar. 11, 1999); Oral Remarks of Richard Miller (General Counsel, AICPA) (Mar. 12, 1999); Written Remarks of Kathryn Oberly (Vice Chair and General Counsel, Ernst & Young) (Feb. 4, 1999); Written Remarks of Roger Page (Deloitte & Touche) (Mar. 11, 1999); Written Remarks of Richard Spivak (Managing Partner-Tax-North America, Andersen) (Mar. 12, 1999); Written Remarks of Irwin Treiger & William J. Lipton (Co-Chairs, National Conference of Lawyers and Certified Public Accountants) (Mar. 11, 1999) .

169. See Written Remarks of James W. Jones (APCO Associates, Inc.) (Feb. 6, 1999).

170. See Written Remarks of Sydney M. Cone, III (Cleary, Gottlieb, Steen & Hamilton) (Mar. 12, 1999); Written Remarks of Lawrence J. Fox (Drinker Biddle & Reath) (Feb. 4, 1999); Oral Remarks of Lawrence M. Hill (White & Case) (Feb. 4, 1999).

171. See Oral Testimony of Jay G. Foonberg (Bailey & Marzano) (Feb. 6, 1999); Written Remarks of Charles F. Robinson (Law Offices of Charles F. Robinson) (Feb. 5, 1999) .

172. See, e.g., Written Remarks of Steven A. Bennett (Banc One) (Nov. 13, 1998); Testimony of Elizabeth Wall (Cable & Wireless) (Nov. 12, 1998).

173. See Testimony of Ward Bower (Altman Weil) (Nov. 12, 1998); Oral Remarks of Lawrence M. Hill (White & Case) (Feb. 4, 1999); Testimony of Karen D. Powell (Petrillo & Powell) (Nov. 12, 1998); Testimony of Les Shapiro (Padgett Foundation) (Nov. 12, 1998); Written Remarks of Samuel B. Sterrett (Vinson & Elkins) (Feb. 4, 1999).

174. See Written Remarks of Judge Judith M. Billings (Chair, ABA Standing Committee on Pro Bono and Public Service) (Feb. 6, 1999); Written Remarks of William M. Hannay, III (Chair, ABA International Law and Practice Section) (Mar. 11, 1999); Testimony of Jan McDavid (ABA Antitrust Section) (Nov. 13, 1998); Oral Remarks of Joseph P. McMonigle (Chair, ABA Standing Committee on Lawyers Professional Liability) (Mar. 12, 1999); Testimony of M. Peter Moser (ABA Standing Committee on Ethics and Professional Responsibility) (Nov. 13, 1998); Oral Testimony of Larry Ramirez (Chair, ABA General Practice, Solo and Small Firm Section) (Feb. 6, 1999); Written Remarks of Charles F. Robinson (Law Offices of Charles F. Robinson) (Feb. 5, 1999); Written Remarks of Stefan F. Tucker (Chair, ABA Section of Taxation) (Feb. 4, 1999).

The following witnesses testified after the Commission issued its report: Oral Testimony of

other lawyer organizations;<sup>175</sup> malpractice insurance representatives;<sup>176</sup> unauthorized practice of law (“UPL”) committee representatives;<sup>177</sup> law school placement officials;<sup>178</sup> organizations and individuals who have dual CPA and lawyer qualifications;<sup>179</sup> representatives from the Securities and Exchange Commission (“SEC”);<sup>180</sup> as well as academics in tax, accounting, legal history, and ethics.<sup>181</sup> Witnesses included those who were strongly opposed to lifting the MDP ban<sup>182</sup> and those who were strongly in favor of adopting regulations to permit MDPs.<sup>183</sup> In addition to these witnesses, the Commission received over thirty written comments not personally presented at the hearings.<sup>184</sup> The Commission also received over forty written comments in response to its *Report* which was issued June 8, 1999.<sup>185</sup>

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Herbert S. Garten (Chair, ABA Commission on IOLTA) (Aug. 8, 1999); Leo J. Jordan (ABA Tort and Insurance Practice Section) (Aug. 8, 1999); Pam H. Schneider (Chair, ABA Section of Real Property, Probate and Trust Law) (Aug. 8, 1999); Oral Testimony of John S. Skilton (Chair, ABA Standing Committee on the Delivery of Legal Services) (Aug. 8, 1999).

175. See Testimony of Stephen McGarry (Lex Mundi) (Nov. 13, 1998). The following witnesses testified after the Commission issued its report: Richard P. Campbell (International Association of Defense Lawyers) (Aug. 8, 1999); Patricia J. Kerrigan (President, Texas Association of Defense Counsel) (Aug. 8, 1999); Oral Testimony of John Kouris (Executive Director, Defense Research Institute) (Aug. 8, 1999).

176. See Testimony of William Freivogel (Attorney Liability Assurance Society) (Nov. 13, 1999); Oral Remarks Joseph P. McMonigle (Chair, ABA Standing Committee on Lawyers Professional Liability) (Mar. 12, 1999).

177. See Testimony of William Elliott (Kane, Russell, Coleman & Logan) (Nov. 13, 1999).

178. See Oral Testimony of Abbie F. Willard (Assistant Dean of Career Services, Georgetown University Law Center) (Feb. 5, 1999).

179. See Oral Testimony of Sidney Traum, David Ostrove, and Philip D. Brent (American Association of Attorney-CPAs) (Feb. 5, 1999).

180. See, e.g., Written Comments Not Presented at Hearings, Comment of Lynn E. Turner (Chief Accountant, United States Securities and Exchange Commission); Written Replies to Commission, Reply of Harvey J. Goldschmid, General Counsel; Lynn E. Turner, Chief Accountant; Richard H. Walker, Director of Enforcement (United States Securities and Exchange Commission).

181. See Written Remarks of John Dzienkowski (Professor, University of Texas School of Law) (Feb. 5, 1999); Testimony of Professor Linda Galler (Professor, Hofstra University School of Law) (Nov. 13, 1999); Testimony of Harold Levinson (American Association of Attorney-Certified Public Accountants) (Nov. 13, 1998); Written Remarks of Laurel S. Terry (Professor, The Dickinson School of Law of the Pennsylvania State University) (Mar. 12, 1999); Written Remarks of Bernard Wolfman (Professor, Harvard Law School) (Mar. 12, 1999).

182. See, e.g., Oral Testimony of Jay G. Foonberg (Bailey & Marzano) (Feb. 6, 1999); Written Remarks of Lawrence J. Fox (Drinker Biddle & Reath) (Feb. 4, 1999); Oral Remarks of Bernard Wolfman (Professor, Harvard Law School) (Mar. 12, 1999).

183. See, e.g., Testimony of Steven A. Bennett (Banc One) (Nov. 13, 1998); Written Remarks of James W. Jones (APCO Associates, Inc.) (Feb. 6, 1999); Written Remarks of Charles F. Robinson (Law Offices of Charles F. Robinson) (Feb. 5, 1999); Written Remarks of Stefan F. Tucker (Chair, ABA Section of Taxation) (Feb. 4, 1999); Written Remarks of Lora H. Weber (Consumers Alliance of the Southeast) (Mar. 11, 1999).

184. See generally the “Written Comments” heading on the *Commission Homepage*, *supra* note 1 (visited Dec. 1, 1999) <<http://www.abanet.org/cpr/multicomments.html>> (presenting comments of persons with various viewpoints on MDPs).

185. See generally the “Written Replies” heading on the *Commission Homepage*, *supra* note 1 [hereinafter *Written Replies*] (visited Oct. 25, 1999) <<http://www.abanet.org/cpr/multicomreplies.html>>

B. *The Commission's MDP Models*

As explained earlier, one of the issues relevant to MDPs is the manner in which an MDP may be organized.<sup>186</sup> On March 3, 1999, shortly before its third and last set of pre-report hearings, the Commission posted a document entitled *Hypotheticals and Models*.<sup>187</sup> The Commission identified five different models in which multidisciplinary practice could be offered.

The Commission's Model 1 was called the *Cooperative Model*; it reflects the U.S. status quo in which lawyers and nonlawyers cannot be partners or share legal fees but can work jointly to provide multidisciplinary services. Model 2 was called the *Command and Control Model*; it was analogized to D.C. Rule of Professional Conduct 5.4, which permits MDPs, provided the MDP's sole function is to provide legal services. Model 3 was called the *Ancillary Business Model* and addressed the situation covered in ABA Model Rule of Professional Conduct 5.7, in which a law firm operates an ancillary business that provides professional services to clients. Model 4, which was called the *Contract Model*, envisioned a situation in which the law firm was an independent entity controlled and managed by lawyers, but which had a contractual relationship with a professional services firm. According to the Commission's *Hypotheticals and Models*:

A typical contract might include terms such as (1) the law firm agreeing to identify its affiliation with the professional services firm on its letterhead and business cards, and in its advertising (e.g., A & B, P.C., a member of XYZ Professional Services, LLP); (2) the law firm and the professional services firm agreeing to refer clients to each other on a nonexclusive basis; and (3) the law firm agreeing to purchase goods and services from the professional services firm (e.g., staff management, communications technology, and rent for the leasing of office space and equipment). The law firm remains an independent entity controlled and managed by lawyers, and accepts clients who have no connection with the professional services firm.<sup>188</sup>

Model 5 was the *Fully Integrated Model*, in which lawyers and nonlawyers could serve as partners and share legal fees. The Commission heard testimony from lawyers who had practiced in all five settings, several of whom practice in MDPs outside the U.S.<sup>189</sup>

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(reflecting range of views on Commission's Report).

186. See *supra* Part IV.C.1 for a discussion of the form of association issues.

187. American Bar Association Commission on Multidisciplinary Practice, *Hypotheticals and Models* [hereinafter *Hypotheticals and Models*] (visited Dec. 1, 1999) <<http://www.abanet.org/cpr/multicomhypos.html>>; see also Daly, *supra* note 1, at 11-14 & nn.21-27 (discussing Commission's *Hypotheticals and Models*).

188. Daly, *supra* note 1, at 13.

189. See Written Remarks of Neil Cochran (Dundas & Wilson, C.S. [an Andersen-affiliated firm]) (Feb. 4, 1999) (describing experiences in firm that falls under Model 4); Written Remarks of James W. Jones (APCO Associates, Inc.) (Feb. 6, 1999) (remarking about APCO, former Arnold and Porter ancillary business, which was sold and is now independent entity, thus describing Models 2 and 3); Testimony of Stephen McGarry (Lex Mundi) (Nov. 13, 1998) (describing his firm, which would fall under Model 1); Testimony of Gerard Nicolay (PricewaterhouseCoopers) (Nov. 12, 1998) (describing

As noted earlier, it is beyond the scope of this Article to provide a detailed analysis of foreign treatment of all MDP issues. Nevertheless, when looking at the various foreign proposals, it may be useful to correlate the foreign jurisdictions' handling of the form of association with the five models identified by the Commission.<sup>190</sup> The charts below show my evaluation of these foreign provisions:

#### **Jurisdictions Expressly Permitting MDPS**

- District of Columbia, U.S. Rule 5.4.....Model 2
- Law Society of Upper Canada.....Model 2
- New South Wales, Australia's Solicitors Rules.....Model 5
  - New South Wales' Legal Profession Advisory Council Recommendation .....Model 5
  - New South Wales' Prior Solicitor Rules .....Model 4
- Netherlands' Bar Rules for MDPS with Tax Advisors.....Model 5
- Netherlands' Bar Rules for MDPS with Auditors.....Model 1
- Germany's Bar Rules for MDPS with Auditors and Tax Advisors .Model 5

#### **Jurisdictions in Which MDP Regulation is Under Consideration**

- Law Council of Australia.....Model 5
- Law Society of England and Wales.....[probably] Model 5
- Canada Bar Association .....Model 5
- Federation of Law Societies of Canada.....Model 5
- Paris Bar Council .....[strict] Model 4
- Nallet Report Requested by French Minister of Justice .....[strict] Model 4
- French National Bar Council.....[strict] Model 4

#### **Voluntary International and Regional Bar Associations with MDP Policies**

- Current CCBE Policy.....Model 1
- CCBE Proposed but Rejected Policy .....[strict] Model 4
- IBA .....None
- UIA .....None
- U.S. Kutak Commission, 1980 Proposed Rule .....Model 5

#### **C. The Commission's June 1999 Report and March 2000 Draft Recommendation**

On June 8, 1999, in accordance with the mandate given to it by ABA President Phil Anderson, the Commission issued a unanimous final report to the

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experiences in firm that falls under Model 4); ; Testimony of Thomas O. Verhoeven (Oppenhoff & Rädler) (Nov. 13, 1998) (describing his experience in Model 5-type organization).

190. See *supra* notes 186-88 and accompanying text for a discussion of these models.

ABA House of Delegates about its work.<sup>191</sup> In addition to its six-page *Report*, the Commission submitted a three-page *Recommendation*, which included fifteen paragraphs, a general information form required by the rules of the ABA Annual Meeting, and three appendices.<sup>192</sup> *Appendix A* was a set of illustrations of possible amendments to the Model Rules of Professional Conduct; *Appendix B* identified the witnesses that testified before the Commission; and *Appendix C* was the *Reporter's Notes*.

The Commission sought approval from the House of Delegates only with respect to its *Recommendation*.<sup>193</sup> As the *Reporter's Notes* explain, the proposed rule changes in *Appendix A* were included only for illustration purposes, and the specific language was not intended to bind the relevant drafting committees.<sup>194</sup>

The Commission concluded in this June 1999 *Recommendation* and again in its March 2000 *Draft Recommendation* that, subject to safeguards to prevent erosion of the legal profession's core values, a lawyer should be able to share fees with a nonlawyer or practice in an MDP.<sup>195</sup> Some commentators have suggested that the Commission's membership made its conclusions inevitable.<sup>196</sup> I disagree. In my view, the Commission's recommendations were not a "done deal" at the time the Commission was appointed. Indeed, my observation of the

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191. ABA Commission on Multidisciplinary Practice, *Report to the House of Delegates* [hereinafter *Report*] (visited Dec. 1, 1999) <<http://www.abanet.org/cpr/mdpfinalreport.html>> .

192. See generally *id.* (presenting *Recommendation* and *Appendices*).

193. See *Reporter's Notes*, *supra* note 58, at 2 ("The Commission is asking the ABA House of Delegates to approve only the *Recommendation*."). The *Recommendation* can be found at ABA Commission on Multidisciplinary Practice, *Report to House of Delegates, Recommendation* [hereinafter *Recommendation*] (visited Sept. 24, 1999) <<http://www.abanet.org/cpr/mdprecommendation.html>> .

194. *Reporter's Notes*, *supra* note 58, at 2. The proposed model rule changes in *Appendix A* have been the subject of numerous critiques. See generally *Written Replies*, *supra* note 185 (discussing potential harms to legal community). In my view, *Appendix A* was a creative and effective manner in which to present very complex and difficult issues. From a logistical perspective, if the Commission intended to take a leadership role in deciding *how* MDPs should be structured and regulated, then I do not see a better method for the Commission to have presented its conclusion to eliminate the complete MDP and fee-sharing ban. The Commission's *Recommendation* has given U.S. lawyers, state regulators, and the ABA House of Delegates a concrete set of principles to debate and vote upon. The *Report* provides the rationale for the *Recommendation* and the *Reporter's Notes* serve as legislative history. The proposed Model Rules changes in *Appendix A* were not intended to be binding and they did serve as a useful mechanism to help lawyers envision the likely impact of the Commission's *Recommendation*. I do not think the Commission can be faulted for not drafting the proposed changes perfectly. The issues are difficult and new and, as the multiple drafts prepared by the Ethics 2000 Commission demonstrate, it is not a simple job to draft rule language even after there is agreement on the basic principles. See generally *Ethics 2000-Commission on the Evaluation of the Rules of Professional Conduct, Minutes, available on Ethics 2000 Homepage*, *supra* note 27 (presenting links to minutes from Ethics 2000 Commission's meetings).

195. See *Recommendation*, *supra* note 193, ¶ 2 (recommending ABA amend Model Rules of Professional Conduct reflecting these values). The Commission's March 2000 *Draft Recommendation* reflects the same conclusion, although the Commission identified two additional core values. See *Draft Recommendation*, *supra* note 158, ¶ 2.

196. This type of comment has been made to me by several lawyers who know of my work regarding MDPs.

Commission members during the hearings leads me to believe that when the Commission began its work, many Commission members were skeptical of MDPS, if not downright hostile.<sup>197</sup>

The Commission's materials explain how it first reached its conclusion that the current MDP ban should be lifted. First, the Commission explained that it was guided by the need to protect "clients and the public and the core values of the legal profession."<sup>198</sup> The Commission identified independence, confidentiality, and loyalty as core values.<sup>199</sup> The Commission concluded that there was client demand for MDPS on the part of both individual and corporate clients, as well as interest among lawyers in forming partnerships with nonlawyers.<sup>200</sup> The Commission did not define the degree of demand nor resolve the controversy between those who thought the demand was minimal

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197. One of the Commission members, Seth Rosner, had spoken against MDPS only one year previously at the 24th National Conference on Professional Responsibility held in Montreal in May 1998. Indeed, the Dutch Bar obtained an expert opinion from Mr. Rosner in connection with its ban on lawyer-auditor MDPS, which is still pending in the case of *Wouters v. NOVA*. See Letter from Seth Rosner, to Nederlandse Orde van Advocaten (Jan. 2, 1997), in ABA 24TH NATIONAL CONFERENCE ON PROFESSIONAL RESPONSIBILITY COURSEBOOK, at Tab 1 (May 28-30, 1998). Mr. Rosner has also participated actively in efforts to defeat the Kutak Commission rule. See *supra* note 20 and accompanying text for a discussion of the Kutak Commission's proposed rule; see also Gilbert & Lempert, *supra* note 15, at 391-92 & nn.37-38 (describing formation of ad hoc committee that later proposed continuing traditional rules relating to law firm ownership and fees).

The Commission's evolving and ultimately unanimous support for regulating MDPS echoes what has happened elsewhere in the world. In June 1999, I spoke at a conference on MDPS. One of the other panelists was Toby Greenbury, who was chair of the London Law Society MDP Working Party. During his remarks, he stated that he initially had despaired about having to prepare a report because his committee had such diverse views about MDPS. Ultimately, however, his committee issued a unanimous report, approving MDPS in concept and proposing various types of regulations. He explained that some committee members were enthusiastic about MDPS while others endorsed them reluctantly, but all ultimately concluded that it was better to regulate lawyers within MDPS than have them go without regulation; see also Written Materials of Toby Greenbury, DJ Freeman/The City of London Law Society, in COURSE MATERIALS FOR OSNEY MEDIA CONFERENCE ON THE THREATS AND OPPORTUNITIES OF MULTI-DISCIPLINARY PRACTICES TO THE LEGAL PROFESSION AND HOW TO PREPARE YOUR FIRM (June 30, 1999) (on file with author) (listing members of London MDP working party and providing further details on report).

198. *Report*, *supra* note 191, at 1. At the time this Article was published, the Commission had not yet posted a report or explanation of its reasoning concerning the March 2000 *Draft Recommendation*.

199. See *Recommendation*, *supra* note 193, ¶ 1. This paragraph of the *Recommendation* proposes:

The legal profession should adopt and maintain rules of professional conduct that protect its core values, independence of professional judgment, protection of confidential client information, and loyalty to the client through avoidance of conflicts of interest, but should not permit existing rules to unnecessarily inhibit the development of new structures for the more effective delivery of services and better public access to the legal system.

*Id.*

200. *Report*, *supra* note 191, at 1 ("After extensive reflection and analysis, the 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 (MDP).").

and those who thought the demand was overwhelming.<sup>201</sup> The Commission further concluded “that it is possible to satisfy the interests of clients and lawyers by providing the option of an MDP without compromising the core values of the legal profession that are essential for the protection of clients and the proper maintenance of the client-lawyer relationship.”<sup>202</sup> The Commission recognized the concerns about independence, confidentiality, and loyalty, but determined that appropriate safeguards could be developed “to adequately address the concerns and maintain the core values while providing broader access to legal services for the public.”<sup>203</sup>

Thus, the Commission’s treatment of the functional and substantive ethics issues was intended to protect clients, lawyers, and the public, while not “unnecessarily inhibit[ing] the development of new structures for more effective delivery of services and better public access to the legal system.”<sup>204</sup> Perhaps the most significant of the Commission’s decisions in its June 1999 *Report* was its recommendation to allow Model 5-fully integrated MDPs, although the Commission appears to have backtracked from that position in its March 2000 *Draft Recommendation*.<sup>205</sup> In its earlier *Report*, the Commission did not require lawyer-majority control or ownership, as in New South Wales’ prior rule,<sup>206</sup> but the Commission did recommend a different enforcement mechanism if an MDP were controlled by nonlawyers.<sup>207</sup> The Commission stated that if nonlawyers

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201. See *infra* note 233 and accompanying text for a discussion of the conflicting witness testimony regarding the demand for MDPs.

202. *Report, supra* note 191, at 1-2.

203. *Id.* at 2.

204. *Recommendation, supra* note 193, ¶ 1. A recent law review article by the Commission’s Reporter, Professor Mary Daly, makes this three-step process even clearer:

The Commission’s analysis proceeded in three steps. First, it asked whether allowing the delivery of legal services by MDPs was in the best interest of the public and clients; second, it identified independence of professional judgment, the protection of confidential client information, and loyalty to the client through the avoidance of conflicts of interests as the core values of the legal profession; and third, it searched for measures that would protect those core values without impeding the delivery of legal services by MDPs.

Daly, *supra* note 1, at 91 (footnotes omitted).

205. See *Recommendation, supra* note 193, ¶ 3. This paragraph of the *Recommendation* states:

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

*Id.* See *supra* note 158 for a discussion of the Commission’s treatment of Model 5 and the lawyer control issue in the March 2000 *Draft Recommendation*.

206. See *supra* notes 63-67 and accompanying text for a discussion of the prior rule in New South Wales.

207. See *Recommendation, supra* note 193, ¶ 14. Paragraph 14 of the *Recommendation* states:

As a condition of permitting a lawyer to engage in the practice of law in an MDP not controlled by lawyers, the MDP should be required to give to the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in

control the MDP, then the MDP should be subject to a court audit procedure.<sup>208</sup> None of the Commission's submissions defined "control" nor did they provide significant detail about the content of the audit.

With respect to the other form of association issues, the Commission's *Recommendation* seemingly did not limit the types of individuals with whom a lawyer might join to form an MDP, although such a limitation is included in the Commission's March 2000 *Draft Recommendation*.<sup>209</sup> The Commission recommended that all lawyers in an MDP make disclosures to a client that the lawyer practiced in an MDP.<sup>210</sup> Additionally, for nonlawyer-controlled MDPs, the Commission's certification process contemplates disclosures by the MDP to the state supreme court or its designee.<sup>211</sup> The Commission recommended against allowing passive investment<sup>212</sup> and did not address the issue of what

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the delivery of legal services (the "court"), a written undertaking, signed by the chief executive officer (or similar official) and the board of directors (or similar body), that [it has complied with the nine specified requirements].

*Id.*

208. See *Recommendation*, *supra* note 193, ¶ 14(H) (providing for court review and audit procedures of nonlawyer controlled MDPs); see also *Appendix A*, *supra* note 134, at Rule 5.8(c) (requiring nonlawyer controlled MDPs to submit to review by highest court written undertakings that allow for administrative audits by that court). The Commission's March 2000 *Draft Recommendation* made no reference to this court certification or audit requirement, but instead referred the mechanics to the states, stating: "To protect the public interest, regulatory authorities should enforce existing rules and adopt such additional enforcement procedures as are needed to implement the principles identified in this *Recommendation*." See *Draft Recommendation*, *supra* note 158.

209. As discussed *infra* at Part VII.F, Comment 2 to Rule 5.8 in *Appendix A* referred to professions that may "appropriately" be included in an MDP. This language could be interpreted to place a limitation on who may join with a lawyer in an MDP. The Commission's March 2000 *Draft Recommendation* clearly limits MDPs to nonlawyer professionals who are members of recognized professions or other disciplines that are governed by ethical standards. See *Draft Recommendation*, *supra* note 158, ¶ 1.

210. See *Recommendation*, *supra* note 190, ¶ 9 ("[A] lawyer should be required to make reasonable efforts to ensure that the client sufficiently understands that the lawyer and nonlawyer may have different obligations with respect to disclosure of client information and that the courts may treat the client's communications to the lawyer and nonlawyer differently."). No analogous requirement is contained in the March 2000 *Draft Recommendation*. See *Draft Recommendation*, *supra* note 158. But see Phila. Bar, *Resolution*, *supra* note 159, at ¶ 2(H) (requiring an MDP lawyer to make reasonable efforts to ensure that the client understands that communications unrelated to the provision of legal services are not protected by the attorney-client privilege).

211. See *Appendix A*, *supra* note 134, at Rule 5.8(c)(8). This rule establishes the basis for such disclosure or transparency when it says:

[The MDP] will permit the highest court with the authority to regulate the professional conduct of lawyers in each jurisdiction in which the MDP is engaged in the delivery of legal services to review and conduct an administrative audit of the MDP, as each such authority deems appropriate, to determine and assure compliance with subsections (1)-(7). . . .

*Id.*

212. See *Report*, *supra* note 191, at 3. The *Report* found:

The Commission is not prepared to recommend any change in the present provisions limiting the holding of equity investments in any entity or organization providing legal services. Ownership would be limited to members of the MDP performing professional services. It would not be permitted for an individual or entity to acquire all or any part of the

constitutes an acceptable MDP name.

The Commission did not recommend any scope of practice limitations on lawyers practicing in an MDP. Unlike the D.C. Rule, the Commission's *Recommendation* did not require that lawyer-nonlawyer partnerships be limited to providing legal services.<sup>213</sup> Nor did the Commission recommend a per se rule that would prohibit MDPs from providing simultaneous legal and audit services to the same client.<sup>214</sup>

Concerning functional ethics, the Commission concluded that lawyers practicing law in an MDP setting should comply with the legal ethics rules, a conclusion reaffirmed in the March 2000 *Draft Recommendation*.<sup>215</sup> As mentioned earlier, the Commission also recommended a certification and audit procedure for MDPs controlled by nonlawyers.<sup>216</sup> In addition, the Commission

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ownership of an MDP for investment or other purposes.

*Id.* The March 2000 *Draft Recommendation* explicitly states that the *Recommendation* does not change the existing rules prohibiting passive investment in a law firm. See *Draft Recommendation*, *supra* note 158, ¶ 4.

213. Compare *supra* note 27 and accompanying text which discusses the D.C. Rule and this scope of practice limitation with *Appendix A*, *supra* note 134, at Comment 2 of Rule 5.8, which states, "[w]hile the provision of legal services is one function of an MDP, it need not be the principal function."

214. In its *Updated Background Report*, the Commission stated that any such omission from the June 1999 *Report* was unintentional and that it recommended a legal-audit ban. *Updated Background Report*, *supra* note 53, ¶ 9 ("The Commission shares the SEC's position and regrets that it did not make this point sufficiently clear.") In the March 2000 *Draft Recommendation*, however, the Commission omitted any reference to a legal-audit ban. See *Draft Recommendation*, *supra* note 158. In its June 1999 *Report*, the Commission noted that the ABA would review the Independence Standards Board's study of the incompatibility of the roles of attorneys and auditors under federal securities law. The June 1999 *Report* states:

In a letter from the Office of the Chief Accountant (OCA) of the Securities and Exchange Commission (SEC), this Commission was advised that the SEC has asked the Independence Standards Board (ISB) to place the topic of legal advisory services on its agenda. The SEC intends to look to the ISB for leadership in establishing auditor independence regulations applicable to the audits of the financial statements of SEC registrants. According to the letter, the SEC auditor independence regulations specifically state that the roles of auditors and attorneys under federal securities laws are incompatible. The OCA would consider an auditing firm's independence from an SEC registrant to be impaired if that firm also provides legal advice to the registrant or its affiliates. The Commission believes that this issue is correctly initially discussed in those fora. When the ISB completes its study, appropriate ABA entities will wish to comment on its recommendations and, possibly, to take formal positions.

*Report*, *supra* note 191, at 6, n.3. But see *infra* Part VII.B for a discussion of how the supporters of a legal-audit ban might rely on the language of *Recommendation* paragraph 9.

215. See *Recommendation*, *supra* note 193, ¶ 5 ("A lawyer in an MDP who delivers legal services to the MDP's clients should be bound by the rules of professional conduct."). But see *infra* notes 310-14 and accompanying text calling for greater clarity in this language. *Accord* *Draft Recommendation*, *supra* note 158, ¶ 4 ("This *Recommendation* does not alter the prohibition on nonlawyers delivering legal services and the obligation of all lawyers to observe the rules of professional conduct.")

216. See *Recommendation*, *supra* note 193, ¶¶ 12 & 14 (discussing scope and procedures for certification and auditing of nonlawyer-controlled MDPs). See *supra* note 208 for a discussion of the absence in the March 2000 *Draft Recommendation* for an analogous requirement.

recommended that when an MDP lawyer provides legal services in conjunction with a nonlawyer providing nonlegal services, the nonlawyer must act in a manner that is compatible with the professional obligations of the lawyer.<sup>217</sup> In other words, if there is a conflict between the two professions' rules, and if legal services are involved, then the legal rules trump.

The substantive ethics issues addressed in the *Recommendation* include independence, confidentiality, conflicts of interest, to whom deference may be given, the obligation to have measures in place to avoid ethics violations, and, for nonlawyer-controlled MDPs, pro bono obligations.<sup>218</sup> Although the *Recommendation* and *Report* urge MDP lawyers to maintain independence, the only special measures put in place are for lawyers practicing in nonlawyer-controlled MDPs; otherwise, MDP lawyers are simply told to remain independent and that an MDP lawyer is not excused from the rules of professional conduct when the lawyer defers to a nonlawyer supervisor.<sup>219</sup>

The *Recommendation* does not specifically address confidentiality other than to identify it as a core value and require disclosure to clients of the risks of a waiver of the attorney-client privilege.<sup>220</sup> Because no special screening rules were established, the *Recommendation* apparently treats confidentiality within an MDP similarly to confidentiality within a traditional law firm; i.e., absent client direction to the contrary, information may flow among all partners and employees in a firm, with the caveat that all are required to keep the information

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217. See *Recommendation*, *supra* note 193, ¶ 10 (recommending requirement of nonlawyer compliance with lawyer standards of professional conduct). The March 2000 *Draft Recommendation* did not explicitly address the issue of nonlawyers' compliance with legal ethics provisions. See *Draft Recommendation*, *supra* note 158.

218. See *Recommendation*, *supra* note 193, ¶ 1 (protecting core values, identified as independence, confidentiality, and avoiding conflicts); *id.* ¶ 6 (stating lawyers may not defer to nonlawyer supervisor's resolution of unclear ethics issues); *id.* ¶ 8 (addressing conflicts of interest and imputation issues); *id.* ¶ 10 (adopting measures to ensure ethically compatible behavior); *id.* ¶ 14(E) (discussing pro bono requirements).

219. See *id.* ¶¶ 6 & 14 (discussing primacy of rules of professional conduct as guide for lawyers' conduct even when practicing with nonlawyers); see also *Report*, *supra* note 191, at 2. The *Report* states:

[T]he Commission does not recommend any change to Model Rule 5.4(c) . . . . Nevertheless, as an added protection, the Commission recommends that the ABA Model Rules of Professional Conduct clearly state that a lawyer who is supervised by a nonlawyer may not use as a defense to a violation of the rules of professional conduct the fact that the lawyer acted in accordance with the nonlawyer's resolution of a question of professional duty.

*Id.* The March 2000 *Draft Recommendation* contained even less guidance because it omits any specific reference to nonlawyer supervisors. *Draft Recommendation*, *supra* note 158, ¶ 1 ("Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services."); *id.* ¶ 4 ("This *Recommendation* does not alter . . . the obligations of all lawyers to observe the rules of professional conduct.")

220. See *Recommendation*, *supra* note 193, ¶ 9 (presenting recommended disclosure requirements); *Report*, *supra* note 191, at 3 (addressing concerns and suggestions for avoiding potential impairment of attorney-client privilege). The March 2000 *Draft Recommendation* similarly identified confidentiality as a core value. See *Draft Recommendation*, *supra* note 158, ¶ 1.

confidential.

The Commission's *Report* confirms this observation, stating:

The Commission recommends that no change be made to the lawyer's obligation to protect confidential client information.

Acknowledging that a nonlawyer in an MDP may be subject to an obligation of disclosure that is inconsistent with the lawyer's obligation of confidentiality. . . . the Commission specifically recommends several safeguards to assure that a nonlawyer who works with, or assists, a nonlawyer in the delivery of legal services will act in a manner consistent with the lawyer's professional obligations.<sup>221</sup>

On the interrelated issue of imputation of conflicts of interest, the June 1999 Commission *Recommendation* decided that imputation should occur on an MDP-wide basis, rather than on a legal-services basis, although this issue was not addressed in the March 2000 *Draft Recommendation*.<sup>222</sup>

The Commission's June 1999 position on pro bono was that nonlawyer-controlled MDPs must certify annually that lawyers in an MDP have the same special obligation to render voluntary pro bono legal services as lawyers practicing solo or in law firms; in the March 2000 *Draft Recommendation*, the certification requirement was eliminated but pro bono was listed as one of the core values of the legal profession.<sup>223</sup> Neither the Commission's June 1999 *Recommendation* nor the March 2000 *Draft Recommendation* specifically address the various money-related issues beyond the statement that MDP lawyers must comply with the rules of professional conduct. The *Report*, however, provided additional guidance:

[A] lawyer in an MDP must take special care that payment for legal services and funds received on behalf of a legal services client are clearly designated as such and segregated from other funds of the MDP . . . . In this regard, the MDP must also comply with any and all financial recordkeeping rules of the jurisdiction in which the legal

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221. *Report*, *supra* note 191, at 3.

222. See *Recommendation*, *supra* note 193, ¶ 8. Paragraph 8 of the *Recommendation* states: In connection with the delivery of legal services, all clients of an MDP should be treated as the lawyer's clients for purposes of conflicts of interest and imputation in the same manner as if the MDP were a law firm and all employees, partners, shareholders or the like were lawyers.

*Id.*; see also *Report*, *supra* note 191, at 3-4 (concluding MDP lawyers must treat every MDP client as lawyer's own client). But see *infra* Part VII.J for a discussion endorsing the MDP-wide imputation concept, but criticizing the Commission's choice of language. See *Draft Recommendation*, *supra* note 158 (omitting any reference to the imputation standard).

223. See *Recommendation*, *supra* note 193, ¶ 14(E) (discussing enforcement of pro bono requirements for MDP lawyers); *Report*, *supra* note 191, at 4 (same). In my view, this portion of the *Recommendation* will not be particularly helpful. Because pro bono is currently voluntary, requiring MDP lawyers to honor the same obligations as traditional lawyers may not be saying very much. As the exchange with Judith Billings demonstrated, MDPs may provide an opportunity for the bar to reconsider a mandatory pro bono requirement. See Oral Testimony of Judge Judith M. Billings (Chair, ABA Standing Committee on Pro Bono and Public Service) (Feb. 6, 1999). See *Draft Recommendation*, *supra* note 158, ¶ 2 (identifying pro bono publico obligations as a core value of the legal profession).

services are being delivered.<sup>224</sup>

The last substantive ethics issue addressed by the Commission was the issue of “holding out.” The Commission concluded:

A lawyer in an MDP should not represent to the public generally or to a specific client that services the lawyer provides are not legal services if those same services would constitute the practice of law if provided by a lawyer in a law firm. Such a representation would presumptively constitute a material misrepresentation of fact.<sup>225</sup>

In its illustrations of possible amendments to the Model Rules of Professional Conduct, the Commission included a definition of the practice of law in the “Terminology” section.<sup>226</sup> The Commission also stated that nonlawyers in an MDP should not be permitted to deliver legal services.<sup>227</sup>

This latter substantive ethics issue has proven to be exceedingly controversial. Over one-quarter of the written replies to the Commission’s June 1999 *Report* addressed these provisions.<sup>228</sup> Because I criticize this aspect of the Commission’s *Report* and because the interplay of these provisions is rather complex, I have postponed until the next section an explanation of the significance and operation of these provisions.

All of the above substantive ethics provisions apply to lawyers who share legal fees with nonlawyers or who practice in an MDP. The Commission defined an MDP as follows:

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

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224. *Report, supra* note 191, at 4.

225. *Recommendation, supra* note 193, ¶ 11. No comparable provision is found in the March 2000 *Draft Recommendation*. See *Draft Recommendation, supra* note 158.

226. See *Appendix A, supra* note 134, at 1 (defining “practice of law” to center around relationship of trust or reliance and providing several examples of conduct that presumptively constitutes “practice of law”).

227. *Recommendation, supra* note 193, ¶ 4. This was one of the few points from the June 1999 *Recommendation* that was carried forward into the March 2000 *Draft Recommendation*. See *Draft Recommendation, supra* note 158, ¶ 4 (“This *Recommendation* does not alter the prohibition on nonlawyers delivering legal services . . . .”)

228. See, e.g., Written Replies to the Commission, Reply of American Antitrust Institute (AAI); Reply of American Institute of Certified Public Accountants (AICPA); Reply of Stephen R. Conafay (Managing Director, Shandwick); Reply of Consumer Representatives, The Consumer Alliance; Reply of Kenneth E. Feltman (President, American League of Lobbyists); Joint Response from 15 Government Affairs Firms, Washington, D.C.; Reply of James A. Klein (President, Association of Private Pension and Welfare Plans (APPWP)); Reply of Wayne Moore, J.D. (Director, Legal Advocacy Group, AARP Foundation); Reply of James P. Schaller, Esq.; Reply of Laurel S. Terry (Professor of Law, Penn State Dickinson School of Law); Reply of Louise G. Trubek (Senior Attorney, Center for Public Representation and Professor of University of Wisconsin-Madison Law School).

sharing of profits as part of the arrangement.<sup>229</sup>

In sum, the Commission's June 1999 *Report* addressed most of the key threshold, functional, and substantive ethics issues previously identified. In other words, the Commission's June 1999 *Recommendation* attempted to provide guidance not only on the issue of *whether* MDPs should be permitted, but also the issue of *how* they should be permitted, resolving issues of the forms of association, scope of practice, functional ethics and substantive ethics. In contrast to this approach, the March 2000 *Draft Recommendation* appears to concentrate on the issue of *whether* to permit MDPs and omits, for the most part, any recommendation about *how* they should be permitted, leaving those decisions to the "regulatory entities." Although the lack of details in the Commission's March 2000 *Draft Recommendation* may make it easier for the Commission to obtain an affirmative vote from the ABA House of Delegates, the state regulatory authorities ultimately will have to address the difficult questions of details about how to permit MDPs if they are allowed. Consequently, state and local bars and state regulatory authorities likely will continue to look to the June 1999 *Recommendation*. Therefore, although the Commission has backtracked from its June 1999 *Recommendation*, Sections VI and VII of this Article evaluate both the general conclusions and the details contained in the Commission's June 1999 *Recommendation*.

#### VI. MY ENDORSEMENT OF THE COMMISSION'S CONCLUSIONS

In my view, the Commission basically "got it right" when it recommended that the fee-sharing ban of Model Rule 5.4 be eliminated. This Section explains the bases for my agreement with the Commission.

##### A. *Starting Premises: Points of Consensus Within ABA Testimony*

Although the Commission participants disagree on many points, an examination of the testimony and submissions demonstrates that the following points cannot be seriously disputed.

First, virtually all commentators agree that the proper bases for regulation are client protection and public interest.<sup>230</sup> Some have argued that the Commission and commentators have not placed enough emphasis on the public interest aspect<sup>231</sup> and some have slipped into talking about the competitive effect

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229. *Recommendation*, *supra* note 193, ¶ 3.

230. See Terry Appendices B1-B7 (Mar. 12, 1999), *supra* note 4, at Threshold Issues, Item A (summarizing testimony of witnesses on this issue).

231. See generally David Luban, *Asking the Right Questions*, 72 TEMP. L. REV. 839, 839-855 (1999). In his article, Mr. Luban analysis of MDPs revolves around this theme. He writes:

Too often, the questions about multidisciplinary practice ("MDP"), mediation and arbitration, and in-house lawyering are whether they are good for lawyers and good for clients. . . . The right question is not whether new roles with no rules are good for lawyers and clients, but rather whether they are good for the rest of us—"us" being the citizenry who count on lawyers to be guardians of the law, and whom market forces will not necessarily protect.

of MDPS,<sup>232</sup> but the fact remains that the dialogue generally has remained focused on the issues of what is in the best interest of clients and the public.

Second, a consensus emerged that there is at least some client and lawyer demand for MDPS. The witnesses disagreed, however, about whether the demand is overwhelming or is minor and is being driven by the suppliers.<sup>233</sup>

Third, the testimony and submissions has shown that the MDP phenomenon exists not only outside the U.S., but within the U.S. as well. Significant numbers of lawyers now are working outside traditional law firms doing work that if done in a law firm would be considered the practice of law.<sup>234</sup>

Fourth, the testimony and submissions has established that U.S. lawyers working outside a traditional law firm setting claim they are not practicing law and therefore are outside the scope of the profession's general regulatory net.<sup>235</sup> Several witnesses expressed the view that if the MDP ban were lifted and lawyers were permitted to work outside a traditional law firm setting, these lawyers gladly would subject themselves to the authority of the disciplinary bodies in exchange for the ability to hold themselves out as lawyers providing legal services.<sup>236</sup>

Fifth, witnesses agreed that there are numerous uncertainties about MDPS. No one knows what the future will hold.<sup>237</sup>

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Id. at 839.

232. See, e.g., Oral Testimony of Larry Ramirez (Chair, ABA General Practice, Solo and Small Firm Section) (Feb. 6, 1999); Oral Remarks of Laurel S. Terry (Mar. 12, 1999) (indicating one question was about effect on lawyers' practices of lifting MDP ban).

233. See *Reporter's Notes*, supra note 58, at 7-8 (addressing extent of and origins of demand for MDPS); Terry Appendices B1-B7 (Mar. 12, 1999), supra note 4, at Threshold Issues, Item F (summarizing testimony of witnesses on this issue).

Larry Fox, on occasion, has denied that there is *any* demand for MDPS. I consider these statements to be hyperbole in view of the testimony of witnesses such as former corporate counsel M. Elizabeth Wall (Cable & Wireless) (Nov. 12, 1998) and Steven A. Bennett (Banc One) (Nov. 13, 1998), that they want the ability to chose an MDP; and Lynda Shely (State Bar of Arizona and ABA Standing Committee on Client Protection) (Feb. 5, 1999), the Arizona ethics counsel who said that she gets several calls a month from lawyers who want to form an MDP. In my view, a consensus emerged that there is at least *some* client and lawyer demand for MDPS.

234. See Terry Appendices B1-B7 (Mar. 12, 1999), supra note 4, at Threshold Issues, Item G (summarizing testimony of witnesses on this issue).

235. There are some ethical provisions, of course, that apply to a lawyer twenty-four hours per day, regardless of the lawyer's professional employment. ABA Model Rule of Professional Conduct 8.4(c), for example, authorizes discipline for dishonesty, fraud, deceit, or misrepresentation, regardless of whether it happens in a professional context. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1999) (finding it is misconduct for lawyer to engage in any of these activities). Most ethics rules, however, apply only in connection with legal services provided by a lawyer to a client.

236. See, e.g., Testimony of Jim Holden (Steptoe & Johnson) (Nov. 12, 1998); Oral Testimony of James Turner (Executive Director, H.A.L.T.) (Feb. 5, 1999); see also Oral Testimony of James W. Jones (APCO Associates, Inc.) (Feb. 6, 1999) (expressing uncertainty). But see Oral Remarks of Richard Spivak (Managing Partner - Tax - North America, Andersen) (Mar. 12, 1999) (opining that significant number of lawyers in MDPS would turn in their licenses).

237. See, e.g., Oral Testimony of Simon Potter (Member, Canadian Bar Association International Practice of Law Committee) (Feb. 6, 1999) (advising ABA Commission to only address what was absolutely necessary because world is in turmoil); Testimony of M. Elizabeth Wall (Cable &

*B. Pragmatic Perspective: Regulation is the Best Option*

One of the major reasons why I endorse lifting the current MDP ban is pragmatism. Regulators in the U.S. have three options for responding to the MDPs: (1) ignore them; (2) try to stop them; or (3) try to regulate them. As described below, I believe the first two options are either undesirable or infeasible, and thus, I conclude that regulation is the best option.

If one chooses to simply ignore MDPs, the result will be two worlds of lawyers, one regulated and one unregulated. Lawyers practicing in a traditional law firm, acknowledging that they are practicing law, remain subject to the applicable ethics rules. These lawyers are bound by the applicable ethics rules even if they dislike certain rules such as the firm-wide imputation rule or the concept of nonconsentable conflicts of interest.<sup>238</sup> In contrast, if the regulators choose to ignore MDPs and maintain the current ban, lawyers practicing in an MDP must continue to claim that they are not practicing law; to do otherwise would subject them to discipline for violation of Rule 5.4.<sup>239</sup> These lawyers, then, would operate on an unregulated basis and might consider themselves free to ignore legal ethics rules they disagree with or consider inconvenient. This parallel world of lawyers—some regulated and some unregulated—will only become larger as MDPs proliferate. I consider this type of world dangerous: it will breed disrespect for the law and legal ethics rules, and it may create a race to the bottom. Some lawyers can obtain a competitive advantage by ignoring the legal ethics rules. Moreover, even if the current ethics rules, such as the imputation and nonconsentable conflicts rules need amendment, I favor changing them through a process such as the Ethics 2000 Commission, in which the pros and cons can be weighed.

The second possible response to MDPs is to try to stop them. Many commentators rely on this option, arguing that the ABA or some other entity should simply enforce the UPL laws against these lawyers (and nonlawyers) practicing together in an MDP.<sup>240</sup> This is the position Larry Fox took during this Symposium.<sup>241</sup> One can argue, of course, about whether UPL enforcement in

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Wireless) (Nov. 12, 1998) (finding issues will take long time to work out).

238. See generally American Bar Association, Center For Professional Responsibility, Commission on Evaluation of the Rules of Professional Conduct, *Minutes* (Oct. 15-17, 1999) (on file with author) (containing criticisms of both of these concepts).

239. See *supra* notes 9-19 and accompanying text for a discussion of the reasons why lawyers would be subject to discipline if they admitted practicing law and sharing fees with nonlawyers.

240. See, e.g., Oral Testimony of Jay G. Foonberg (Bailey & Marzano) (Feb. 6, 1999) (proposing ABA resolution to call for increased UPL enforcement and support it financially); Oral Testimony of Lawrence J. Fox (Drinker Biddle & Reath) (Feb. 4, 1999); Testimony of Karen D. Powell (Petrillo & Powell) (Nov. 12, 1998).

241. See Phyllis W. Beck Chair in Law Symposium Remarks of Lawrence J. Fox, (Nov. 12, 1999). See generally Lawrence J. Fox, *Old Wine in Old Bottles: Preserving Professional Independence*, 72 TEMP. L. REV. 971, 983 (1999) (“[W]e must call on those who enforce our disciplinary rules to do so. Where are the regulators when the violations of Rule 5.4 are so blatant? . . . It’s summary judgment time for these miscreants . . .”).

this context is a desirable outcome.<sup>242</sup> Aside from the issue of whether this result is appropriate or desirable, I have become convinced that this result is not achievable.

One of the Commission's standard questions during the hearings was: "How would you define the practice of law (for UPL enforcement purposes)?" None of the witnesses had a particularly satisfactory answer. As witness Jim Jones explained, it is very easy to define the practice of law in an inclusive sense that describes what it is that lawyers do.<sup>243</sup> Malpractice insurance policies, for example, describe the practice of law in an inclusive sense.<sup>244</sup> Jones explained, however, that it is very difficult to define the practice of law exclusively, so as to prohibit nonlawyers from engaging in the specified activities.<sup>245</sup>

There are several reasons why it will be difficult to define the practice of law in an MDP context. First, if UPL is enforced criminally, the MDP and its lawyers can argue that any ambiguities in the definition of the practice of law should be construed in their favor.<sup>246</sup> Additionally, many UPL cases have been brought against disempowered defendants who do not have unlimited resources to spend in litigating the definition of the practice of law.<sup>247</sup> Moreover, judges have not been particularly sympathetic to UPL claims when there is no evidence of client harm.<sup>248</sup> Finally, one must examine the cases cited by those who

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242. See generally ABA Commission on Nonlawyer Practice, *Nonlawyer Activity in Law-Related Situations: A Report with Recommendations* 61-74 (1995) (reporting on unmet needs for legal services and discussing UPL); Daly, *supra* note 1, at 48-54 & nn.116-39 (discussing history and development of rules restricting UPL); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981) (describing history, empirical evidence, and constitutional implications of UPL); see also Oral Remarks of Wayne Moore (Director, AARP) (Mar. 11, 1999) (seeking broadest change possible while protecting clients because it promotes access to justice).

243. See Written Remarks of James W. Jones (APCO Associates, Inc.) (Feb. 6, 1999).

244. *Id.*

245. *Id.* See also *supra* note 8 and accompanying text for a discussion of the difficulty in defining the "practice of law" precisely.

246. See, e.g., *United States v. Yermian*, 468 U.S. 63, 77 (1984) (Rehnquist J., dissenting) (asserting statutory construction requiring "ambiguity concerning the ambit of criminal statutes . . . be resolved in favor of lenity" in construing applicable statute); *Rewis v. United States*, 401 U.S. 808, 812 (1971) (noting doubts in criminal statutes resolved against imposing harsher statutes).

247. See generally WOLFRAM, *supra* note 20, at 838-49 (providing numerous case examples). In June 1998, for example, "the web page for the Pennsylvania Bar Association Unauthorized Practice of Law Committee . . . list[ed] 17 opinions. Only five of these opinions involve alleged UPL by a non-Pennsylvania lawyer. The other opinions involve alleged UPL by nonlawyers." *What If?*, *supra* note 1, at n.104.

248. See, e.g., Florida Bar *re* Advisory Opinion - Nonlawyer Preparation of Pension Plans, 571 So. 2d 430, 433 (Fla. 1990) (refusing to adopt recommendation of Florida UPL committee that it is unauthorized practice of law for nonlawyers to design and prepare pension plans because court was not convinced by record that there was public need for protection sought by UPL committee); *Perkins v. CTX Mortgage Co.*, 969 P.2d 93, 100 (Wash. 1999) (declining to find activities of mortgagee in connection with completion of financing documents constituted practice of law); see also *In re N.J. Soc'y of Certified Pub. Accountants*, 507 A.2d 711, 714 (N.J. 1986) (noting "in cases involving an overlap of professional disciplines we must try to avoid arbitrary classifications and focus instead on the public's realistic need for protection and regulation."); *In re Unauthorized Practice of Law Rules*

endorse using UPL to stop the MDP phenomenon. *Lawline v. American Bar Association*<sup>249</sup> is one of the cases that has been cited for the proposition that UPL is alive and kicking and should be used against MDP lawyers.<sup>250</sup> In *Lawline*, a plaintiff challenged on antitrust grounds the defendants' adoption and use of the ABA Model Rules' UPL provisions. The defendants were: the ABA; the Illinois State Bar Association; the Chicago Bar Association; the justices of the Illinois Supreme Court in their official capacities; members of the Illinois Supreme Court Committee on Professional Responsibility; members of the Attorney Registration and Disciplinary Commission of the Illinois Supreme Court; members of six executive committees of the court in their official capacities; and the U.S. Trustee for the Northern District of Illinois and his assistant.<sup>251</sup> Is it any wonder that the court upheld the UPL provision given the context of this suit? I submit that it will be a very different case if a Big Five firm or lawyers practicing in the Big Five are charged with UPL violations; there is enough money at stake that they undoubtedly will litigate vigorously.<sup>252</sup> One cannot assume based on *Lawline* that the UPL provisions can be enforced. In short, I have not yet been convinced that the "stop it" option could be successful, even if it were desirable.

If ignoring MDPs is not desirable, and stopping MDPs is not feasible, the only remaining option is to regulate. This is the pragmatic reason why I endorse lifting the MDP ban.

My decision to endorse Model 5—the fully integrated MDP—as opposed to a more limited model of MDP—also was based on pragmatism. Various Commission witnesses testified that *form of association* limitations, such as rules

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Proposed by the South Carolina Bar, 422 S.E.2d 123, 124-25 (S.C. 1992) (concluding CPAs may represent clients before agencies and probate court without violating state's UPL prohibition). *Cf.* Florida Bar *re* Advisory Opinion on Nonlawyer Representation in Securities Arbitration, 696 So. 2d 1178, 1181 (Fla. 1997) (holding nonlawyer retained to represent investor, for compensation, in securities arbitration against broker is engaged in unauthorized practice of law); Sharon Village Ltd. v. Licking County Bd. of Revision, 678 N.E.2d 932, 936 (Ohio 1997) (affirming dismissal of tax appeals because board of revision lacked jurisdiction to hear complaints about property tax assessments filed for clients by nonlawyer and also found nonlawyer had engaged in unauthorized practice of law). *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Proposed Final Draft No. 2, 1998), § 4, Reporter's Note, cmt. c (listing cases).

249. 956 F.2d 1378 (7th Cir. 1992).

250. *See, e.g.*, Written Comments Not Presented at Hearings, Therese M. Stewart (President, Bar Association of San Francisco). Ms. Stewart wrote:

We also note that ethics rules prohibiting lawyers from entering into partnerships with non-lawyers if any of the activities of the partnership consist of the practice of law, and rules forbidding lawyers from assisting lay persons in the unauthorized practice of law have been upheld against constitutional challenges of due process and equal protection as well as challenges under the First Amendment.

*Id.* (citing *Lawline v. American Bar Ass'n.*, 956 F.2d 1378 (7th Cir. 1992)).

251. *See Lawline*, 956 F.2d at 1387 (discussing claims that adopting disciplinary rules violates Sherman Act, First Amendment, as well as Due Process and Equal Protection Clauses).

252. *See, e.g.*, Testimony of William Elliott (Kane, Russell, Colemand & Logan) (Nov. 13, 1998) (describing Texas UPL complaint against Andersen and resources expended in investigation and defense of complaint).

requiring lawyers to have a majority ownership or a controlling interest, or requiring a separate legal entity to provide legal services, are not the correct way to go about protecting lawyers' core values, clients, or the public.<sup>253</sup> I became convinced these types of requirements are easily manipulated.<sup>254</sup> It would be inefficient to concentrate on detecting violations of these issues, rather than violations of our underlying concerns. Moreover, there is not a complete correlation between these formalistic requirements and the underlying goals. For example, a majority ownership requirement might or might not translate into protecting a lawyer's ability to exercise independent legal judgment.

Furthermore, the global experience suggests that less-than-fully-integrated-MDPs are merely an interim step. New South Wales recently amended its rule to delete the requirement of a lawyer majority interest and the Law Council of Australia endorsed a similar policy.<sup>255</sup> Witnesses testified that the rules in their jurisdictions of France, England, and Scotland ultimately will be relaxed.<sup>256</sup> The Canadian Bar eliminated from its final report restrictions in its Interim Report that had received extensive criticism.<sup>257</sup> Germany's recent law requiring a lawyer majority interest in limited liability firms has been in operation approximately one year and already is the subject of criticism. Moreover, it is the Big Five-affiliated German firms, rather than traditional firms, that first embraced this new statute that has a lawyer-control requirement.<sup>258</sup>

If the U.S. ultimately will have a fully-integrated model, there is something to be said for starting off immediately with that model and trying to get it right. Rather than using rules about legal forms as a proxy for our true concerns, U.S. regulators should focus on the underlying issues. This is especially true because developments such as McKee Nelson Ernst & Young suggest that a lawyer majority requirement will not allay concerns about independence but may instead prevent Main Street MDPs. I therefore endorse Model 5 and urge U.S.

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253. See, e.g., Written Replies to the Commission, Reply of Richard P. Campbell (International Association of Defense Counsel); Reply of Sydney M. Cone, III (Counsel, Clearly, Gottlieb, Steen & Hamilton); Reply of Defense Research Institute; Reply of Lawrence J. Fox (Drinker Biddle & Reath, LLP); Reply of Steven Krane (New York State Bar Association); Reply of Ramon M. Mullerat, Esq.; Reply of New York County Lawyers' Association; Reply of Karen D. Powell (Petrillo & Powell, P.L.L.C.); Reply of State Bar of California; Reply of Stuart P. Werling, Esq.; Reply of Bernard Wolfman (Professor of Law, Harvard Law School).

254. See, e.g., Testimony of Stephen McGarry (Lex Mundi) (Nov. 13, 1998); Oral Remarks of Roger Page (Deloitte & Touche) (Mar. 11, 1999); Oral Remarks of Richard Spivak (Managing Partner-Tax-North America, Andersen) (Mar. 12, 1999). *But see* Oral Remarks of Lawrence M. Hill (White & Case) (Feb. 4, 1999) (finding Model 4 could make regulation issues less complicated).

255. See *supra* notes 63-69 and accompanying text for a discussion of Australia's MDP provisions.

256. See Oral Remarks of Neil Cochran (Dundas & Wilson C.S.) (Feb. 4, 1999) (discussing post-hearing proposals to modify English and French MDP rules); Testimony of Alison Crawley (Law Society of England and Wales) (Nov. 12 1998); Testimony of Gerard Nicolay (PricewaterhouseCoopers) (Nov. 12, 1998); .

257. See *supra* note 70 and accompanying text for a discussion of testimony concerning this charge by the Canadian Bar.

258. See Henssler, *supra* note 133; Terry, *German MDPs*, *supra* note 58.

regulators not to focus on the form of practice in an MDP, but instead to focus on the underlying concerns, and then attempt to respond directly to those concerns.

In sum, having determined that an MDP phenomenon exists and having identified only three ways of reacting to that phenomenon, I concluded that the effort to regulate the phenomenon made much more sense than ignoring or trying to stop it.

### C. *Theoretical Perspective*

In addition to the pragmatic grounds discussed above, there are several theoretical reasons why I favor lifting the current MDP ban. The most significant of these grounds concerns a concept I have referred to as “burden of proof.”<sup>259</sup>

As explained above, the world is changing before our eyes and we are unsure as to what will happen and whether these changes will be for the better or worse.<sup>260</sup> Given this uncertainty, assignment of the burden of proof regarding MDPs is critical because the side with the burden will likely lose.

There are two major options with respect to the burden.<sup>261</sup> A regulator might, for example, decide that those who want to change the current MDP ban must convince the regulator that the proposed change is good and the risks minimal. Alternatively, a regulator might decide that those who want to keep an existing MDP ban have the burden to justify the limitations on the way lawyers can organize and practice.

Although very few of the pre-Commission *Report* commentators expressly acknowledged the burden of proof issue, that situation changed dramatically during the summer of 1999. During the plenary session on MDPs at the June 1999 25th National Conference on Professional Responsibility, for example, there was a colloquy with the panel about who had the burden and whether it

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259. See Written Remarks of Laurel S. Terry (Mar. 12, 1999). *Burden of proof* is an imprecise term that encompasses concepts such as burden of pleading, burden of production, and burden of persuasion. It is also a term I tell my students never to use. Nevertheless, this is the term I used throughout my testimony and in subsequent conferences such as the 25th National Conference on Professional Responsibility. See *supra* note 4 for presentation of the author's testimony and remarks distributed at this conference. Because of the dialogue that already has occurred about the correct allocation of the “burden of proof,” I have continued in this Article to use this imprecise term. By this term, I intend to refer to both the burden of production and the burden of persuasion. See also Wolfram, *supra* note 39, at 344 (“The answer to any MDP discussion may well turn on who has the burden of carrying the argument.”).

260. See also Written Comments Not Presented at Hearings, Comment of Robert W. Gordon (Professor of Law, Yale Law School) (stating our “profession is evidently undergoing a major revolution in the organization and delivery of legal services”).

261. Other permutations may emerge as the thinking about these issues develops and becomes more sophisticated. At this beginning stage of the analysis, however, I found it a useful-enough exercise to think about the burden of proof issue in a binary, zero-sum sense, in which the burden is entirely assigned either to those who wish to retain the current MDP ban or those who wish to delete the current MDP ban.

had been met.<sup>262</sup> Perhaps because Larry Fox is a member, the Pennsylvania MDP Commission's July 1999 report explicitly addresses the burden of proof concept.<sup>263</sup>

Similar to the Pennsylvania MDP Commission resolution, the Florida bar resolution adopted by the ABA House of Delegates during the August 1999 Annual Meeting is based on a burden of proof concept. Some of the comments since the Commission's *Report* also refer expressly to the concept of burden of proof. Supporters and critics of the MDP ban often have very different views on whether those who seek to maintain the current MDP ban have the burden to show that the ban is justified or whether those who seek to change the status quo and permit MDPs have the burden of showing that the risks are minimal and the benefits outweigh the risks.<sup>264</sup>

In my view, those who wish to retain the current MDP ban have the burden of proof to justify such a ban given the testimony showing at least some client and lawyer demand for MDPs.<sup>265</sup> The current MDP ban tells clients: "I am

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262. See ABA 25TH NATIONAL CONFERENCE ON PROFESSIONAL RESPONSIBILITY, SUPPLEMENTARY COURSEBOOK MULTIDISCIPLINARY PRACTICE (June 3, 1999), Testimony of Laurel S. Terry (Mar. 12, 1999), app. A, at 3 (on file with author).

263. See Pennsylvania Bar Association, *Pennsylvania Bar Association Commission on Multidisciplinary Practice & Related Trends Affecting the Profession, Recommendation* [hereinafter *PA Bar Recommendation*] (adopted by PBA Board of Governors July 27, 1999) (visited Dec. 8, 1999) <<http://www.pabar.org/mdprecom.shtml>>. The Pennsylvania Bar Association's *Recommendation* read as follows:

RESOLVED, that the American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which would permit a lawyer to offer legal services through a multidisciplinary practice, unless and until extensive evidence and well-reasoned analysis demonstrate that such change will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients, and that the Recommendation of the American Bar Association's Commission on Multidisciplinary Practice be disapproved.

*Id.* As explained *supra* note 159, the Pennsylvania Bar Association MDP Commission has endorsed MDPs that are 60% controlled by lawyers and meet certain other conditions, which was somewhat surprising given this earlier report. See *PA Bar, MDP Report, supra* note 159.

264. Compare *FL Bar Recommendation, supra* note 155 (recommending ABA should "make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until additional study demonstrates that such changes will further the public interest") and *PA Bar Recommendation, supra* note 263 (recommending no change to Model Rules of Professional Conduct until "extensive evidence and well-reasoned analysis" show public interest will be furthered without harming duties of lawyers), with Written Remarks of Laurel S. Terry (Mar. 12, 1999), *supra* note 4, at 4-5 (asserting people wishing to keep Model Rule 5.4 have burden of convincing Commission that rule should be kept) and Written Reply to the Commission, Reply of Theodore J. DelGaizo, PE, Esq. ("The Pennsylvania Bar Association (of which I am a member) argues that the rules should not be changed without evidence that problems (conflicts, independence, etc.) will not occur. I think it is the other way around. Defenders of the status quo should be required to provide the rational basis for the current rule, other than some arcane notion of tradition.").

265. While not used consistently, this is the approach that I believe is used throughout the Model Rules. When a limitation is placed on client choice (such as with nonconsentable conflicts or limiting clients' right to have a fee based on literary rights), regulators try to justify those actions and limitations. In my view, we assume good cause must be shown for the limitations, rather than

sorry, I know you want MDPs, but for your own good or for the sake of the public good, I am not going to let you use an MDP.” While there certainly are situations in which it is appropriate to have paternalistic rules, I think the burden should be on the person or institution imposing the paternalistic rule to justify that limitation on client choice.<sup>266</sup>

In my view, those who wish to retain the MDP ban did not carry their burden of proof nor show why an MDP ban was necessary. The Commission heard relatively little testimony about clients who had been injured by lawyers practicing in an MDP. Former U.K. corporate counsel Elizabeth Wall was one of the few witnesses with first-hand knowledge of such a problem. She described the efforts of one Big Five firm to include (and disguise) legal services in a bid, even though the request for bids specifically excluded such services.<sup>267</sup> Although she lamented what she described as the “Trojan Horse” problem, she indicated that she wanted the freedom to choose an MDP as a legal services provider.<sup>268</sup> On the other hand, the Commission heard testimony about places in which MDPs currently are functioning, without any evidence that this has eroded the rule of law or fundamental nature of the profession.<sup>269</sup> The Commission also heard testimony from lawyers currently practicing in an MDP who felt they could do so without compromising their legal values. Witness Gerard Nicolay, for example, essentially said: “I am a sixth generation lawyer. My ethics and honor are important to me. I would never compromise them while working for PricewaterhouseCoopers.”<sup>270</sup> Witness Neil Cochran testified similarly.<sup>271</sup> Witnesses Jones, Ramirez, Robinson, and Tucker predicted that it would be possible for a lawyer to work in an MDP context without compromising one’s values or independence.<sup>272</sup>

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assuming the limitation is fine absent a showing to the contrary. Obviously, this issue of burden of proof is one of the many issues deserving of in-depth treatment in a separate law review article.

266. See *supra* note 265 and accompanying text for a discussion of who bears burden for justifying client limitations. See also Written Comments Not Presented at Hearings, Comment of Robert W. Gordon (Professor of Law, Yale Law School) (explaining poor record of bar in opposing, on client protection grounds, practice innovations that now appear to benefit clients and to have been economically threatening to some lawyers).

267. See Testimony of M. Elizabeth Wall (Cable & Wireless) (Nov. 12, 1998).

268. *Id.*

269. See Witnesses Neil Cochran (Feb. 4, 1999), Gerard Nicolay (Nov. 12, 1998), and Thomas Verhoeven (Nov. 13, 1998), all of whom practice in an MDP, and Witnesses Allison Crawley (Nov. 12, 1998), Michel Gout (Nov. 12, 1998), Gerard Mazet (Feb. 6, 1999), and Andrew Scott (Nov. 13, 1998), who are regulators or bar advisors in countries with MDPs. In contrast to these witnesses, Witness Dr. Hans-Jürgen Hellwig (Feb. 4, 1999 and August 8, 1999) stated that he thought there had been an effect on the legal profession in Europe in terms of over-commercialization of the legal profession and that Big Five MDPs in Germany had been a failure. My research in Germany, however, did not uncover these problems. See Terry, *German MDPs*, *supra* note 58.

270. See Testimony of Gerard Nicolay (PricewaterhouseCoopers) (Nov. 12, 1998).

271. See Written Statement of Neil Cochran (Dundas & Wilson C.S.) (Feb. 4, 1999).

272. See Oral Testimony of James W. Jones (APCO Associates, Inc) (Feb. 6, 1999); Oral Testimony of Larry Ramirez (Chair, ABA General Practice, Solo and Small Firm Section) (Feb. 6, 1999); Oral Testimony of Charles F. Robinson (Law Offices of Charles F. Robinson) (Feb. 5, 1999); Oral Testimony of Stefan F. Tucker (Chair, ABA Section of Taxation) (Feb. 4, 1999).

Weighed against this testimony is the concern that one cannot believe these lawyers, or that these lawyers are anomalies. Witness Gerard Mazet testified, for example, that he wouldn't be worried if all lawyers were like PricewaterhouseCoopers' Gerard Nicolay.<sup>273</sup> Larry Fox has argued that it is unrealistic to expect all lawyers in these MDP settings to resist the pressures they will face.<sup>274</sup>

In short, although I have concerns about whether MDP lawyers will honor their obligations, I am not ready to override client choice on this basis. As the Commission heard, there are many situations in which lawyers face pressures to compromise their independent legal judgment: pressures within a large law firm, pressures because of high student debt loans that must be paid, pressures from nonlawyers in a government agency, pressures within a corporate law setting, and pressures from insurance companies.<sup>275</sup> Yet the U.S. system (unlike many European systems) has been willing to put lawyers in situations in which they face such pressures. The U.S. system is based on the integrity of the individual lawyer and has been willing to trust the lawyer to resist such pressures.<sup>276</sup>

Fox and Foonberg suggest that the corporate counsel situation is distinguishable because corporate counsel has only one client, whereas the MDP lawyer will have many clients. In my view, this distinction does not undercut the value of the analogy. Although corporate counsel may have only one client, we expect the lawyer to honor the lawyer's ethical obligations with respect to that client, notwithstanding pressure from nonlawyers and other constituents of the client.

Professor Eleanor Myers also argues that the corporate counsel situation can be distinguished. In her view, the most significant risk to corporate counsel is that they will identify too closely with their clients, whereas the risk from MDPs is that the lawyer will identify too closely with the third-party employer, rather than the client.<sup>277</sup> Even if Professor Myers is correct that identification with the client presents the major risk to corporate counsel's independence, corporate counsel also face pressures from third parties such as a president with the power to hire, fire, and set salaries for counsel.<sup>278</sup> Despite these risks, U.S. states, unlike many European countries, permit licensed lawyers to serve as in-

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273. See Oral Testimony of Gerard Mazet (President of the International Commission of the French National Bar Council) (Feb. 6, 1999).

274. See Written Remarks of Lawrence J. Fox (Drinker Biddle & Reath) (Feb. 4, 1999).

275. See, e.g., Written Comments Not Presented at Hearings, Comment of Robert W. Gordon (Professor of Law, Yale Law School); Oral Testimony of Stefan F. Tucker (Chair, ABA Section of Taxation) (Feb. 4, 1999).

276. See, e.g., Phyllis W. Beck Chair in Law Symposium Remarks of Professor Mary Daly (Nov. 12, 1999) (observing that Big Five have tremendous resources and lobbying power, as evidenced by quick adoption of the Tax Preparer Privilege). I do not believe this lobbying power is sufficient justification to deny MDP lawyers the opportunity to comply with the existing ethics rules.

277. See Phyllis W. Beck Chair in Law Symposium Remarks of Lawrence J. Fox, (Nov. 12, 1999); See generally Myers, *supra* note 145 (contrasting risks to lawyer independence which occur in in-house and MDP settings).

278. See, e.g., Phyllis W. Beck Chair in Law Symposium Remarks of Robert Mundheim (Nov. 12, 1999).

house counsel.<sup>279</sup> In other words, U.S. regulators trust that corporate counsel will comply with their ethical obligations despite pressures from third parties.

Some commentators also have argued that the third-party insurance company payor situation shows that it is a bad idea to permit nonlawyer employment of a lawyer and demonstrates that allowing MDPs will make a bad situation worse.<sup>280</sup> There is no doubt that the insurance company payor situation has placed new and tremendous pressures on lawyers.<sup>281</sup> The current problems with third-party insurance company payors, however, is not sufficient to justify the MDP ban. Given the restriction on client autonomy, I am uncomfortable using a rationale of “don’t make a bad situation worse,” especially because some of the “bad situations” involve pressures within a large law firm and because law firms may benefit economically from such a decision to retain the MDP ban.<sup>282</sup> Additionally, the legal profession’s response to the third-party payor-insurance situation demonstrates that many (and hopefully most) lawyers will resist pressure to undermine their judgment. The American Law Institute, for example, amended the proposed rule in the Law Governing Lawyers to ensure that in third-party payor situations, lawyers obtain client consent before agreeing to let the insurance company direct the lawyer’s actions.<sup>283</sup> Thus, because there

279. See, e.g., Terry, *supra* note 93, at 20 (finding conflict problems led some European countries to exclude “house counsel from their definition of lawyer”).

280. See Oral Testimony of Lawrence J. Fox (Drinker Biddle & Reath) (Feb. 4, 1999).

281. A perusal of the *ABA/BNA Lawyers Manual on Professional Conduct, Current Reports*, for example, contains an insurance-related article in almost every issue. See, e.g., *Confidentiality: Lawyer Must First Obtain Insured’s Consent Before Sending Confidential Data to Auditor*, in 15 *LAWYER’S MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 554-55 (1999)*. See generally 15 *LAWYER’S MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) (1999)* (presenting issues concerning professional conduct).

Arizona Ethics Counsel Lynda Shely testified that this was a much greater problem than MDPs. See Oral Testimony of Lynda Shely (State Bar of Arizona and ABA Standing Committee on Client Protection) (Feb. 5, 1999).

282. See generally Written Comments Not Presented at Hearings, Comment of Robert W. Gordon (Professor of Law, Yale Law School) (observing many lawyer actions that were justified at time on client protection grounds appear, in hindsight, as measures to protect lawyers’ income or stature).

283. On May 12, 1998, the American Law Institute approved the *Restatement of the Law Governing Lawyers* project. See *ALI Completes Restatement on Lawyers, Gives Final Approval to All Sections*, in 14 *LAWYER’S MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 211 (1998)* [hereinafter *ALI Completes Restatement*]. Section 215, regarding the tripartite insured-insurer relationship, proved quite controversial. Section 215, as originally proposed, provided:

A lawyer’s professional conduct on behalf of a client may be directed by someone other than the client when:

- (a) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and
- (b) the client consents to the direction under the limitations and conditions provided in § 202.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 248, § 215(2). The comment to section 215 indicated, and the reporters defended, the proposition that a lawyer is not required to speak directly with the client to obtain the client’s consent. *Id.* at cmt. b. The comment stated:

In insurance representations, when there appears to be no substantial risk that a claim

are other situations in which lawyers face pressure, and because MDPs do not seem qualitatively different, I do not believe a showing was made at the Commission hearings which would justify a limitation on client choice.

The closest I can find to a principled basis for distinguishing the MDP practice is the size of the entity with which the lawyer would be practicing. Although the point was not explicitly framed in this manner, some commentators appear to believe that if a lawyer is only a small part of a large organization and the lawyer is not in control, then pressures will be placed on the lawyer that we cannot expect the lawyer to resist.<sup>284</sup> The unstated assumption may be that lawyers currently have enough power and prestige so that their judgments are respected. But, lawyers in a large MDP will be powerless and therefore their ethical judgments will not be respected.

In my view, the size of the MDP entity should not be the basis for a principled decision. First, there is the line-drawing problem: How big is too big? Second, there is the problem of uneven application; as Commission Witness Jones said: Will we apply this rule to large law firms? Third, many of the MDPs which the Commission heard about and which would be excluded by an MDP ban, would be small MDPs—used by Main Street, not Wall Street, lawyers for Main Street clients. Fourth, every witness who addressed the topic urged the Commission not to fragment the bar, which might happen if there was a rule that made small but not large MDPs acceptable.<sup>285</sup>

Larry Fox has argued that the fact that problems currently exist does not mean lawyers cannot get better or that lawyers cannot say: “Here is where we draw the line.” I would agree with him if I thought the decision was only about lawyers getting better. But I would rephrase the issue to ask whether lawyers have a legitimate basis for adopting a paternalistic rule that denies some clients what they want. In my mind, legitimate concerns about size and pressure of a large MDP firm are not sufficient justification to override the will of clients, given that we have been willing in the past to rely on a lawyer’s integrity and a lawyer’s promise to abide by the applicable ethics rules and given the lack of evidence of specific dangers to clients or the public interest.

A second but related theoretical basis for my willingness to lift the MDP ban is my willingness to trust MDP lawyers to follow any newly-promulgated ethics rules. Some critics argue that MDP lawyers currently are engaged in

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against a client-insured will not be fully covered by an insurance policy pursuant to which the lawyer is appointed and is to be paid, consent other than that implicit in the action of the insured in forwarding the claim to the insurer is not required.

*Id.* This comment to section 215 was amended by a voice vote, to require the lawyer or insurer to inform the insured in writing of the general terms of the representation. See *ALI Completes Restatement, supra*, at 283. The ALI also voted 166-118 to amend section 215 to add the language from ABA Model Rule 1.8(f) that a lawyer may be paid by a third party only if “the direction does not interfere with the independent professional judgment of the lawyer.” *Id.*

284. See, e.g., Fox, *supra* note 102, at A23 (discussing dangers of relative size). In my view, this perspective runs throughout his article.

285. See Terry Appendices B1-B7 (Mar. 12, 1999), *supra* note 4, at Threshold Issues, Item C (summarizing testimony of witnesses who urged Commission not to fragment bar).

massive civil disobedience because they are sharing fees with nonlawyers in violation of Rule 5.4.<sup>286</sup> They strenuously criticize such lawyers, stating that they are flaunting the law, displaying their contempt for the legal ethics rules, and thereby proving that an MDP system will not and cannot work. I do not share these views. Realistically, one must recognize that U.S. lawyers who currently work in an MDP context must claim that they are not practicing law. To do otherwise would be to concede a violation of Rule 5.4.<sup>287</sup> Therefore, U.S. lawyers currently working in non-traditional firms are engaged in civil disobedience only if their actions are a clear violation of the unauthorized practice of law provisions.

As explained in Section VI.B above, I have not been able to come up with a precise definition of the practice of law which could be upheld in a criminal or quasi-criminal context if vigorously challenged.<sup>288</sup> And if one cannot articulate an enforceable definition of the practice of law, then lawyers working in nontraditional firms are taking advantage of a “loophole,” namely the ambiguity in the definition and enforcement of UPL. Unlike Larry Fox, I have been unwilling to assume that because MDP lawyers use a loophole, they would not comply with new explicit rules regulating their role in an MDP. Indeed, the Commission testimony suggested that many MDP lawyers would welcome the opportunity for regulation and to acknowledge their status as lawyers who provide legal advice.<sup>289</sup> Consequently, I worry more about designing effective rules than I worry that the rules will be ignored.

## VII. SPECIFIC CRITICISMS OF THE COMMISSION’S *REPORT*

### A. *Introduction*

Although I generally endorse the Commission’s June 1999 *Report* to the ABA House of Delegates, there are some aspects with which I disagree and some points that should be clarified before any similar accompanying *Recommendation* is adopted.<sup>290</sup>

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286. See, e.g., Fox, *supra* note 38, at 983 (“The truth is the Big Five . . . engage in systematic civil disobedience today—employing thousands of lawyers who are violating Rule 5.4 and all of our other core value rules everyday . . .”).

287. See *supra* notes 9-13 and accompanying text for a discussion of Model Rule 5.4.

288. See *supra* notes 243-48 and accompanying text for a discussion of why it is difficult to define the practice of law in a MDP context.

289. See *infra* note 321 and 336 and accompanying text for a summary of testimony of lawyers who would “opt in.”

290. I realize that these comments may be more detailed and specific than will be of interest to the general reader. I have included them, however, because they may be of interest to those lawyers who may soon have to vote on specific MDP proposals that contain this level of detail. As explained *supra* note 158, the Commission now appears to have abandoned this *Recommendation*. Because it provides details about the *how* of MDPs as well as the question of *whether* to have MDPs, I address the *Recommendation* in detail.

B. *Disagreement on Scope of Practice: Address (and Ban) the Issue of Simultaneous Legal and Audit Work for the Same Client*

My first disagreement with the Commission concerns a scope of practice issue. As explained earlier, the Commission deferred consideration of the controversial issue of whether a lawyer practicing in an MDP should be permitted to provide legal services to a client if the MDP also provides audit services to that client.<sup>291</sup> The Commission initially expressed the view that it made sense to wait until after the Independence Standards Board completes its current study, later clarified that it intended such a ban, but then omitted it from the March 2000 *Draft Recommendation*.<sup>292</sup>

In my view, the Commission inappropriately ducked this issue. The analysis of the Independence Standards Board necessarily will focus on the requirement that an auditor be independent. Regardless of the answer with respect to an auditor's obligations, the ABA and state regulators have an obligation to analyze the effect of simultaneous legal and audit services upon a lawyer's professional obligations.

It is possible that the Commission initially considered this issue, could not reach agreement, but declined to make its disagreement public. One could read into *Recommendation* paragraph 9, for example, a disagreement within the Commission about whether legal and audit services are incompatible:

To the extent that the delivery of nonlegal services to a client is compatible with the delivery of legal services to the same client and with the rules of professional conduct, a lawyer should be required to make reasonable efforts to make sure that the client sufficiently understands that the lawyer and nonlawyer may have different obligations with respect to disclosure of client information and that the courts may treat the client's communications to the lawyer and nonlawyer differently.<sup>293</sup>

The *Updated Background Report* was therefore a useful clarification in my view.<sup>294</sup> The Commission should not deprive the legal community of its significant expertise by remaining silent on this important issue.

Turning to the merits of this scope of practice limitation, I believe it is appropriate to include a simultaneous legal-audit ban, at least initially.<sup>295</sup> One of the points that has most troubled MDP critics is whether there is an inherent, nonconsentable conflict of interest between the lawyer's duty to a client and the

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291. See *supra* note 205 and accompanying text for a discussion of *Recommendation* paragraph 3. See also *supra* note 197 for a description of some commentators' views that there is an inherent conflict between a lawyer's duty of confidentiality and duty toward the client on the one hand, and the auditor's duty toward the public on the other hand.

292. See *supra* note 214 for a discussion of the Commission's position on a legal-audit ban.

293. *Recommendation*, *supra* note 193, ¶ 9 (emphasis added).

294. See *supra* note 214 for a discussion clarifying recommendation of the Commission for when legal and nonlegal services are performed for a client.

295. The Commission might have chosen to have a "sunset" aspect to this rule. It might have said, for example, that this scope of practice limitation would lapse absent a finding that simultaneous legal and audit services should be viewed as creating a nonconsentable conflict of interest.

auditor's duty to the public.<sup>296</sup> Indeed, a number of foreign rules and proposals include a ban on performing simultaneous legal and audit services.<sup>297</sup> A temporary legal-audit ban would provide time to learn more about the risks and benefits of MDPs and to learn whether the topic of nonconsentable conflicts will be further revised as a result of the Ethics 2000 Commission deliberations. In short, because MDPs are such a new situation, I urge caution on this point.

C. *Disagreement About Functional Ethics: Apply the Court Audit Requirement in Recommendation ¶ 14 to All MDP Lawyers*

My second disagreement with the Commission concerns a functional ethics issue. I disagree with the Commission's decision in *Recommendation* paragraph 12 to limit the court-audit procedure to nonlawyer-controlled MDPs.<sup>298</sup>

I am not alone in criticizing the Commission's requirement that nonlawyer-controlled MDPs comply with a court audit procedure.<sup>299</sup> Some commentators contend that the court audit will not provide an effective control mechanism, whereas the consumer advocacy representatives worry that the audit will prove too expensive and will serve to discourage Main Street MDPs.<sup>300</sup> My criticism of *Recommendation* paragraph 12 is different.

My criticism is that if a court audit requirement is adopted, it should apply

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296. See *supra* notes 215-17 and accompanying text for a discussion of the differences in lawyer and auditor conflict of interest standards, including the fact that there are many situations in which an accountant could proceed after obtaining client consent, but a lawyer could not proceed even if the client consented.

297. See *supra* note 72 for a discussion of foreign rules and proposals that ban simultaneous legal and audit services.

298. *Recommendation, supra* note 193, ¶ 12. Paragraph 12 of the *Recommendation* reads:

A lawyer should not share legal fees with a nonlawyer or form a partnership or other entity with a nonlawyer if any of the activities of the partnership or other entity consist of the practice of law except that a lawyer in an MDP controlled by lawyers should be permitted to do so and a lawyer in an MDP not controlled by lawyers should be permitted to do so subject to safeguards similar to those identified in paragraph 14.

*Id.*; see also *Reporter's Notes, supra* note 58, at 10-11 (discussing recommendation that courts have discretionary right to review and conduct administrative audit of MDPs to ensure compliance). After I first wrote this Section, the Commission abandoned the court audit and certification requirements. See *Draft Recommendation, supra* note 158. While some of the criticisms of the court audit appeared valid, that was less true of the certification procedure. Therefore, I am sorry to see these requirements disappear from the March 2000 *Draft Recommendation* without further discussion of whether some of the requirements were feasible. The focus of this section, however, is on applying the requirements evenhandedly if they are included.

299. See, e.g., Written Replies to the Commission, Reply of The Association of the Bar of the City of New York; Reply of Sydney M. Cone, III (Counsel, Cleary, Gottlieb, Steen & Hamilton); Reply of Consumer Representatives, The Consumer Alliance; Reply of Lawrence J. Fox (Drinker Biddle & Reath, LLP); Reply of Silvia Ibanez (CPA, JD, CFP).

300. Compare Written Replies to the Commission, Reply of Consumer Representatives, The Consumer Alliance, which worries about the effect of an audit's cost with the other commentators listed *supra* note 299. See also Written Replies to the Commission, Reply of Louise G. Trubek (Senior Attorney, Center for Public Representation and Professor of University of Wisconsin-Madison Law School) (noting "[a] similar system for group and pre-paid plans is working effectively under Wisconsin Supreme Court Rule 11.06").

uniformly to all MDPS. There are two main reasons for this conclusion. First, I think it is important to ask the purpose of the court audit. While discipline and enforcement is one role a court audit may serve, I consider education an equally important function. If MDPS are permitted in the U.S., it will be a new experience for U.S. lawyers. Even lawyers practicing in a lawyer-controlled MDP will have to face both new and old issues in different contexts. A court audit could serve an education function. For example, the court audit might provide a checklist for MDPS. The court audit also provides a context to discuss issues such as that raised by commentator Silvia Ibanez. She asserts that MDP lawyers should be required to provide a disclaimer to clients warning them about possible compromises to confidentiality that could occur when lawyers and nonlawyers work together.<sup>301</sup>

Second, a court audit requirement should be uniformly applied because it would be a waste of resources to have to determine, prior to a court audit, whether the MDP is controlled by lawyers or nonlawyers. I join those who have criticized the Commission's failure to provide a definition of control.<sup>302</sup> But even if a definition were provided, there undoubtedly will be some room for disagreement. The Commission's definitions of MDPS and the court audit, for example, arguably do not apply to the new law firm of McKee Nelson Ernst & Young because the firm claims to share costs, but not fees, with Ernst & Young.<sup>303</sup> Because McKee Nelson Ernst & Young is breaking new ground, however, and shares contiguous physical space with the Big Five firm Ernst & Young, this situation is a prime example of when a court audit procedure might be useful. In short, I believe the focus should be whether the MDP is operated in a manner consistent with client and public interests and whether the MDP somehow compromises a lawyer's core values. The fight (and resources) should not be about whether to have a court audit in the first place.

In addition, the Commission should provide additional guidance to state courts about the possible content of a state audit requirement. The Commission's *Report* carefully notes that it has not proposed a new federal regulator and that the court audit procedure and MDP regulation is left to the states.<sup>304</sup> The desire not to step on state courts' toes may explain why the Commission provided no specific suggestions about the content of a court audit. Such detail would be useful.

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301. See Written Replies to the Commission, Reply of Silvia Ibanez, CPA, JD, CFP. Ms. Ibanez's reference probably should be a reference to waiver of the attorney-client privilege rather than the duty of confidentiality.

302. See, e.g., Written Replies to Commission, Reply of Sydney M. Cone, III (Counsel, Cleary, Gottlieb, Steen & Hamilton); Reply of The Association of the Bar of the City of New York.

303. See *supra* note 40 for the firm's press release.

304. See *Report*, *supra* note 191, at 4-5. This section of the *Report* reads:

This does not mean that a new regulatory body must be established or that regulation must be done on a national level. The Commission's recommendations provide for continued regulation of the delivery of legal services by the highest court of each jurisdiction, regardless of the organizational structure in which a lawyer practices.

*Id.*

The Commission has spent a significant amount of time educating itself about the issues and concerns related to MDPs. If the Commission shared its expertise, it would provide the basis for a better debate about whether the court audit procedure can serve as an effective control mechanism for lawyers practicing in MDPs. In addition, state supreme courts have not, and probably will not, have time to devote equivalent resources to these issues.

It is true that paragraph 14 of the Commission's *Recommendation* provides some guidance to state courts. But the Commission has not suggested specific methodologies or questions that a state supreme court could use when conducting the audit. In short, I do not think it is fair for the Commission to suggest an audit procedure but expect state courts to reinvent the wheel.

*D. Clarify a Threshold Issue: Revise Recommendation ¶ 1 to Include Competency as a Core Value*

In addition to the policy disagreements described above, there were several places where I thought the Commission's *Recommendation* was ambiguous. I assumed that the Commission's failure to include competency as a core value was an oversight and a drafting error, rather than a deliberate policy choice, as the Commission later admitted. Loyalty, independence, and confidentiality are important, among other reasons, because of their relationship to competency.<sup>305</sup> As the consumer representatives and state bar ethics representatives advised the Commission, competency is very important to clients. Therefore, any state regulators relying on *Recommendation* paragraph 1 should revise it to explicitly include competency as a core value.

*E. Clarify a Form of Association Issue: Revise the Definition of an MDP in Recommendation ¶ 3*

Paragraph 3 of the Commission's *Recommendation* defined the term MDP. As noted earlier, this definition limited MDPs to lawyer-nonlawyer partnerships and fee-sharing arrangements between lawyers and nonlawyers.<sup>306</sup> Paragraph 3 should be revised in order to expressly include law firms that hold themselves out as affiliated with a nonlegal entity such as a Big Five firm.

When the Commission described the Model 4-contract model MDP, it recognized that the law firm might have a contractual affiliation with a nonlegal firm, but not purport to share fees.<sup>307</sup> Under the current definition, these Model 4 MDP lawyers could argue that they are not covered by the Commission's *Report* because: (1) they are not a member of an association of lawyers and

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305. See *supra* note 199 and accompanying text for a discussion of three instrumental values—confidentiality, loyalty, and independence—necessary to achieve client service. The Commission confirmed in its December 1999 *Updated Background Report* and again in the March 2000 *Draft Recommendation* that competency is a core value. See *supra* note 195.

306. See *supra* note 229 and accompanying text for a discussion of the limited nature of the definition of MDPs.

307. See *supra* note 188 and accompanying text for a hypothetical example of a law firm entering into a contractual relationship with a professional services firm.

nonlawyers, but instead are part of an all-lawyer firm; (2) their law firm does not hold itself out to the public as providing nonlegal services; and (3) there is no direct or indirect sharing of profits between their law firm and the affiliated firm, such as a Big Five firm. Instead, there are things such as joint marketing arrangements, cost-sharing agreements, and contracts to provide back room services.<sup>308</sup>

These three points are similar to the manner in which Commission witnesses Gerard Nicolay and Neil Cochran described their law firms and is also similar to the press release announcing the new firm McKee Nelson Ernst & Young.<sup>309</sup> I cannot imagine that the Commission intentionally excluded these types of MDP lawyers from the ambit of its report nor do I think it wise to do so. Especially where a law firm is practicing in physically contiguous space, it is useful to have the lawyer subject to special rules that provide guidance on how to apply the traditional ethics rules in this new setting. For these reasons, I recommend that the definition of a MDP be revised to include law firms that hold themselves out as having an affiliation with a nonlegal entity such as a Big Five firm or include the name of nonlawyers within the name of the law firm.

*F. Clarify a Form of Association Issue: Eliminate Any Ambiguity and Permit Anyone to Join an MDP*

Another ambiguity concerns the rules to determine the form of association issue concerning who may join an MDP.<sup>310</sup> The Commission's definition of an MDP in *Recommendation* paragraph 3 contains no limitation on who could join an MDP. I initially assumed that anyone, including a tow truck driver, is permitted to form an MDP with a lawyer provided the other requirements are satisfied.

*Appendix A*, however, arguably was inconsistent with this conclusion and the March 2000 *Draft Recommendation* clearly limits the acceptable MDP partners.<sup>311</sup> In my view, limiting the acceptable MDP partners is undesirable. My reasoning includes the difficulty of drawing a line because of the fact that "inappropriate" partners on the one hand may be subject to an ethics code and included, whereas "appropriate" partners such as a Nobel-prize winning

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308. I do not consider this reaction speculative. A lawyer practicing in a Model 4 MDP that is affiliated with a Big Five firm has advised me that he isn't sure whether the terms of the *ABA Report* covers his firm.

309. See *supra* notes 189 and accompanying text for discussion of witnesses' testimony describing Model 4.

310. See *supra* notes 114-16 and accompanying text for a discussion of this issue. Germany's rule, for example, limits the individuals with whom a lawyer may join in an MDP although it includes auditors. One of the Big Five representatives, for example, suggested that there are professions that are compatible with the profession of a lawyer, and those that are incompatible, and that he knows them when he sees them. See, e.g., Oral Remarks of Samuel DiPiazza (PricewaterhouseCoopers) (Mar. 11, 1999). In contrast to these witnesses, I recommended that there be no limitations on the individuals with whom a lawyer may join in an MDP. See Terry Appendix B-2 (Mar. 12, 1999), *supra* note 4, at Forms of Association, Issue A (containing my recommendation).

311. See *supra* note 209 for a discussion of who may join an MDP.

economist might not fit the definition. In short, I think the market rather than regulators will be a better measure of the types of partnerships that can prove beneficial to clients. And if the tow truck driver example gives one pause, I think a better solution is to ask why (e.g. concerns about solicitation) and then address those concerns directly. Consequently, I recommend that state regulators revise the language of Comment 2 to Model Rule 5.8 of *Appendix A* in order to avoid creating any confusion. Comment 2 states: “‘MDP’ is defined in the Terminology section. Examples of professions that may *appropriately* be included in MDPs are [an alphabetical list follows.]”<sup>312</sup> The word “appropriately” is confusing and ambiguous. The inclusion of this word arguably suggests a test of compatibility or appropriateness, independent of issues related to the lawyer’s ability to maintain the lawyer’s core values. Therefore, in order to avoid any confusion about the *Recommendation*, I suggest deletion of the word “appropriately.”

*G. Clarify a Functional Ethics Issue: Make Recommendation ¶ 5 Clearer About When the Ethics Rules Apply to MDP Lawyers and Whether the Decision is Based on the Lawyer’s Status or the Particular Activity*

With respect to functional ethics, the Commission decided that lawyers practicing in an MDP should be subject to legal ethics rules. Paragraph 5 of the Commission’s *Recommendation* states: “A lawyer in an MDP who delivers legal services to the MDP’s clients should be bound by the rules of professional conduct.”<sup>313</sup> Paragraph 5 should be revised to make it clearer that whether the legal ethics rules apply depends on the lawyer’s status in the MDP and not the particular activity in which the lawyer is engaged at the moment.

Every witness who addressed the issue agreed that if MDPs are permitted, lawyers practicing in an MDP should be bound in some respects by legal ethics and other rules governing lawyers; they disagreed, however, about when to apply such rules.<sup>314</sup> Some witnesses asserted that an MDP lawyer’s use of the ethics rules should be based on the lawyer’s status within the MDP, i.e., whether the lawyer is holding him or herself out to the public.<sup>315</sup> Other witnesses asserted that one must look at the particular activities provided to a specific client in order to determine whether the legal ethics rules apply.<sup>316</sup>

As currently written, neither the March 2000 *Draft Recommendation* nor paragraph 5 of the June 1999 *Recommendation* resolves this controversy.

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312. *Appendix A*, *supra* note 134, at Rule 5.8, cmt. 2 (emphasis added).

313. *Recommendation*, *supra* note 193, ¶ 5.

314. *See generally* Terry Appendices B1-B7 (Mar. 12, 1999), *supra* note 4, at Functional Analysis of MDP Ethics & Discipline Issues, Item A (presenting views on whether MDP lawyers must obey legal ethics rules).

315. *See, e.g.*, Written Remarks of James W. Jones (APCO Associates, Inc.) (Feb. 6, 1999); Testimony of M. Peter Moser (ABA Standing Committee on Ethics and Professional Responsibility) (Nov. 13, 1998).

316. *See, e.g.*, Oral Testimony of John Dzienkowski (Professor, University of Texas School of Law) (Feb. 5, 1999); Oral Testimony of Kathryn Oberly (Vice Chair and General Counsel, Ernst & Young) (Feb. 4, 1999).

Although I have assumed that the Commission intended to adopt the “status” approach, paragraph 5 could be interpreted to mean “a lawyer who delivers legal services [in this particular matter] to [these] MDP clients should be bound by the rules of professional conduct.”

Because I believe it is possible that someone could argue that the *Recommendation* focuses on the lawyer’s activity, rather than the lawyer’s status, and because I disagree with this approach, *Recommendation* paragraph 5 should be revised in order to eliminate any chance of ambiguity. The addition of four words would make this paragraph much clearer. Paragraph 5 could be revised to say: “A lawyer *whose function* in an MDP *is to* deliver legal services to the MDP clients should be bound by the rules of professional conduct.” If and when a Model Rule ultimately is drafted, the comment could discuss how a lawyer might establish the fact that his or her function in the MDP is to provide something other than legal services. Placement of the lawyer somewhere other than in a “legal department” and not holding oneself out as a lawyer are two factors that might be relevant.

Lawyers, regulators, clients, the public, and other professionals in an MDP need a bright, simple line they can use to define when a lawyer must comply with the legal profession’s ethics and discipline system. An individual lawyer’s status as an actively licensed lawyer, absent clear caveats to the contrary, provides such a line. There is obviously an overlap between this issue and the appropriate MDP model, but a lawyer’s disclosure about status must be clear, regardless of the method in which the MDP is organized.

Obviously, this status approach has limitations because not everyone who has taken a bar examination will forever practice law. There also are some inconsistencies with the attorney-client privilege case law; not everything a lawyer does is covered by the privilege. These problems are minor, however, compared to the limitations of the activities approach.

Virtually every witness asked about the topic conceded that there was no effective definition of activities that can be used to establish the exclusive areas of practice for lawyers (i.e., there is no effective UPL definition).<sup>317</sup> Witness William Freivogel of ALAS provided twelve examples of items that ALAS defines as the practice of law for coverage purposes and noted that other carriers used similar definitions; in response to a question, however, he conceded that the list included many things that nonlawyers could do.<sup>318</sup> In other words, the items defined as the “practice of law” are not the exclusive province of lawyers. Witness William Elliott’s testimony concerning the fate of the State Bar of Texas’ UPL complaint against Arthur Andersen revealed the difficulty of pursuing a UPL claim in today’s environment.<sup>319</sup> Witness James Jones perhaps

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317. See generally Terry Appendices B1-B7 (Mar. 12, 1999), *supra* note 4, at Scope of Practice, Item C (summarizing testimony at MDP public hearings).

318. See Testimony of William Freivogel (Attorney Liability Assurance Society) (Nov. 13, 1998).

319. Testimony of William Elliott (Kane, Russell, Coleman & Logan) (Nov. 13, 1998). Other witnesses also spoke about the difficulty of defining the practice of law. See Testimony of Ward Bower (Altman Weil) (Nov. 12, 1998); Testimony of Linda Galler (other than in-court appearances)

said it best when he testified:

... [T]he definition of the “practice of law” is frustratingly illusive. Indeed aside from a few obvious functions (like filing of pleadings in court or the rendering of formal opinions), it is almost impossible to define with precision what constitutes the practice of law in the United States today, at least in any exclusive sense. While it is certainly possible to list the hundreds of things that lawyers do, as bar counsel and many courts have discovered, it is very difficult to come up with a comprehensive list of many things that *only* lawyers can do. To cite but a few examples: [contract negotiation, lobbying, tax and estate planning are considered legal services when performed by a lawyer but few would argue that nonlawyers cannot do this.]

Stated differently, the scope of the “legal monopoly” in the U.S.— i.e., those activities that *only* lawyers may engage in—is fairly narrow and arguably getting narrower. Thus, any regulatory scheme that is premised on a tightly drawn exclusive definition of lawyering is likely to be either too narrow to be much good in a regulatory sense or too broad to be enforceable. I would accordingly be very suspicious of any regulatory approach to dealing with the MDP concept that depends for its effectiveness on a precise definition of the “practice of law.”<sup>320</sup>

Based on this testimony, among other reasons, I concluded that if the Commission or a state regulator uses a lawyer’s activities or the term “practice of law” to determine when legal ethics rules apply to lawyers within an MDP, we may never emerge from the UPL quagmire. In contrast, an MDP lawyer’s status should prove to be a relatively easy line to apply. Therefore, I recommend that if a regulator adopts a provision similar to *Recommendation* paragraph 5, it specify that the legal ethics rules apply to a lawyer based on the lawyer’s status within the MDP, i.e., the manner in which the lawyer holds him or herself out to the public.

Some commentators have criticized the Commission’s *Report* insofar as it subjects MDP lawyers to the legal ethics rules. They suggest that the Commission’s requirements are so onerous that lawyers practicing in an MDP simply will “opt out” of the system and will choose to no longer hold themselves out as lawyers.<sup>321</sup> I was not convinced that this would occur. Because I believe that many lawyers would like to be able to hold themselves out as lawyers

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(Nov. 13, 1998); Oral Remarks of Lawrence M. Hill (White & Case) (Feb. 4, 1999); Testimony of M. Peter Moser (ABA Standing Committee on Ethics and Professional Responsibility) (Nov. 13, 1998); Testimony of Gerald Nicolay (PricewaterhouseCoopers) (Nov. 12, 1998); Testimony of Charles F. Robinson (Law Offices of Charles F. Robinson) (Feb. 5, 1999); Samuel B. Sterett (Vinson & Elkins) (Feb. 4, 1999); Oral Testimony of Stefan Tucker (Chair, ABA Section of Taxation) (Feb. 4, 1999); Oral Testimony of James Turner (Executive Director, H.A.L.T.) (Feb. 5, 1999). But see Witness Shely (Feb. 5, 1999), who referred the Commission to the ABA’s UPL study and suggested it pick the best of those definitions and Witness Foonberg (Feb. 6, 1999), whose report accompanying Resolution 105 lists activities lawyers engage in.

320. Written Remarks of James W. Jones (APCO Associates, Inc.) (Feb. 6, 1999).

321. See, e.g., Geoffrey C. Hazard, Jr., *Bar’s MDP Moves Risky*, NAT’L L. J., Dec. 13, 1999, at A29 (discussing problems MDPs pose in hiring lawyers in large accounting firms, which raises professional conduct issues).

practicing law within an MDP setting, and because I believe many MDPs would like to be able to advertise “one-stop shopping,” I recommend this approach. A regulator may revisit this question if many MDP lawyers “opt out,” thus creating the problem of parallel worlds of regulated and nonregulated lawyers. Until that happens, however, I would adopt a rule that requires an MDP lawyer, who holds him or herself out as a lawyer, to abide by the legal ethics rules.

*H. Clarify a Functional Ethics/Scope of Practice Issue: Delete the Reference to the “Practice of Law” or Clarify That it Applies to “Holding Out”*

One of the most controversial aspects of the Commission’s work is the Commission’s various pronouncements about the practice of law. At least one-quarter of the written responses to the Commission’s *Report* criticized this aspect.<sup>322</sup> Even individuals and organizations that supported MDPs generally rejected this aspect of the Commission’s earlier work.<sup>323</sup>

The provisions that have provoked this controversy are paragraphs 4 and 11 of the *Recommendation*, together with the definition in the terminology section of *Appendix A*. Paragraph 4 states: “Nonlawyers in an MDP, or otherwise, should not be permitted to deliver legal services.”<sup>324</sup> Paragraph 11 states:

A lawyer in an MDP should not represent to the public generally or to a specific client that services the lawyer provides are not legal services if those same services would constitute the practice of law if provided by a lawyer in a law firm. Such a representation would presumptively constitute a material misrepresentation of fact.<sup>325</sup>

The proposed amendments to the terminology section included adding a definition of the “practice of law,” including a presumption that one is practicing law if engaged in any of the activities identified in six subsections.<sup>326</sup> This definition potentially could be used when interpreting Rule 5.5 (Unauthorized Practice of Law) and perhaps even in a criminal UPL case.

Not surprisingly then, some commentators have concluded that the Commission’s work product could serve to increase the lawyer’s monopoly and decrease the choices available to consumers. Criticism has come from entities as diverse as James Schaller (the former chair of the D.C. Court of Appeals Committee on the Unauthorized Practice of Law and chair of the ad hoc committee that drafted the definition that was the basis for the Commission’s definition);<sup>327</sup> the Ethics 2000 Commission reporters;<sup>328</sup> Louise Trubek (Senior

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322. See *supra* note 228 for identification of those written replies that criticized the Commission’s inclusion of a practice of law definition.

323. See, e.g., Written Replies to the Commission, Reply of Consumer Representatives, The Consumer Alliance; Reply of American Antitrust Institute; *ACCA Fears ABA Plan May Kill MDPS* (visited July 7, 1999) <<http://www.lawmoney.com/public/news/hotnews/news9906/news990625.4.html>> (discussing that imposition of ethical rules on MDPs will have adverse effects).

324. *Recommendation*, *supra* note 193, ¶ 4.

325. *Id.* at ¶ 11.

326. See *Appendix A*, *supra* note 134, at 1 (presenting definition of “practice of law” for Commission’s proposed changes to Model Rules of Professional Conduct).

327. See Written Replies to the Commission, Reply of James P. Schaller, Esq.

Attorney, Center for Public Representation, and Professor of Law, University of Wisconsin-Madison);<sup>329</sup> six individuals who wrote on behalf of the consumer advocacy community;<sup>330</sup> the American Antitrust Institute,<sup>331</sup> and the American Corporate Counsel Association<sup>332</sup> (the last three previously endorsed the concept of MDPs).

Much of this criticism is justified. If read in isolation, paragraph 4 is acceptable because it could be read simply as a factual statement that the Commission has not recommended any changes to the current criminal unauthorized practice of law provisions to permit nonlawyer practice; indeed the March 2000 *Draft Recommendation* stops here.<sup>333</sup>

Paragraph 11, however, is more problematic. At first blush, one might conclude that it is simply an effort to ensure that MDP lawyers accurately describe their function in the MDP. In reality, however, paragraph 11 does much more. Paragraph 11 responds to MDP lawyers who might "opt out" of the new regulatory system by continuing to claim that they are not engaged in the practice of law.<sup>334</sup> Paragraph 11 attempts to bring these MDP lawyers into the

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328. See *Working Draft-For Use by Ethics 2000 Commission Only, The Report of the Commission on Multidisciplinary Practice (for Discussion at August 1999 [Ethics 2000] Commission meeting), "Initial Reactions to the [MDP Commission] Report"* (July 19, 1999), ¶ 6 at 4-5 [hereinafter *Working Draft-Ethics 2000*] (on file with author) (stating that proposal to define "practice of law" is "questionable").

329. See *Written Replies to Commission, Reply of Louise Trubek* (Senior Attorney, Center for Public Representation and Professor of University of Wisconsin-Madison Law School).

330. See *Written Replies to the Commission, Reply of Consumer Representatives, The Consumer Alliance*.

331. See *Written Replies to the Commission, Reply of American Antitrust Institute*.

332. See *ACCA Fears ABA Plan May Kill MDPs* (visited July 7, 1999) <<http://www.lawmoney.com/public/news/hotnews/news9906/news990625.4.html>> (discussing debate of how to implement MDPs).

333. In my view, the Commission was worried that lawyers might perceive their work as authorizing the unauthorized practice of law by nonlawyers. Therefore, the Commission on several different occasions took the opportunity to stress that it was not changing the rules about nonlawyer UPL. See, e.g., *Recommendation, supra* note 193, ¶ 4 ("Nonlawyers in an MDP, or otherwise, should not be permitted to deliver legal services."); see also *Report, supra* note 191, at 2. The *Report* states:

To ensure that those values are preserved the Commission has specifically proposed that a lawyer in an MDP who delivers legal services to the MDP's clients is bound by the rules of professional conduct and all the rules of professional conduct that apply to a law firm also apply to an MDP. It should be stressed that the Commission is not recommending that nonlawyers be permitted to deliver legal services.

*Id.* This concern may have led to overcompensation and the problems caused by including a definition of the practice of law. Although the definition of a practice of law was not carried over to the Commission's March 2000 *Draft Recommendation*, the concern about nonlawyers practicing law apparently was. There are only four paragraphs in the *Draft Recommendation* but one of them includes the statement that "[t]his *Recommendation* does not alter the prohibition on nonlawyers delivering legal services and the obligations of all lawyers to observe the rules of professional conduct." See *Draft Recommendation, supra* note 158, ¶ 4.

334. See *supra* notes 48-49 and accompanying text for a discussion of the MDP phenomenon in which lawyers work outside the setting of a traditional law firm, but are engaged in activities that if done by lawyers in a law firm would be treated as the practice of law.

“tent of regulation,” to use one of the phrases from the Commission hearings. It does so by defining the conduct that will subject these MDP lawyers to legal ethics.

This is a mistake. In my view, any effort to define the practice of law is ill-fated from the start and inevitably will lead to problems.<sup>335</sup> Nor did I consider such a definition necessary at this time. Although there are some risks and difficulties inherent in omitting a definition of the practice of law, the resulting problems are less severe than the issues that occur when one tries to define the practice of law.

Therefore, my recommendation is that the Commission delete the definition of the practice of law in the terminology section and revise *Recommendation* paragraph 11 to state:

A lawyer in an MDP who represents to the public generally or to a specific client that the lawyer is a practicing lawyer or that the lawyer is providing legal services must be registered with the appropriate authorities and must comply with the appropriate Rules of Professional Conduct and other regulations governing the practice of law. The lawyer must ensure that the MDP does not misrepresent the lawyer's status or function in the firm or convey that the lawyer is practicing law when the lawyer is not.

As this revision demonstrates, paragraph 11 should only address the situation of misrepresentation, in which MDP lawyers or the MDP itself, falsely holds the individual out as a licensed, practicing lawyer, when the lawyer is not.

This “misrepresentation” approach does not address the situation of lawyers who “opt out” of the system, but it need not. Several MDP lawyers testified that they would like to be able to hold themselves out as lawyers. Moreover, if the MDPs truly want to offer one-stop shopping, they will have to acknowledge the presence of lawyers who deliver legal services; this will bring these lawyers within the “tent of regulation.” In short, in the absence of evidence that the “opt out” problem is real and significant, I would avoid the inherent problems that arise when one attempts to define the practice of law in an exclusive sense.<sup>336</sup>

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335. See Written Remarks of Laurel S. Terry (Mar. 12, 1999), *supra* note 4, at 12-13 (observing difficulties caused by attempting to define practice of law); see also GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 5.5:103 (2d ed. 1998) (“Defining the outer limits of the ‘practice of law’ is practically impossible. In our law-dominated society, almost every significant financial decision has at least some legal element to it, and legal elements predominate in many other common transactions.”); *RESTATEMENT OF THE LAW (THIRD) GOVERNING LAWYERS*, *supra* note 138, § 4, cmt. c (“The definitions and tests employed by courts to delineate unauthorized practice by non-lawyers have been vague or conclusory, while jurisdictions have differed significantly in describing what constitutes unauthorized practice in particular areas.”).

336. See *supra* notes 243-45 and accompanying text, which explained that it is very easy to describe what lawyers do in an *inclusive* sense. For example, this is what is done on a malpractice insurance policy. It is extremely difficult, however, to describe the practice of law in an *exclusive* sense, meaning that nonlawyers (or nonpracticing lawyers) could be subject to criminal penalties for engaging in these activities.

I. *Clarify a Functional Ethics Issue: Revise the “Signature” Requirement in Recommendation ¶ 14 so That it is Suitable for Main Street MDPs as well as Wall Street MDPs*

Throughout the hearings, the Commission members repeatedly stated that they were particularly interested in hearing about the risks and benefits of MDPs to smaller, consumer-oriented clients. Elder care and family care MDPs were cited as examples of MDPs that might benefit Main Street clients and lawyers. Because the signature language in *Recommendation* paragraph 14 may discourage these Main Street MDPs, I would revise the following language:

As a condition of permitting a lawyer to engage in the practice of law in an MDP not controlled by lawyers, the MDP should be required to give to the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in the delivery of legal services (the “court”), a written undertaking, *signed by the chief executive officer (or similar official) and the board of directors (or similar body), that . . .*<sup>337</sup>

Paragraph 14 will apply to those Main Street MDPs that lack a lawyer majority. One example mentioned during the hearings was an MDP consisting of a lawyer

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In my July 1999 response to the Commission’s *Report*, I asserted that it was possible to interpret Paragraph 11 as an effort to provide an inclusive definition of the practice of law. I offered the following explanation:

If the Commission insists on including a definition of the practice of law, then the Commission should clarify that this definition be used “inclusively” but not exclusively. This inclusive definition would tell lawyers practicing in an MDP the contexts in which the Model Rules would apply to them. [Paragraph] 11, combined with a definition of the “practice of law” is one way to achieve this . . . (This “inclusive” approach could be analogized to the definitions of covered activities that are used in malpractice insurance policies.)

On the other hand, I believe that it is a major mistake for the Commission (or the ABA) to attempt to define the practice of law in an “exclusive” sense, which is intended to limit the activities of nonlawyers. The Commission heard significant testimony about the difficulty of devising such an exclusive definition (not to mention the antitrust concerns). The Commission has enough difficult issues to face and resolve without trying to address or solve the UPL issue.

Consequently, the Commission’s *Recommendation* would be much better if paragraph 4 were deleted. [If this solution is rejected, then] at a minimum, I would hope that clarifying language would be added so that it is clear that any definition of the “practice of law” is intended to be [inclusive] only, in order to explain to MDP lawyers when the Model Rules apply to them. This definition [should not exclude lawyers or nonlawyers] from certain activities nor would it be used when interpreting Rule 5.5.

Written Replies to the Commission, Reply of Laurel S. Terry (Professor, Penn State Dickinson School of Law) (July 1999). Upon further reflection, I reaffirm my conclusion to delete or amend paragraph 11, but have revised my analysis. I now believe that paragraph 11 attempts to define the practice of law in an *exclusive* sense. It defines certain activities that only licensed practicing lawyers may perform. It prohibits MDP lawyers from engaging in these activities if these lawyers assert that they are not engaged in the practice of law. In other words, Paragraph 11 is simply a UPL provision directed toward MDP lawyers. For the reasons described in the text and in the prior section of this article, I conclude that this effort to define the practice of law in an *exclusive* sense is doomed to failure.

337. *Recommendation*, *supra* note 193, ¶ 14 (emphasis added).

specializing in elder law, a financial planner, and others.<sup>338</sup>

Despite the application of paragraph 14 to the three-person MDP, this language does not lend itself particularly well to this setting. This choice of language suggests a lack of interest in Main Street MDPs that does not reflect the Commission's hearings generally.<sup>339</sup> For this reason, paragraph 14's language should be revised so that it clearly signals the applicability of regulation to Main Street clients and lawyers.

*J. Clarify a Substantive Ethics Issue: Revise Recommendation ¶ 8 to be More Precise With Respect to MDP-Wide Imputation*

Not surprisingly, one of the most controversial of the Commission's conclusions was *Recommendation* paragraph 8, which sets forth the scope of imputation within an MDP; this issue was omitted from the March 2000 *Draft Recommendation*.<sup>340</sup> Paragraph 8 states, "all clients of an MDP should be treated as the lawyer's clients for purposes of conflicts of interest and imputation in the same manner as if the MDP were a law firm and all employees, partners, shareholders or the like were lawyers."<sup>341</sup> The Commission thus concluded that

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338. See, e.g., Oral Testimony of Charles F. Robinson (Law Offices of Charles F. Robinson) (Feb. 5, 1999). When Mr. Robinson was asked what kind of law firm he might like to have, he answered his:

[W]ould still be a large solo law firm but he would want a multidisciplinary virtual team (i.e., CPA, financial planner) to deal with client elder law issues and present one bill. If he decided to build a firm it would be multidisciplinary and include accounting and also likely financial management. He would also consider folding his practice into a CPA firm and, as a partner, building its elder care assurance area.

*Id.*; see also Testimony of Theodore Debro (Board Chairman, Consumers for Affordable and Reliable Services of Alabama) (Feb. 12, 2000) (providing additional examples and contrasting the inability of the private sector to provide MDPs although the public sector currently does so); Written Remarks of Lora H. Weber (Consumers Alliance of the Southeast) (Mar. 11, 1999) (expressing view that consumers would very much like MDPs, and giving examples of having MDPs to provide house renovation or purchases, small business owners, and by combining tax preparers and lawyers, one-half of population without a will might get one).

339. See generally *Reporter's Notes*, *supra* note 58, at 7 (discussing Main Street MDPs).

340. See *Draft Recommendation*, *supra* note 158 (omitting imputation issue). The witnesses before the Commission both endorsed and rejected the principle of MDP-wide imputation. For examples of witnesses rejecting the Commission's MDP-wide imputation stance, see Written Replies to Commission, Reply of American Antitrust Institute, and Written Replies to Commission, Reply of American Institute of Certified Public Accountants (AICPA). For examples of witnesses endorsing MDP-wide imputation, see Written Replies to Commission, Reply of The Association of the Bar of the City of New York.

The Ethics 2000 Commission reporters also were skeptical of the ABA Commission's MDP-wide imputation rule:

There seems no doubt that accountants should not have less constraints than lawyers, i.e., they should not be immune from imputation or permitted to screen when lawyers are treated otherwise. However, saying that every audit client is automatically treated as if it were a law client seems to be a stretch. We will want to come back to this when we get to Rule 1.10 again.

*Working Draft-Ethics 2000*, *supra* note 328, ¶ 5, at 4.

341. *Recommendation*, *supra* note 193, ¶ 8.

conflicts of interest imputation should be applied to the entire MDP firm, rather than just the lawyers working within the firm.<sup>342</sup>

Some Commission critics assert that the Commission has tried to impose lawyers' ethical rules, as a general matter, on nonlawyers.<sup>343</sup> The American Institute of Certified Public Accountants, for example, adopted the following resolution:

The AICPA further objects, as clearly inappropriate and overreaching, to the Commission's proposal to unilaterally impose the legal rules of conduct on accounting firms that include lawyers. This in turn has the potential to subject any accounting firm that employs an individual licensed as a lawyer to the rules of the legal profession including the legal profession's rules concerning conflicts of interest and solicitation of clients, for all firm engagements. This would create conflict situations in the same circumstances where none existed before.<sup>344</sup>

Such statements arguably misconstrue the Commission's work. *Recommendation* paragraph 8 clearly states that the imputation rule applies only in connection with the delivery of legal services. Consequently, this imputation rule does not make nonlawyers generally subject to the legal ethics rules; these rules apply to nonlawyers only in connection with the provision of legal services by the MDP.

Although I endorse an MDP-wide substantive ethics imputation rule,<sup>345</sup> the clarity of the imputation rule is even more important than its substance.<sup>346</sup>

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342. See *supra* notes 126-29 and accompanying text describing as a functional ethics issue, regulation of an MDP nonlawyer. The Commission's substantive ethics imputation rule results in the functional ethics "middle-ground" approach to MDP nonlawyer regulation. In other words, the consequence of the Commission's imputation rule is that nonlawyers are not generally subject to the legal ethics rules, but must comply with the legal ethics rules if a legal services client is involved.

343. See, e.g., Written Replies to Commission, Reply of American Institute of Certified Public Accountants (AICPA); Reply of The National Conference of Lawyers and Certified Public Accountants; Reply of American Antitrust Institute. In my view, all of these entities came quite close to making this point.

344. Written Replies to Commission, Reply of American Institute of Certified Public Accountants (AICPA).

345. My endorsement is clear for the fully-integrated Model 5 MDP. I am less sure how to handle Model 4 MDPs.

346. See Written Remarks of Laurel S. Terry (Mar. 12, 1999), *supra* note 4, at 15-16; Written Replies to the Commission, Reply by Laurel S. Terry at 10-11 (observing *Recommendation* paragraph 8 should be revised to be more precise). I find the imputation question for Model 4 MDPs much more problematic than for Model 5 MDPs. I still have not resolved how I think imputation should be handled in this context. As noted in the conclusion, I would benefit by the opportunity to discuss and debate these types of details. On the one hand, if a law firm is completely comprised of lawyers and has only a contractual relationship with nonlawyers, one can see the argument in favor of not imputing conflicts to the entire MDP firm. On the other hand, the "seamlessness" described by various Commission witnesses, along with the physical proximity that is possible in a Model 4 context, suggest that an MDP-wide imputation rule would also be appropriate in the Model 4 context. In addition, I am troubled by the notion of Model 4 MDPs which advertise their affiliation, getting the benefit of the public's perception of the network, but who are not subject to the same imputation rules as traditional law firms that advertise their networks. In short, I would welcome the opportunity for further extended discussion of this issue.

Because *Recommendation* paragraph 8 creates two different kinds of ambiguities, it should be revised.

Currently, paragraph 8 states:

In connection with the delivery of legal services, all clients of an MDP should be treated as the lawyer's clients for purposes of conflicts of interest and imputation in the same manner as if the MDP were a law firm and all employees, partners, shareholders or the like were lawyers.<sup>347</sup>

This paragraph would be clearer if a period were placed after the words "as if the MDP were a law firm." The deleted language serves only to confuse the issue, given that the current ethics law does not treat all employees of a law firm as if they were lawyers.<sup>348</sup> This last portion of this sentence is thus over-inconclusive and simply provides room for confusion.

The second ambiguity in paragraph 8 is much more subtle. Paragraph 8 is written in the passive voice and, therefore, focuses on the object of the sentence, the clients. In my view, drafting the sentence in the passive, rather than the active, voice creates ambiguities.

Two different types of situations can raise imputation issues. In the first situation, an MDP nonlawyer might provide nonlegal services to Client 1 and subsequently an MDP lawyer might be asked to provide legal services to Client 2 (who might be Client 1's adversary or competitor).<sup>349</sup> In the second situation, the MDP legal services to Client 1 come first, followed by the requested MDP nonlegal services for Client 2.<sup>350</sup>

In each of these two situations, the second professional must decide: (1) whether to accept Client 2; (2) whether to consider his or her colleague's representation of Client 1 when making that decision; and (3) whether legal ethics principles govern the decision to accept Client 2. In the first situation, the lawyer is the professional who must decide whether to accept Client 2. In the second situation, the nonlawyer is the professional who must decide whether to accept Client 2.

Because paragraph 8 is written in the passive voice, it does not specify whether the Commission's imputation rule applies to lawyers, nonlawyers, or both. This failure to specify the professionals to whom paragraph 8 applies creates ambiguity and should be changed.<sup>351</sup>

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347. *Recommendation*, *supra* note 193, ¶ 8.

348. *See, e.g.*, ANNOTATED MODEL RULES, *supra* note 23, at 169-70 (summarizing cases on imputation due to nonlawyer employees, many of which permit screening of conflicts involving paralegals, summer associates, and secretaries); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1999) (providing rule where screening is generally not permitted). As the Annotated Model Rules show, in a disqualification context, courts recognize screening more than Rule 1.10 does.

349. *See, e.g.*, *Hypotheticals and Models*, *supra* note 187, at Hypothetical 4.1 (describing situation in which MDP nonlawyers reviewed books of husband's business and thereafter MDP lawyers were asked to represent wife against husband in her divorce).

350. *Id.* at Hypothetical 5.2 (presenting situation where MDP lawyers represent Client 1 who seeks license; thereafter Client 2 seeks to hire MDP nonlawyers in effort to obtain same license).

351. One might argue that paragraph 10 covers the second situation in which a nonlawyer is

Substantively, I recommend that the Commission revise the rule so that it applies to both situations described above. I assume that situation two is the more controversial. The following hypothetical provides the basis for my recommendation.<sup>352</sup>

Imagine that Prince Jefri (Client 1) is a law client and that MDP lawyers represented Prince Jefri's company in connection with something called the Project Lucy litigation. After that litigation concluded, the Brunei Investment Agency (Client 2) asks forensic accountants from the same MDP to investigate a misappropriation charge against Prince Jefri. Imagine that the investigation of the misappropriation charge will be substantially related in many respects to the Project Lucy litigation.

Absent client consent, should the legal ethics rules prevent the MDP nonlawyer from subsequently opposing an MDP legal client if the matters are substantially related? This question raises the issue of whether the lawyers' conflict should be imputed to the nonlawyers, in order to protect the lawyer's core value of confidentiality. I would extend imputation to this fact pattern. Unless lawyer confidentiality assumptions are radically changed, Prince Jefri can assume that his confidential information was shared within the MDP. Because of this fact and the duty of the MDP lawyers to protect Prince Jefri's confidential information after the representation is over, I would extend imputation. Without imputation, Prince Jefri never learns of the adverse representation and never has a chance to object.

Moreover, although the MDP debate currently is driven by the actions of the Big Five, if MDPs are permitted, numerous small Main Street MDPs may take advantage of the rule change. I consider MDP-wide imputation particularly important in the small MDP context because the likelihood is even greater that information will be shared among the different MDP professionals.

Many critics have challenged the MDP-wide imputation rule, arguing that it

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asked to represent Client 2. See *Recommendation, supra* note 193, which states:

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

*Id.* ¶ 10. Paragraph 10 does not, however, require nonlawyers as a general matter to comply with legal ethics when deciding whether to accept Client 2 because it only applies to some of the MDP's nonlawyers, namely those working in connection with the delivery of legal services.

352. This hypothetical is based on a variation of the facts of Brunei Investment Agency's ("BIA") investigation of Prince Jefri, its former chairman. See *Prince Jefri Bolkiah v. KPMG*, 2 W.L.R. 215, 218-22 (H.L.(E.) 1999) (presenting facts of case concerning Prince Jefri's relationship with BIA). In that case, the English House of Lords reversed an appellate court decision that had permitted KPMG forensic accountants to represent the BIA in investigation against Prince Jefri where KPMG accountants previously had represented the Prince's company. *Id.* at 229 (reversing lower court's dissolution of injunction because "not satisfied on the evidence that KPMG . . . discharged the heavy burden of showing that there is no risk that information" confidential to Prince Jefri and from client relationship with him is disclosed to BIA). The court determined that KPMG's Chinese Wall did not justify the representation. *Id.* at 228 (finding steps taken by KPMG were not enough because "established ad hoc and were created within a single department").

is unfair and unworkable. I believe the proper forum for these arguments is the Ethics 2000 Commission. And if these critics are correct that the proposed rules, taken together, are unworkable, then I would prefer to amend the nonconsentable conflicts rule in an MDP context, rather than narrow the scope of imputation. Particularly if the scope of nonconsentable conflicts were narrowed, the major impact of an MDP-wide imputation rule is to require disclosure and consent.<sup>353</sup> I favor more rather than less disclosure. Greater disclosure is better achieved through a broad imputation rule.

In summary, the Commission reached the correct conclusion when it recommended that Rule 5.4's MDP ban be eliminated and provided a useful start in analyzing how MDPs should be regulated; significant progress must now be accomplished to flesh out the Commission's recommendations, clarify ambiguities, and reconsider key policy decisions.

#### CONCLUSION: THE POST-REPORT SHAKEOUT

Very few people have expressed satisfaction with the Commission's *Report*, which may explain why the Commission recently abandoned its efforts to determine how MDPs should be regulated and instead focused on whether they should be permitted. The critiques of the Commission's original approach varied widely from those who thought it is too permissive to those who thought it too restrictive. Accordingly, the Commission may feel that it has been engaged in a thankless task.

The alternative perspective, which I endorse, is that the Commission's work has been a resounding success. The topic of MDPs appears on almost a daily basis in the legal and popular press throughout the country. State regulators are trying to get beyond mere rhetoric and to learn about the issues in a thoughtful manner.<sup>354</sup> Even some of the Commission's most vocal critics concede that the Commission asked the right questions and focused on the right issues, although they do not like the Commission's answers. Critics such as Larry Fox and Professor Bernard Wolfman, for example, have commended the Commission for its acknowledgment of the lawyer's core values of confidentiality, loyalty, and independence. The Ethics 2000 Commission reporters noted: "The MDP Commission should be congratulated for taking a serious, independent look at an issue on which knee-jerk reactions are very easy. The report correctly keeps

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353. I realize that clients sometimes withhold consent inappropriately in order to hurt an adversary. Absent empirical evidence to the contrary, however, I do not believe that this represents the majority of cases in which clients would withhold consent.

354. For example, I was invited to participate on a panel that addressed the Pennsylvania Disciplinary Board, which is the body that makes rule change recommendations to the Pennsylvania Supreme Court. The Board allocated four hours for discussion and appeared ready to continue the discussion even beyond the allotted time. I considered the session to be a thoughtful exchange of ideas; the lengthy time and dialogue created an atmosphere that seemed to go beyond mere rhetoric.

The Commission's webpage suggests that other regulatory bodies are engaged in similar efforts. See *Meetings and Programs Where Commission Representatives Have Appeared* (last modified Dec. 15, 1999) (visited Dec. 8, 1999) <<http://www.abanet.org/cpr/mdpmtgs.html>> (listing dates of various programs and meetings which Commission representatives have attended).

its focus on client needs rather than lawyer preferences for the status quo.”<sup>355</sup>

Moreover, through the Commission’s hearing process, the debate has become much more focused, and there are now issues on which a consensus has emerged.<sup>356</sup>

At this time, the key points of disagreement include the issue of where to assign the burden of proof; whether the threats posed by an MDP are sufficiently distinguishable from other threats so as to justify a paternalistic rule prohibiting MDPs; whether it is possible to stop alleged UPL by MDP lawyers; whether MDPs themselves and MDP lawyers could be trusted to follow a new regulatory scheme; and the efficacy of any enforcement mechanism. This disagreement has crystalized into a debate about whether to have MDPs and if so, whether to limit them to lawyer-controlled MDPs.

The best summary of the competing paradigms for the MDP debate may be the simplest. On the one hand, there are those who say “If it ain’t broke, don’t fix it.”<sup>357</sup> On the other hand, there are those who say that “the train has left the station,” so the time to regulate MDPs is now or never.<sup>358</sup> Although this Article appears in an academic journal, as time has progressed, the primary basis for my recommendations has become pragmatic rather than theoretical. I choose to regulate MDPs because I see no viable alternative. Ignoring MDPs creates serious problems and stopping them is not viable given the difficulty of defining the practice of law. I prefer the Commission’s earlier *Recommendation* because I believe regulators will have to confront the mechanics of how to regulate MDPs. Thus, although the Commission has backed away from its earlier proposal, I predict that it will be consulted frequently by those considering the MDP issue.

Accordingly, while I commend this Symposium, I hope the next Phyllis

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355. *Working Draft- Ethics 2000*, *supra* note 328.

356. See *supra* Part VI.A for a discussion of points on which the testimony before the Commission revealed a consensus.

357. See Written Replies to the Commission, Reply of Stuart P. Werling, Esq. (“As for me, I am proud to be a lawyer and very proud of our rich heritage of independence and loyalty to our client. The American Bar produces most of the world’s very best lawyers. It ain’t broke. Don’t fix it.”)

358. See Oral Testimony of Stefan Tucker (Chair, ABA Section of Taxation) (Feb. 4, 1999) (“The Section considers that a rapid response from the ABA is absolutely necessary. As the train has left the station and headed down the track, the Section urges that the Bar’s response be focused on the direction and configuration of the tracks ahead.”); see also Written Comments Not Presented at Hearings, Comment of Ethics 2000 Liaison Committee, Los Angeles County Bar Association. The committee wrote:

First, we believe that market forces and demand, competitive business considerations and the drive towards greater efficiency, and the globalization of the economy mean the question is not *if* there will be MDP’s, but rather, *when, what their structure will be and how they will be regulated*. That process has already started. It is more advanced in European countries, but it is happening in the United States as well. The legal profession can either be an active participant in that dialogue, providing valuable input, or be a bystander, watching the form, structure and regulation of MDP be designed by others. We believe a proactive stance is best for all concerned.

*Id.*

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Beck Chair in Law Symposium will host a conference that focuses not on *whether* to permit MDPs, but *how* they should be regulated. The task is a monumental one. It is, and was, unreasonable to expect the Commission to get all the details correct given the necessity to first decide whether to permit MDPs. Therefore, I look forward to the next conference where I hope we can hammer out those details.

**APPENDIX: ISSUE CHECKLIST**AN "ISSUE CHECKLIST" FOR THE ABA COMMISSION  
ON MULTIDISCIPLINARY PRACTICE (CMDP)APPENDIX A TO THE TESTIMONY OF PROFESSOR  
LAUREL S. TERRY, PENN STATE DICKINSON SCHOOL  
OF LAW\*

- I. THRESHOLD ISSUES THE CMDP SHOULD CONSIDER WHEN DECIDING WHETHER TO RECOMMEND A REVISION TO MRPC 5.4:
- A. WHAT STANDARDS SHOULD THE CMDP USE WHEN DECIDING WHETHER TO RECOMMEND RETAINING MRPC 5.4 IN ITS CURRENT FORM ( i.e., whether to permit lawyers to join multidisciplinary practices)?

*Recommended Answers:*

1. Client protection;
2. Public interest

*Alternatives:*

3. Protecting lawyers' "turf";
4. Defining the "public interest" more specifically, e.g., to include:
  - a. Preserving the "rule of law" (e.g., from the IBA policy statement);
  - b. Preserving the independence of the lawyer;
  - c. Bringing lawyers "into the tent" so that they participate in, and

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are subject to, the lawyer regulatory system;

- d. Preserving the number of law firms available in order to maximize client choice (see Consultation Report of the Law Society of England and Wales, at p. 19; prior CCBE policy);
  - e. Providing freedom of choice for both lawyer and client (*id.*);
  - f. Preventing harm to the public from nonlawyer practice;
  - g. Keeping lawyers competitive and/or relevant to clients; and/or
  - h. Efficient delivery of legal services (which might include cost & ease of administration).
5. Deregulating the provision of legal services and letting clients and the market decide how much “ethics,” such as confidentiality and conflicts, are important to them

**B. WHAT ARE THE CORE VALUES OF LAWYERS THAT MUST BE PROTECTED IN ORDER TO ACCOMPLISH THE REGULATORY AIMS IDENTIFIED IN QUESTION A, ABOVE?**

*Recommended Answer:*

1. Competence;
2. Independent legal judgment;
3. Confidentiality;
4. Loyalty (as ensured through conflicts of interest rules)

*Alternatives:*

5. Lawyer’s role as collaborator of justice (similarly, preserving the lawyer’s role in ensuring the rule of law);
6. Honesty & integrity;
7. Service to the client, including pro bono publico obligations;

8. The standing and independence of the profession as a whole (Law Society Report, at p. 19);
  9. Stopping the unauthorized practice of law;
  10. Lawyer self-governance;
  11. Protecting the attorney-client privilege
- C. SHOULD THE CMDP'S RECOMMENDATIONS APPLY EQUALLY TO LARGE "WALL STREET" FIRMS AND SMALLER "MAIN STREET"-TYPE FIRMS? AND IS THE ISSUE RELEVANT TO BOTH?

*Recommended Answer:*

1. Yes; there should be the same rules, and the issue is relevant to both Main Street and Wall Street lawyers and clients.

*Alternatives:*

2. Yes; there should be the same rules, which are relevant to both; but perhaps there should be different interpretations of the rules when applied to different fact patterns. For example, more disclosure might be required with respect to unsophisticated clients.
  3. No; have different rules for Wall Street and Main Street lawyers (e.g., permit only small MDPs).
- D. WHERE DOES THE "BURDEN OF PROOF" LIE? I.E., SHOULD THE CMDP RECOMMEND REVISING MRPC 5.4 UNLESS THE CMDP IS CONVINCED THE STANDARDS IN SECTION A, ABOVE (E.G., CLIENT PROTECTION/PUBLIC INTEREST) WILL BE INJURED? OR SHOULD THE CMDP RECOMMEND MAINTAINING THE STATUS QUO UNLESS IT IS CONVINCED THAT THESE VALUES WILL NOT BE INJURED?

*Recommended Answer:*

1. *Those seeking the status quo have the "burden of proof":* Since MRPC restricts both lawyer and client autonomy and choice and since all lawyer regulation should be justifiable, the CMDP should

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recommend retaining the current version of MRPC 5.4 only if it is convinced that the regulatory interests set forth in §A above require the current rule.

*Alternative:*

2. *Those seeking to change the rule have the "burden of proof"*: Before it recommends any change in the status quo, the CMDP should be convinced that the core values of the legal profession will not be harmed and that the regulatory aims can be protected should MRPC 5.4 be revised and MDPs permitted.

E. WHICHEVER SIDE HAS THE BURDEN, HOW MUCH "EVIDENCE" IS NEEDED BEFORE THE CMDP RECOMMENDS RETAINING (REVISING) MRPC 5.4?

*Recommended Answer:*

1. Something akin to *clear and convincing* evidence

*Alternatives:*

2. Something akin to a *preponderance of the evidence* standard;
3. Something akin to a *beyond a reasonable doubt* standard

F. IS THERE CURRENTLY A CLIENT NEED OR DEMAND FOR MDPS AND WHAT IS THE SIGNIFICANCE OF THIS QUESTION?

*Recommended Answer:*

1. Yes; there is at least *some* client demand and perceived need for MDPs, as demonstrated by the direct testimony of Witnesses Elizabeth Wall and Steven Bennett, who presented the views of corporate counsel "clients," and the indirect testimony of Witnesses Lynda Shely (State Bar of Arizona) and Abbie Willard (Assistant Dean of Career Services, Georgetown University Law School), among others. Given at least *some* client demand and perceived need for MDPs, the question of the *degree* of client need or demand for MDPs is irrelevant. The CMDP must face the issue of whether the current MRPC 5.4 is a justifiable restriction upon the autonomy

and choices available to at least *some* clients and lawyers.

*Alternatives:*

2. Yes; not only is there client need and demand for these services, but if lawyers do not begin to offer MDP services, they risk having nothing of value to offer clients because of clients' changing needs and demands.
  3. No; the perceived demand is really "smoke & mirrors" and other service-providers exist.
  4. No; the perceived "client" demand" for MDPs is in fact being driven by the MDP "supply" and in the absence of significant demand, the CMDP should not change rules that historically have worked quite well.
  5. Irrelevant; lawyers must decide what rules are appropriate and client demand should not control the analysis.
- G. DO U.S. LAWYERS AND NONLAWYERS WHO PRACTICE IN AN MDP APPEAR TO BE OFFERING WHAT WOULD BE CALLED "LEGAL SERVICES" IF OFFERED IN A TRADITIONAL U.S. LAW FIRM?

*Recommended Answer:*

1. Yes; substantial testimony showed that lawyers and nonlawyers in MDPs were offering services that would be called legal services if provided by lawyers in an traditional law firm (see, e.g., Witnesses Holden, Powell, Bower, Moser, Galler, Fox, Dzienkowski, Jones).

*Alternatives:*

2. No; *lawyers* in MDPs are not offering what would be called "legal services" if offered in a traditional law firm.
  3. No; *nonlawyers* in MDPs are not offering what would be called "legal services" if offered in a traditional law firm.
- H. HAS THE CMDP HEARD TESTIMONY OF ANY ACTUAL PROBLEMS CAUSED BY AN MDP?

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*Recommended Answer:*

1. Yes; Witness Elizabeth Wall, who has been an MDP client, testified concerning legal services being provided without disclosure that they were part of the “bundled” product; about information being disclosed by one MDP consulting branch to the MDP legal branch, despite being requested not to; and about MDP lawyers’ failure to disclose their status during meetings. Witness Karen Petrillo testified, as a lawyer observer, about incompetent work performed by nonlawyers in MDPs. Witness Hellwig referred to conflicts problems and Witness Fox cited reports of MDPs using the audit power to steer clients.

*Alternative:*

2. No.

I. THE ULTIMATE QUESTION: SHOULD MRPC 5.4 BE AMENDED TO PERMIT MDPS IN SOME FASHION?

*Recommended Answer:*

1. Yes; see Terry Testimony for explanation.

*Alternatives:*

2. No.
3. Reformulate the Question:
  - a. Is the current MDP ban in MRPC 5.4 necessary in order to protect lawyers’ core values and to advance legitimate regulatory aims?
  - b. Has there been convincing evidence of a sufficient need or reason to change the current ban and a showing that lawyer core values can be protected in an MDP environment?
  - c. Should the CMDP know what it would answer to the “functional” questions before answering this fundamental question?

- d. Will the failure to allow MDPs mean that lawyers will be driven out of the market because they are not adapting and offering the services that clients need or want?

II. IF THE CMDP RECOMMENDS REVISING MRPC 5.4, HOW SHOULD THE "FUNCTIONAL" ISSUES REGARDING ACCEPTABLE MDP "FORMS OF ASSOCIATION" BE ANSWERED?

A. SHOULD THE CMDP PLACE ANY LIMITS ON THE TYPES OF INDIVIDUALS WITH WHOM A LAWYER MAY HAVE AN MDP?

*Recommended Answer:*

1. No.

*Alternatives:*

2. Yes; a lawyer should only be able to participate in an MDP with a limited category of professionals who share the same values as lawyers. (Note that in Germany, this includes accountants (auditors), but in The Netherlands, it does not).
3. Yes; a lawyer should only be able to participate in an MDP with other licensed "professionals" (perhaps defined as those with licensure requirements and codes of ethics).
4. Yes, a lawyer should only be able to participate in an MDP with "registered" nonlawyers, who have been "vetted" by the bar (See Law Society of England and Wales Consultation Report, at p. 13).

B. SHOULD THE CMDP RECOMMEND THAT LAWYER PARTICIPATION IN MDPS BE LIMITED TO MDPS WHOSE SOLE OR MAIN PURPOSE IS THE PROVISION OF LEGAL SERVICES?

*Recommended Answer:*

1. No.

*Alternative:*

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2. Yes. (This would be comparable to D.C. Rule 5.4)

*C. WHAT NAME WILL YOU PERMIT THE LEGAL SERVICES ARM OF THE MDP TO USE?*

*Recommended Answer:*

1. If separately organized, the legal services arm of an MDP may use any name it wants, so long as the name is not misleading. See MRPC 7.5. The use of a trade name, (e.g., MDP Legal Services Worldwide), is not misleading.

*Alternatives:*

2. The legal services arm is required to use the name of lawyers currently practicing in the firm.
3. The legal services arm need not use the names of lawyers currently practicing in the firm, but use of the MDP's name will be considered to be false and misleading.
4. The legal services arm must use either #2 or #3 above, but is permitted to add a sentence saying that it is affiliated with the MDP firm.
5. An MDP's name must disclose its nature (Compare to Germany, where firm letterhead reveals how the firm is organized, i.e., whether it is a Wirtschaftsprüfer GmbH, Rechtsanwalt GmbH, partnership of the two, etc.).

*D. IF THE CMDP RECOMMENDS RELAXING MRPC 5.4, SHOULD IT RECOMMEND RULES REGARDING LAWYER MAJORITY OWNERSHIP AND/OR CONTROL, OR REQUIRE THE LEGAL SERVICES ARM TO BE A SEPARATE LEGAL ENTITY FROM THE REST OF THE MDP?*

*Recommended Answer:*

1. No, see Terry Testimony. (Cf. *Fully-integrated* model listed in the Commission's Hypotheticals.) Experience in the U.S. and Germany suggests this won't stop the Big Five-affiliated MDPs, which seems to be one of the major rationales for such a rule. Instead, its major

impact likely will be on small Main Street firms and clients.

*Alternatives:*

2. Yes; e.g., the CMDP might recommend a rule that requires lawyers to have the majority ownership interest in an MDP. (This would be similar to what is required under the German statute creating limited liability partnerships for lawyers.)
3. Yes; e.g., the CMDP might recommend a rule that requires lawyers to have the controlling managerial interest in an MDP. (Cf. *Command and Control* Model listed in the Commission's Hypotheticals).
4. Yes; e.g., the CMDP might recommend a rule similar to the prior New South Wales' rule that required lawyers to earn 51% of gross profits.
5. Yes; e.g., the CMDP might recommend a rule in which a law firm operates an ancillary business that provides professional services to its clients. (Cf. *Ancillary Business* Model listed in the Commission's Hypotheticals).
6. Yes, e.g., the CMDP might recommend a rule that requires the legal services arm to be separate from the MDP. (This would be similar to what is required under the current French rules.) This rule might permit lawyers to share fees or profits with the MDP or might only permit cost sharing. (Cf. *Contract* Model listed in the Commission's Hypotheticals).
7. Yes; e.g., the CMDP might adopt one of the many variations on the above listed on p. 13 of the Consultation Report of the Law Society of England and Wales.

E. SHOULD THE CMDP PERMIT PASSIVE INVESTMENT IN A LAWYER-AFFILIATED MDP?

*Recommended Answer:*

1. No.

*Alternative:*

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2. Yes.

F. SHOULD THE CMDP REQUIRE TRANSPARENCY, AND IF SO, WHAT KIND?

*Recommended Answers:*

1. Yes; require disclosure to clients by lawyers;
2. Recommend to either the Ethics 2000 Commission or a new mega-regulator, consideration of the issue of requiring disclosure of the MDP Agreement.

*Alternatives:*

3. No; there shouldn't be any required disclosure from lawyer to client.
4. No; there shouldn't be disclosure of the MDP agreement.
5. Reformulate the question to specify the types of lawyer-client disclosure required. Possibilities include:
  - a. the nature of the MDP firm (or the relationship between firms under the *Ancillary Business* and *Contract* models);
  - b. identification of lawyers *qua* lawyers on business cards, announcements, etc.;
  - c. disclosure of lawyer participation in a particular project (i.e., *no Trojan horses*);
  - d. the fact that a client who uses one set of services of the MDP (e.g., audit) is under absolutely no obligation and will face no penalties if it does not use other services of the MDP;
  - e. possible compromises to the attorney-client privilege from using an MDP; and
  - f. the amount of any MDP fee attributable to legal services.

III. IF THE CMDP RECOMMENDS REVISING MRPC 5.4, HOW SHOULD

THE "FUNCTIONAL" ISSUES REGARDING AN MDP LAWYER'S  
"SCOPE OF PRACTICE" BE ANSWERED?

A. SHOULD THE CMDP RECOMMEND ANY LIMITS ON THE  
SCOPE OF A LAWYER'S PRACTICE WITHIN AN MDP?

*Recommended Answer:*

1. Yes; if the MDP is organized in such a way that fees among branches are shared and confidences and conflicts are imputed, then a lawyer affiliated with an MDP should be precluded from representing a client if the audit arm of the MDP currently represents the client.

*Alternatives:*

2. Yes; a lawyer practicing in an MDP should be precluded from trying cases in a court, although the lawyer would be permitted to handle discovery and arbitration (Witness Dzienkowski's proposal).
3. No, there should be no limitations on a lawyer's scope of practice within an MDP.

B. WHAT IF ANYTHING SHOULD THE CMDP RECOMMEND BE  
DONE WITH RESPECT TO LAWYERS WHO "OPT OUT" OF  
THE LEGAL PROFESSION'S REGULATORY AND DISCIPLINE  
SYSTEM?

*Recommended Answer:*

1. Nothing.

*Alternatives:*

2. Attempt to find some method of holding these lawyers accountable;
3. Reject any recommended revision to MRPC 5.4 on this basis

C. CAN OR SHOULD A REGULATOR EFFECTIVELY LIMIT THE  
"UPL" ACTIVITIES OF NONLAWYERS?

*Recommended Answer:*

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1. No (and the CMDP should leave the situation and UPL laws as is for the moment).

*Alternatives:*

2. No (and the CMDP should recommend changes in UPL law).
3. Yes; leave to states to enforce UPL, as currently.
4. Yes; and the ABA should monitor and support UPL prosecutions as set forth in Witness Foonberg's Resolution 105.

IV. IF THE CMDP RECOMMENDS REVISING MRPC 5.4, HOW SHOULD THE FUNCTIONAL "ETHICS AND DISCIPLINE" ISSUES BE RESOLVED?

A. MUST A LAWYER PRACTICING IN AN MDP OBEY THE LEGAL ETHICS RULES?

*Recommended Answer:*

1. Yes.

*Alternatives:*

2. No; the lawyer must use another profession's ethics rules.
3. No; the lawyer is not subject to any ethics rules.

B. SHOULD THE CMDP RECOMMEND THAT NONLAWYERS IN AN MDP USE LAWYERS' ETHICS RULES?

*Recommended Answer:*

1. Yes, in certain circumstances; the nonlawyers in an MDP should follow the lawyers' ethics rules when working at the lawyer's direction on a matter or when necessary for the lawyers to honor their own ethical obligations.

*Alternatives:*

2. Yes; the nonlawyers in an MDP must always comply with all of the lawyers' ethics rules, which would be enforceable through discipline of the lawyers in the MDP. (This is the German approach).
  3. Yes; in order for lawyers to work in an MDP, the nonlawyers might have to agree to register with the bar and be subject to the lawyers' ethics rules (See Law Society Report).
  4. No; the nonlawyers in an MDP are never required to follow lawyers' ethics rules, but instead should comply either with the ethics rules of those professionals having a controlling interest in the MDP or their own ethics rules.
  5. Maybe; have a mega-regulator develop new rules that would apply to an MDP.
  6. Maybe; have the professions involved negotiate this.
- C. WHOSE RULES PREVAIL WHEN DIFFERENT SETS OF ETHICS RULES WITHIN AN MDP CLASH?

*Recommended Answer:*

1. It depends (the *procedural* answer); an MDP must have in place procedures to address the situations in which different sets of ethics rules clash. But the lawyer might have to take appropriate steps, such as withdrawal, if he or she could not comply with the applicable ethics regulations.

*Alternatives:*

2. Lawyer's rules should always take precedence.
3. The "stricter" rules should always take precedence.
4. The dominant professional's rules should take precedence since those persons have the oversight and liability responsibilities.
5. The CMDP could leave this issue silent.
6. A new "mega-regulator" might decide how to resolve such issues.

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7. The professions (or some advisory group) should determine this.

D. SHOULD THE CMDP RECOMMEND THAT EITHER AN EXISTING OR NEWLY-CREATED ENTITY REGULATE THE MDP ITSELF AND/OR ALL OF THE INDIVIDUALS IN THE MDP?

*Recommendation:*

1. Maybe; the CMDP should evaluate whether its goal is to come up with an ideal solution or an achievable solution. If the latter, it must evaluate the political realities on this issue.

*Alternatives:*

2. Yes; the CMDP should recommend establishment of a federal “mega-regulator”(either for lawyer-auditor MDPs or more generally) on an *opt-in basis*. (Witness Holden’s recommendation)
3. Yes; the CMDP should recommend establishment of a federal “mega-regulator”(either for lawyer-auditor MDPs or more generally) on a mandatory basis.
4. Yes; the CMDP should recommend establishment of multiple state “mega-regulators.”
5. Yes; the CMDP should recommend that the MDP be required to register with the Bar, as suggested by the Consultation Paper of the Law Society of England and Wales.
6. Yes; the CMDP should recommend that an existing entity, other than the bar, regulate the MDP itself.
7. No; but the CMDP should recommend significant changes in the state systems to permit *mutual recognition of licenses*; i.e., a lawyer licensed in one state can register and then practice in another state.
8. No; but the CMDP should recommend changes to fix enforcement problems in the existing regulatory structure.
9. No; no special action is needed.

E. DO LAWYER-MDPS PRESENT SPECIAL ISSUES THE CMDP SHOULD CONSIDER WITH RESPECT TO MALPRACTICE EXPOSURE OR LIABILITY?

*Recommended Answer:*

1. Yes:
  - a. the CMDP should articulate its vision of how the lawyers' conflict of interest provisions would operate in an MDP context; and
  - b. the CMDP should recommend that the ABA Ethics 2000 Commission seriously consider adopting mandatory malpractice insurance requirements.

*Alternatives:*

2. Yes; there probably will be difficulties finding an MDP carrier and the CMDP should take steps to facilitate such coverage.
3. No:
  - a. the CMDP should not articulate a vision of how the lawyer's conflict of interest provision would operate in an MDP context; and/or
  - b. the CMDP should recommend a mandatory malpractice insurance requirement for lawyers practicing law in an MDP context.
4. No; there are no special malpractice issues that require CMDP recommendations.

V. IF THE CMDP RECOMMENDS REVISING MRPC 5.4, WHAT ARE THE CMDP'S THRESHOLD ETHICS PREMISES?

(Note: numbers rather than letters are used to conform to the organization on the Appendix B1-B5 charts. The chart used *letters* to designate the *threshold* and *functional* analyses questions and *numbers* to designate the *ethics* analysis questions.)

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1. IS AN MDP LAWYER'S OBLIGATION TO USE LAWYER ETHICS RULES JUDGED ON A CASE-BY-CASE BASIS?

*Recommended Answer:*

- a. No; lawyers within an MDP, who are actively licensed lawyers and have not indicated that they are NOT practicing law, should be treated as normal lawyers and be subject to the same regulatory system, ethics rules, and discipline system as other lawyers.

*Alternatives:*

- b. Yes; lawyers in an MDP are subject to the legal ethics rules whenever they provide "legal services" with respect to any given matter.
- c. Yes; lawyers in an MDP should follow the ethics rules of the "dominant" professionals in the MDP, i.e., those with the majority ownership or control.
- d. Yes; lawyers in an MDP should follow the ethics rules of the professional that is "driving the deal."
- e. No; lawyers in an MDP are not subject to any ethics rules.
2. SHOULD AN MDP LAWYER'S ETHICAL OBLIGATIONS VARY, DEPENDING ON THE WAY IN WHICH THE MDP IS STRUCTURED?

*Recommended Answer:*

- a. Yes; the analysis that follows should apply generally to a lawyer practicing law in an MDP context. However, lawyers may choose to provide legal services in a manner that is so separate from the MDP that the analysis will differ; at some point, an MDP could approach the *Cooperative* model listed on the Commission's Hypotheticals and probably should be treated differently than other "MDPs." (Note: This issue needs significant further development).

*Alternatives:*

- b. No; the CMDP should recommend a specified manner in which the

ethics rules would apply to lawyers practicing law in an MDP context and this interpretation should not depend on the manner in which the MDP's legal services are delivered. In other words, the model used for an MDP might vary, but the ethics rules would never vary.

- c. No; the CMDP should recommend a specified and exclusive model by which the MDP may deliver services; accordingly, the ethics rules would not vary because the model used would not vary.

3. HOW SHOULD THE MRPC TERM "FIRM" BE DEFINED WHEN USED IN AN MDP CONTEXT?

*Recommended Answer:*

- a. As the entire MDP firm, not just the legal services branch of the MDP firm.

*Alternatives:*

- b. As the legal services branch of the MDP *provided that* the lawyers take steps to separate themselves in some fashion from the rest of the MDP.
- c. The term shouldn't be used; in the MDP context, one should only look at the activities of the individual lawyer in question.

4. DOES AN MDP LAWYER'S DUTY OF CONFIDENTIALITY FORBID GIVING INFORMATION TO NONLAWYERS IN THE MDP?

*Recommended Answer:*

- a. No; the MDP lawyer should be treated like lawyers in traditional law firms. The lawyer is encouraged to keep client information as confidential as possible and is required to keep client information confidential with respect to individuals outside of the MDP firm, but is permitted to share information within the MDP firm in order to assist the lawyer in serving the client.

*Alternatives:*

- b. Yes; the lawyer is required to keep client information confidential

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even with respect to nonlawyers in the MDP firm unless the lawyer has received informed client consent to such disclosure (i.e., a waiver).

- c. Yes; the *lawyer* is required to keep client information confidential even with respect to lawyers in the MDP firm unless the lawyer has received informed client consent to such disclosure (i.e., a waiver).
  - d. There are many possible alternatives in addition to these two. For example, a lawyer might be permitted to share confidential client information only with those who are on the same MDP “team,” i.e., on the same side of the “firewall.” This might be done even without seeking client consent.
5. *IMPUTATION OF KNOWLEDGE: SHOULD THE CMDP ASSUME THAT, ABSENT IMPLEMENTATION OF ANY SPECIAL MEASURES AUTHORIZED BY LAW, A LAWYER IS IMPUTED TO KNOW WHATEVER INFORMATION OTHER MEMBERS OF THE MDP KNOW, INCLUDING NONLAWYERS?*

*Recommended Answer:*

- a. Yes; absent special steps endorsed by the CMDP or applicable law, knowledge possessed by nonlawyers within an MDP firm should be imputed to the lawyers within a firm when analyzing the lawyer’s ethical obligations.

*Alternatives:*

- b. No; knowledge possessed by nonlawyers in an MDP firm should not be imputed to the lawyers in the MDP firm for the purpose of conducting an analysis of the lawyers’ ethical obligations.
  - c. No; provided special steps are taken to put an effective screen in place, knowledge possessed by nonlawyers in an MDP firm should not be imputed to the lawyers in the MDP firm, for the purpose of conducting an analysis of the lawyers’ ethical obligations
6. *SHOULD THE CMDP ASSUME THAT NONLAWYER MEMBERS OF THE MDP HAVE IMPUTED KNOWLEDGE OF THE LAWYER’S INFORMATION?*

*Recommended Answer:*

- a. Yes; in devising its recommendations, the CMDP should assume that the nonlawyers in the MDP have had access to the confidential information given to MDP lawyers. In other words, where relevant, knowledge should be imputed from the MDP lawyers to MDP nonlawyers.

*Alternatives:*

- b. No; the CMDP should assume that an MDP lawyer's knowledge will not be imputed to the nonlawyers within the MDP firm.

7. SHOULD THE CMDP CONSIDER RECOMMENDING A NEW MRPC AS A PROMOTING UNDERSTANDING OF, AND COMPLIANCE WITH, AN MDP LAWYER'S OBLIGATION TO EXERCISE INDEPENDENT LEGAL JUDGMENT?

*Recommended Answer:*

- a. Yes; a new MRPC covering lawyers practicing in an MDP context would be particularly useful.

*Alternative:*

- b. No; the CMDP should not recommend a new MRPC provision covering lawyers practicing in an MDP, either because the CMDP does not currently have enough experience to address the issues or because such a rule is unnecessary.

- 7a. IF THE CMDP DECIDES TO DRAFT A NEW MRPC PROVISION TO APPLY TO LAWYERS PRACTICING IN MDPS, WHAT PROVISIONS SHOULD IT INCLUDE?

*Recommended Answer:*

- a. The CMDP should draft a MRPC provision with the following elements:
  - 1) have lawyers subject to the legal profession's existing regulatory and discipline;
  - 2) require clear identification of a lawyer's role within the MDP (i.e., is the lawyer offering legal services or working in a nonlegal

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capacity?);

- 3) require consistency in the lawyer's function within the MDP, i.e., the lawyer should not be able to decide that today I am providing legal services but tomorrow I am not;
- 4) require appropriate disclosures, including: disclosure to the client of situations in which a "product" provided by the MDP is based on legal analysis or services rendered by the MDP; the nature of the MDP firm (or the relationship between firms under the *Ancillary Business* and *Contract* models); the identification of lawyers *qua* lawyers on business cards, announcements, etc.; and disclosure of lawyer participation in a particular project (i.e., *no Trojan horses*); the fact that a client who uses one set of services of the MDP (e.g., audit) is under absolutely no obligation and will face no penalties if it does not use other services of the MDP; and possible compromises to the attorney-client privilege from using an MDP;
- 5) require supervision and training of lawyers by a lawyer;
- 6) require evaluation of lawyers' work by other lawyers;
- 7) require clearly established lines of authority, so that junior lawyers understand who they report to and so that independence of judgment is preserved;
- 8) provide clear rules regarding the interpretation of confidentiality, independence, and loyalty requirements in an MDP context (i.e., how should conflicts be evaluated and imputed, etc.); and
- 9) require a physical situation, including offices, files, and computers, among other things, consistent with the lawyer's confidentiality, loyalty, and independence obligations.

*Alternatives:*

- 10) transparency with respect to the MDP Agreement;
- 11) require a separate legal firm or department;
- 12) disclosure of possible lesser rights, similar to the "warnings"

discussed in the Consultation Report of the Law Society of England and Wales;

- 13) disclosure of the amount of any MDP fee attributable to legal services; and/or
  - 14) a provision similar to Pennsylvania RPC 5.7, which requires application of the MRPC unless the client knows or reasonably should know that he or she is not receiving the protections of a client-lawyer relationship. See Laurel S. Terry, *Pennsylvania Adopts Ancillary Business Rule*, 8 *The Professional Lawyer* 10 (Nov. 1996).
8. SHOULD THE CMDP RECOMMEND THAT LAWYERS IN AN MDP OWE A DUTY OF LOYALTY TO THE CUSTOMERS OF THE MDP NONLAWYERS?

*Recommended Answer:*

- a. Yes; assuming a fully-integrated MDP, the MDP lawyers should be viewed as having a duty of loyalty to the customers of the MDP nonlawyers. Consequently, when analyzing their obligations under conflict of interest and other rules, the MDP lawyer should take into account any conflicts of interest arising from the MDP firm's representation of customers of the MDP nonlawyers.

*Alternative*

- b. No; even in a fully-integrated MDP, the MDP lawyers should not be viewed as owing a duty of loyalty to customers served by the MDP nonlawyers. Consequently, when analyzing their obligations under conflict of interest and other rules, MDP lawyers need not take into account conflicts of interest with customers served by the MDP nonlawyers.