2000

The Evolving Nature of Tax Practice

Stefan F. Tucker

Repository Citation
https://scholarship.law.wm.edu/tax/196

Copyright © 2000 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
https://scholarship.law.wm.edu/tax
I. KEY ISSUES

A. What Do Tax Practitioners Want?
   1. law firm
   2. accounting firm
   3. consulting firm (whether or not an accounting firm)
   4. corporation or other in-house setting
   5. none of the above

B. Where Are the Tax Practitioners Coming from?
   1. law school
   2. masters in tax law
   3. government service – IRS, Justice Tax, Treasury
   4. but, ABA Tax Section was @ 28,000 in 1986, and is now at @ 19,000 and heading downward. and, within Tax Section, more and more tax practitioners at accounting firms, consulting firms and less and less at law firms.

C. What Is the Practice of Law and Concomitantly the Unauthorized Practice of Law? (Every state but Arizona prohibits UPL.)
   1. real estate
      a. like kind exchanges
      b. purchases
      c. settlements
      d. sales
      e. set up entities, such as LLC, LP, corporation
2. litigation
   a. pretrial
   b. discovery
   c. document review
   d. trial
   e. PRIVILEGE as an override [see Prince Jefri Bolkiah v. KPMG, House of Lords (12/18/98)]

3. energy

4. environmental

5. tax
   a. tax returns
   b. tax shelters – "corporate" tax shelters
   c. tax planning (illustratively)
      i. partnerships
      ii. benefits
      iii. international
      iv. ESOPs
      v. corporate (C corporations, S corporations, consolidated returns)
      vi. real estate
      vii. estate planning
      viii. again. PRIVILEGE (Sec. 7525—"federally authorized tax practitioner"; contrast Frederick case)
D. What Does the Client Want?

1. who are the clients?
   a. multinational entities
   b. multistate entities
   c. multicity entities
   d. family-owned businesses
      i. succession planning
      ii. estate planning
      iii. entity planning
      iv. tax planning
   e. individuals and collections of individuals (e.g., LLCs, LPs, S corporations, JVs)

2. what kind of service do clients want?

3. what about cost?
   a. training associates
   b. using paralegals
   c. products – their development and sale

II. FOUR PRINCIPAL AREAS

A. Model Rules of Professional Conduct

1. Preamble – a lawyer's responsibilities
2. Rule 1.7 – conflict of interest – general rule
3. Rule 1.8 – conflict of interest – prohibited transactions
4. Rule 1.9 – conflict of interest – former client
5. Rule 1.10 -- imputed disqualification – general rule –
   -- see MDP Commission Recommendation

6. Rule 2.1 -- advisor

7. Rule 2.2 -- intermediary

8. Rule 5.4 -- professional independence of a lawyer
   -- see MDP Commission Recommendation
   [DC only – lawyer may practice in organization where financial interest or management authority exercised by nonlawyer who performs professional services which assist organization in providing legal services to clients, but only if
   - organization has sole purpose of providing legal services to clients;
   - all persons with managerial authority or holding financial interest agree to abide by rules of professional conduct;
   - lawyers responsible for non-lawyers as if they were lawyers under Rule 5.1;
   - foregoing set forth in writing.]

9. Rule 5.7 -- [PA only – requires lawyer to take reasonable measures to assure that each person using non-legal services provided by lawyer or lawyer-controlled entity understands that rules relating to lawyer-client relationship do not apply to ancillary services.]

10. Rule 7.2 -- advertising
    -- Rule 7.2(c) -- cannot give anything of value for referral

B. Authorization to Practice Law and Unauthorized Practice of Law

1. Protecting the turf of lawyers in one state from incursions by lawyers from another state


-- see CA Stats 1997, ch 915 – Assembly Bill #2086 -- effective 9/28/98 for urgency, and effective 1/1/99 for non-urgency; repealed 1/1/2001

c. In Re Fre Le Poole Griffiths, 93 S.Ct. 2851 (1973) – resident alien in CT – law school in U.S.

2. Protecting the turf of lawyers from incursions by accounting firms, accountants, consultants and legal (self-help) publishers

a. Stanford Prof. Deborah L. Rhode's paper – "Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice" (9/95) – reaction to ABA Commission on Nonlawyer Practice.

b. Texas Committee on UPL investigation of Arther Andersen LLP

i. terminated 7/23/98

ii. article by Wm. Elliott, past Chair of Section of Taxation of State Bar of Texas, in Tax Notes (10/26/98): "Unauthorized Practice of Tax Law: Failure of Proof or Failure of Will?"

c. Nolo vs. Texas Committee on UPL

2 lawsuits, as follows:

i. filed in TX Supreme Court to challenge "secret inquisition-like procedures" used to investigate Nolo and its products. – Supreme Court of TX ruled on 4/15/99 that the Committee on UPL is required by new Rule 12 to give public disclosure of information sought by NOLO, with limited exceptions.

ii. filed in TX Supreme Court seeking a judgment that NOLO's books and software do not practice law and, in any event, banning such products would violate constitutional rights of all parties.
iii. Texas legislative result—H.B. 1507 is proposed legislation that would exempt NOLO's products from the Texas statute prohibiting UPL.

3. Focus on the AICPA Code of Professional Conduct as a possible Model—

Rule 505 provides (in relevant part) as follows:

a. At least 2/3 of a firm's owners (in terms of financial interests and voting rights) are CPAs. Non-CPA owners must be actively engaged in providing services to firm clients as their principal occupation. Investors or commercial enterprises not actively engaged as firm members may not acquire equity stakes. Firms that don't comply with these requirements have 3 years to do so.

b. A CPA takes ultimate responsibility for all the services provided by the firm and for each business unit performing attest and compilation services and other engagements governed by AICPA statements on auditing standards or statements on accounting and review services. (The term "business unit" applies to both geographic units, such as regional offices, and functional units, such as divisions in the same office that provide different services.)

c. Non-CPA owners do not assume ultimate responsibility for any attest or compilation engagement.

d. Non-CPA owners do not hold themselves out as CPAs. Such owners may use the title principal, owner, officer, member, shareholder or any other title permitted by state law.

e. Non-CPA owners abide by the AICPA Code of Professional Conduct. AICPA members may be held responsible under the Code for all co-owners' acts.

f. Non-CPA members complete the same work-related CPE requirements that AICPA members must fulfill.

g. Non-CPA owners at all times must own their equity in their own right and be the beneficial owners of the equity capital ascribed to them. Provision must be made for the transfer of such ownership to the firm or to other qualified owners if a non-CPA ceases to be actively engaged in the firm.
C. Multidisciplinary Practice

1. S. Tucker testimony before ABA Commission on MDP

2. National Conference of Lawyers and CPAs position


5. William M. Hannay (Chair, ABA Section of International law and Practice) testimony before MDP Commission

6. The Press

d. American Lawyer 6/98 – "King Arthur's March on Europe"

b. Washington Post 11/12/98 – "Rivals Call Law Firms to Account"


d. American Lawyer 6/99 – "Eyes on the Prize"

e. Tax Notes 6/14/99 – "ABA Commission Recommends Fee-Sharing, But With Strings"

7. ABA MDP Commission Recommendations

a. yes – change 5.4

b. no – don’t change 1.10

D. Privilege and Conflicts


2. Prince Jefri Bolkiah v. KPMG, House of Lords (12/18/98)

Ethics, etc. By Geoffrey C. Hazard Jr.

Lawyers and Accountants Must Make It Work

In previous columns, I have described the way in which the big accounting firms are aggressively enlarging their practices to include services that law firms traditionally have performed. The accounting firms call these services "tax practice," "financial services" and "management consulting." Whatever the services are called, they include advice and assistance that requires sophisticated legal knowledge. The large accounting firms among them employ hundreds of lawyers, here and abroad, to provide the necessary legal acumen. A problem for the legal profession is what it should now do about this development.

In my estimate, it will be fruitless to attempt to curtail or suppress these accounting firm activities. The legal theory would be that the activities constitute the unauthorized practice of law. The reality, however, is that these services necessarily involve a mixture of legal analysis and other services, such as financial analysis. If these services were held to be the unauthorized practice of law, it would be difficult to see why many other services using lawyers outside of independent practice would not also be deemed illegal. The courts will be reluctant to restore a 1920s definition of law practice. Business clients want services to be packaged this way, and the accounting firms will rest.

Lawyers are not very popular these days, particularly when the issue is maintenance of a professional monopoly. If push came to shove, legislation could repeal any definition of "unauthorized practice of law" that was inconvenient to business clients.

But this would require many changes in the way that most lawyers now "package and sell" themselves.

The financial relationships rule effectively prohibits multidisciplinary practice if a nonlawyer is a principal in the organization. The American Bar Association Model Rules of Professional Conduct provide that (b) and (d), respectively, provide that a lawyer «cannot share legal fees with a nonlawyer" or "practice law in an organization in which a nonlawyer owns a substantial interest." The prohibition on sharing fees could be skirted by separate billings for different kinds of services, which would be a good idea anyway. The prohibitions on sharing fees and co-ownership with nonlawyers, however, have real bite. The only ways nonlawyers could be affiliated in a multidisciplinary practice would be as employees, not partners or shareholders, which would make them second-class citizens in the enterprise.

First-class accountants, MBAs and other professionals are unwilling to accept that status, particularly if their presence is one of the strong attractions to prospective clients. These financial relationships rules are disregarded in a way that most respected lawyers are in-house counsel whose "fees" come from organizations owned by nonlawyers. How is it that a lawyer whose entire income is dispensed by nonlawyers can be an honorable member of the bar, but a lawyer who derives income with an accountant or MBA is beyond the pale?

Redefining Relationships

There used to be a concern about unfair steering or forwarding if nonlawyers were in practice with lawyers. But the bar has for some time recognized the "rainmaker" function in law firms—i.e., the partners who are paid to deliver business to the firm rather than simply providing legal assistance to the clientele. The more complicated problem is imputation of conflicts of interest. ABA Model Rule 1.10(a) provides that "with lawyers are associated in a firm, none of them (may) represent a client when any one of them practicing alone would be prohibited from doing so" under the conflict-of-interest rules.

Everyone would agree that a lawyer or a financial adviser—or an accountant for that matter—should not simultaneously advise a prospective acquiring company and a takeover target. Nor should they counsel both buyer and seller in a complicated commercial real estate deal. And—need it be said—they could not advise both the plaintiff and the defendant in an arbitration or a lawsuit. It would be impossible to keep client secrets and preserve client confidence in loyalty in such situations.

Imputation, however, is something else. The rule could be that the conflict of one lawyer in a firm would not be imputed to others if an insulating wall has been established. Such is the rule that already now applies to accounting and financial advisory firms. Similar departmental walls are recognized within businesses having subsidiaries, such as banks and insurance companies. Rule 1.1(a), governing lawyers who move from government service to private practice, is essentially the same.

The bar should think about it.

Mr. Hazard, a law professor at the University of Pennsylvania, is one of the nation's leading experts on legal ethics.
Written Remarks of Stefan F. Tucker  
Submitted to the Commission on Multidisciplinary Practice  

Testimony of Stefan F. Tucker,  
Chair, Section of Taxation  
Before the Commission on ABA Multidisciplinary Practice  
Los Angeles, California  

February 4, 1999  

I. Introduction  

Thank you for the invitation and opportunity to appear before you today in my capacity as Chair of the American Bar Association Tax Section. As you may be aware, the Tax Section is one of the largest Sections of the ABA, with about 20,000 members. Our Mission Statement identifies the Tax Section as "the national representative of the legal profession with regard to the tax system". We believe that, as a whole, the ABA and its Sections, Divisions and Committees, as well as state and local bar associations; the AICPA and other national, as well as state and local, accounting groups; the Treasury Department, Internal Revenue Service and other Federal government agencies; and the key Congressional Committees, their Staffs and the Joint Committee on Taxation likewise all see the Tax Section in the same light.

The Tax Section membership itself represents a broad cross-section of lawyers—including those in private law practice, ranging from persons in American firms with multinational offices to solo practitioners, and those in practice in non-U.S. firms; those in accounting firms, ranging from persons at the Big Five to those in smaller regional or local firms; those who teach full-time at law and business schools; those who work at corporate, tax-exempt and investment firm legal departments; and those who are general practitioners, business lawyers or specialists in other legal or non-legal practices who feel the need to keep up-to-date on one more or more areas of the tax law, and see the Tax Section and its publications and continuing legal education facilities as the very best means to do so, at the lowest effective cost.

Interestingly enough, many of our most active and productive members are not practicing in law firms at this time, but, rather, are at accounting firms. We find that the
accounting firms are doing a far better job of encouraging their personnel to participate in outside activities, such as the Tax Section. In contrast, many, if not most, law firms—both big and small—are driving their attorneys to work more and more billable hours, effectively precluding these lawyers from participating in outside activities, which do not translate immediately into gross receipts. [To quote Walt Kelly's Pogo, "We have met the enemy, and it is us".]

By way of illustration, one of our Council Members is a member of a Big Five accounting firm. Moreover, we have approximately 50 Committees and Task Forces; of these, 10 are chaired by persons at Big Five accounting firms, 6 are chaired by persons on in-house corporate legal staffs, 5 are chaired by full-time law professors, one by a person at a trade association and one by a person at a lobbying firm.

Thus, when I speak as Chair of the Tax Section, I believe that I am representing my Section's views as a whole, although I am the first to admit that there is no comprehensive agreement on the issue of multidisciplinary practice within our Section, even among those who practice law in "traditional" arenas. Certainly, by this time, our members have had the time truly to think about multidisciplinary practice, rather than simply to flail about in reaction to the same.

We recognize that the phenomenon of multidisciplinary practice now extends far beyond the tax world, into areas such as employee benefits, environmental law, real estate and, like it or not, litigation (and, certainly, alternative dispute resolution). However, my emphasis today will, perforce, be on the practice of tax law.

The ABA itself had an excellent showcase program on "The Ends of the Profession" at its Annual Meeting in Toronto last August. Unfortunately, that program was neither well attended nor taped. The views of Mr. Feather, the futurist who gave an overview, Professor Ogletree of Harvard Law School, who moderated, and the excellent panelists, from a variety of backgrounds and current activities, would have been highly beneficial to the members of the Commission.

The Tax Section, at my urging, had its own program, likewise labeled "The Ends of the Legal Profession", at its Midyear Meeting in Orlando last month. The program was designed to take a critical look at the future of the legal profession, with particular emphasis on the future of tax lawyers.

The participants on that program were: Phillip Mann, our Immediate Past Chair, who acted as moderator; Sherwin Simmons, a former Chair of the Tax Section, former Delegate from the Tax Section to the ABA Board of Governors, and the Chair of this Commission; Irwin Treiger, a former Chair of the Tax Section, former Delegate from the Tax Section to the ABA House of Delegates, current Chair of the Tax Section's Goal II Task Force and Co-Chair of the National Conference of Lawyers and Certified Public Accountants; Paul Sax, our incoming Chair, who has, throughout his membership in the Tax Section, placed a genuine 055550-00000-00929.doc - 2 -
focus on legal ethics, conflicts and multidisciplinary practice; and Charles Robinson, an elder law specialist from Clearwater, Florida, a consultant to law firms, and a panelist in the Toronto Showcase Program. I have given a tape of that program to Sherwin Simmons and would be more than pleased to furnish the same to any member of the Commission. (Others may purchase the tape through Tax Section headquarters.)

In preparation for this Hearing, I have carefully reviewed the comments of those who have already appeared before the Commission. In formulating my views, I have also reviewed a number of articles and treatises, including The Legislative History of the Model Rules of Professional Conduct.

II. Summary

Multidisciplinary practice has not developed in a vacuum. It is the product of a rapidly growing, consumer-driven, global economy. We see ever more sophisticated clients seeking advice on increasingly complex matters, often involving an inextricable mix of finance, accounting, law and other disciplines.

The Model Rules fail to reflect the marketplace realities imposed upon the modern law practice irrespective of size or scope. Moreover, the protections the Model Rules once afforded our clients are now in many respects unnecessary from a consumer point-of-view, and therefore inappropriate. These Model Rules have hampered the ability of lawyers to assimilate into this multidisciplinary world. If the legal profession is to progress and compete in the 21st Century, rather than becoming merely an adjunct or a footnote in the real world, certain aspects of our self-regulatory system must be overhauled. Only in that manner will the best interests of the public, and therefore the legal profession, ultimately be served.

III. Overview

The Tax Section believes that a rapid response by the ABA is absolutely necessary. Because any response will, in all events, be occurring well after the train has left the station and headed down the track, the Bar's response ought to be focused on the direction and configuration of the tracks ahead. Multidisciplinary practice is here. We cannot be, or be perceived in the minds of lawyers, other professionals or the public as, tilting at windmills on the Plains of La Mancha. If we do not attune ourselves to client- (or, to use a term that reflects reality, even if it may sounds more crass) "customer"-driven realities, then we lawyers will simply be left behind.

We believe that the efforts of the organized bar to protect the ramparts against what it defines as the "unauthorized practice of law" are, in many instances, viewed as, simply, the lawyers protecting their pocketbooks, rather than protecting the interests of the public. To reiterate, consumers are seeking other sources of service and product because of their need to save dollars. When large and small businesses alike are using cost-cutting as a means to offset the inability to increase profits, in a highly competitive business world, it is wholly logical that
cutting the costs of what we would like to say are "legal services" is a necessary component of business survival.

We can analogize to other professions which, in seeking to maintain their guild rules under changing national or global circumstances, ultimately lost their institutional respect as professionals. With the exception of certain boutique-type practices, particularly in architecture and engineering, one-time "professionals" are now largely viewed as individuals encapsulated in larger organizations. Anecdotal evidence suggests that the engineering profession is dominated by engineers on the payrolls of employers, with fewer and fewer independent concerns. Medicine is rapidly mirroring that change, with more and more doctors functioning as employees of, or beholden for their billings and the scopes of their practices to, large medical service providers or health maintenance (or similar) organizations. We need always to remember Santayana's warning: "Those who cannot remember the past are condemned to repeat it".

As we see prepaid legal plans spread (and, mark my words, we will see the same, as the public and its elected representatives, on the Federal, state and local levels, all react to the extraordinary legal fees in the asbestos cases, the tobacco litigation, stratospheric tort verdicts and the upcoming gun cases), we will see even more subordination of the traditional lawyer roles to client- or consumer-driven demands.

Among other things, this means we must rethink, and then rewrite, certain of our Model Rules of Professional Conduct (the "Model Rules"). It is very hard to say who these Model Rules are actually protecting these days. Frankly, we see the key Model Rules that block multidisciplinary practices involving lawyers as guild rules, not client-oriented canons. If clients want a particular lawyer and are willing to waive conflict (or even forget the issue of conflict where that lawyer's firm is representing another entity against the client, or one of the client's subsidiaries, affiliates, co-venturers, officers or directors), who do we lawyers believe we are protecting? Furthermore, if a lawyer cannot share fees with non-lawyers or engage in ancillary services, how does the lawyer compete in a multidisciplinary practice world?

When I grew up during the late '40s, '50s and early '60s, in a small Midwestern city, the lawyers did the legal work, the real estate title work, insurance brokerage and, very often, tax returns. They simply identified what they were being paid for each time. In-house counsel are paid by their corporate employers, and the continuity of their jobs is, in no small part, dependent upon corporate earnings. They own stock or stock options, and therefore share in the fortunes of the corporation. How do these situations differ from the concept of a multidisciplinary practice, with the sharing of fees and the rendering of ancillary services?

IV. Answering the Commission's Specific Questions

We believe that amending the Model Rules—and, in particular, Rule 5.4—to permit lawyers to enter into partnerships or other fee-sharing arrangements with non-lawyers would not harm clients, so long as clients understand the facts. Such understanding can be engendered
and enhanced by appropriate public relations and media communications by the legal profession, through the American Bar Association and similar state and local groups, rather than causing each separate entity, on its own and through its own resources, to do so.

The ongoing proliferation of multidisciplinary practices is, in and of itself, plain testimony to the fact that clients believe that they benefit from "one-stop shopping", from looking to one source, as they can with the Big Five, American Express, Century Business Systems or their own in-house staffs. It is, moreover, quite clear that the client base that shares this belief may have begun with the Fortune 1000, but now reaches down into small businesses and entrepreneurs at virtually every local level, for all are cost- and fee- conscious today.

This client base exists not only in the large law firms, but with small firms and even solo practitioners. All lawyers face the reality that "one-stop shopping" is here to stay, and so they will lose more and more business to the mega-service providers and the specialists, who are furnishing--more efficiently, with a broader base of experience and information, and for significantly lower costs—those services and products traditionally provided by lawyers. Again, cost savings truly drive today's consumer-oriented economy.

We cannot identify any specific instances of harm to a client as a result of such a change to the Model Rules. In fact, without fear of being redundant, we can see only benefit—not just to the Fortune 1000 and "multi-national" companies, but also to our usual, everyday "bread and butter" practice clients, who cross city, county, state and national borders every day and in every way.

Moreover, the desire of states to protect their licensed practitioners from competitive incursions by those in other states or nations is arguably protectionist and chauvinistic. Take, for example, the absurd case of a California court upholding a California-based client's refusal to pay a New York-based law firm for legal services provided by that law firm in connection with a California matter, where all the legal work was done in New York or outside of California. Take it as granted that certain areas of practice—civil and criminal litigation in the state and local courts, real estate title and similar matters, domestic relations and wills, trusts and probate matters, and state and local taxation—require local practitioners; over and above that, there is so much more that does not require the same, and clients should be able to make their own business decisions as to who they will call upon for advice and assistance, wherever that advisor is located.

In our view, changing the Model Rules would pose absolutely no risk of impairment to a lawyer's independent professional judgment. In today's world, lawyers receive contingent fees, or success bonuses, from clients. Some receive interests in their clients' entities in consideration for their services. Others are offered preferential acquisition opportunities, or preferential terms on the acquisition of such interests, by or on behalf of clients. Any of these existing and established practices poses, in my view, far more of a threat to independent professional judgment than does fee sharing with non-lawyers; yet, they are clearly accepted and appear to have no impact whatsoever on attorney-client relations.
We must recognize that there is often little, if any, real distinction or variance between business or financial advice and legal advice, and, in fact, the two are inextricably intertwined, along with the continuous impact of interpersonal relations between lawyers and their clients.

In her testimony (on November 13, 1998), Professor Linda Galler, of Hofstra University, addressed the differences in the standards of professional conduct that apply to accountants and lawyers. In the interests of time, I would add only that Treasury Circular 230 is a somewhat effective regulator in terms of its application of uniform standards to both lawyers and non-lawyers. As members of the Tax Section's Tax Shelter Task Force have agreed, it is evident that Circular 230 needs far more teeth in it today when we are facing the proliferation of investment firm-formulated tax shelters for multinational corporations utilizing the interplay of Internal Revenue Code Sections intended to apply, independently, to quite different facts and circumstances.

No changes need be made to Rule 1.6 to protect client confidentiality. It is, quite simply, a matter of disclosure to the client and informed client consent. Clearly, the client's level of sophistication will dictate the nature and quantity of disclosure (that is, explanation of the issues, facts and ramifications) necessary to assure a truly "informed" consent. But, this is not a revelation; we all know this today. Remember that the Preamble to our Model Rules states: "In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation." [Emphasis supplied.] Too many of our problems with clients are not attributable to perceived breaches of the protection of client confidentiality or conflict of interest, but, rather, to failures of communication, whether due to incompetence, lack of promptness, lack of diligence or just plain arrogance, or any combination of the same.

The reality is that, notwithstanding the proscriptions of Model Rules, it is almost impossible, and certainly unrealistic, to say that perceived conflicts of interest can readily be avoided in today's multi-jurisdictional world. The geographic reach and substantive breadth of law practice today has, as a practical matter, outgrown the Model Rules. It can almost always be argued that a lawyer has a conflict; this is a "virtual reality". A lawyer in the Houston office of a national law firm may have no knowledge of work being done by his partner or an associate in New York City, Washington, Brussels, Budapest or Tokyo. The notion of imputed knowledge of facts was developed during a time when law firms were small and self-contained, in one city or, at most, two cities in one state. We should not be governed by antiquated Rules.

For this very reason, the general rule on imputed disqualification should be revised in a wholesale manner to take into account the realities of practice. All of the clients of a multi-office professional practice need not suffer the impracticalities of imputed disqualification, simply because two lawyers in two different offices, who may not even know each other, are working for the client in one matter and against the client (or its subsidiary, parent, affiliate, co-venturer, officer, director or employee) in another matter. The client is more likely to know
about the situation than either lawyer, and, if the client does not object, why do the Model Rules do so?

The Rules on the responsibilities of a partner or supervisory lawyer (Rule 5.1), the responsibilities of a subordinate lawyer (Rule 5.2), the supervision of nonlawyer assistants (Rule 5.3), the unauthorized practice of law (Rule 5.5(b)), the responsibilities regarding law-related services (Rules 5.7), and on advertising and solicitation (Rule 7.1-7.5) likewise need to be refocused on today's realities.

Furthermore, it must be noted that Rule 7.2(c) is out of touch with reality. A lawyer "shall not give anything of value to a person for recommending the lawyer's services...." Does that mean that a lawyer cannot send that person a gift, whether at the time or at Christmas, or treat the person and his or her spouse or significant other to dinner or a show or both? Is this Rule even honored, or is it so impractical as to be ignored on a wholesale basis?

We must accept that the "unauthorized practice of law" is an increasing reality (and product of) our consumer-oriented society. If a consumer is happy to take a will form and seek the advice of a non-lawyer regarding filling in the blanks, why should we seek to disallow this? Today's average consumer cannot afford the legal fees that start at about $100 and go up into the $600-$700 range per hour. Recognizing differing individual needs and differing demographic needs, the consumer finds what best suits his or her needs and resources. In other words, water finds its own level.

The fact is that many of what were once considered "law-related services" are now provided outside the traditional law practice. This is not revolutionary; it is evolutionary. Only a generation ago, lawyers routinely performed title work, insurance brokerage and tax return preparation. As the world changes, likewise the practice. Even the concept of privilege is eroding in today's world, and not just in the context of lawyer versus accountant in Federal tax practice. And, while we need not shift with every wave in the ocean, we must be aware of, and attuned to, its ebbs and flows. To paraphrase a song from Lerner and Loewe's Paint Your Wagon—"Where are we going? We don't know. When will we get there? We're not certain. All that we know is that we're on our way."

We do not believe that the Model Rules should be amended to permit the discipline of law firms and/or multidisciplinary practices. As others have testified, client protection and public interest are the only legitimate grounds for regulation. Accordingly, the need for discipline should be focused on individual lawyers. In this context, when one reviews local bar disciplinary actions, the focus is most often on the misuse of trust accounts and client funds, missed court and filing deadlines, breaches of client confidences to the detriment of such clients, criminal conduct, and blatant conflicts of interest (using knowledge obtained when directly representing a client against that same client in another matter).

Law firms and multidisciplinary practices are, by virtue of today's litigious world, truly regulated by external forces—client and customer demands and expectations. If a firm or
multidisciplinary practice commits a moral or legal wrong, there will be consequences, either in the form of actual damages or impaired reputation (which, in the medium or long term, may well be far more detrimental to the firm and its members).

It is clear that the existing regulatory framework is broken, and needs fixing. It should be restructured by calling in a focus group of persons reflecting consumers of all levels—from the multi-national corporation to the local company, to the individual needing services personally, to lawyers and judges. Such regulation should be nationally based and Federally implemented, without the ability for state-to-state variance.

In his testimony before this Commission on November 12, 1998, James Holden, a former Chair of the Tax Section and a highly respected authority in legal ethics and conflict issues, suggested, as a point of discussion, the establishment of a Federal-level commission to regulate professional service entities on an elective basis. This is an idealistic concept. What we need, ultimately, is the Federal government acknowledging that legal and other professional services are a matter of interstate commerce, governed by the Constitution. We are not suggesting, or even considering, Federal regulation of legal services. We are, rather, suggesting Federally imposed deregulation, with a focus on the realities of a consumer-oriented economy, not antiquated, unrealistic and ineffective guild rules.

Peter Moser, Chair of the ABA Standing Committee on Ethics and Professional Responsibility, urged (in his November 13, 1998 testimony) interstate agreement, so that attorneys could practice across state lines with some simple form of registration. In our view, even if states are allowed (as they will certainly insist) to retain their individual admission standards, the Federal government should affirmatively recognize—or impose—the absence of state borders, except in strictly local matters, such as wills, trusts and probate, real estate title, state and local business entities and the like.

We believe that the Federal government will not even consider stepping into this morass unless and until the ABA itself takes the lead by revising extensively its Model Rules. Furthermore, and importantly, until such time as the Model Rules are so revised, it is highly unreasonable to expect the states to act at all. The ABA needs to be the leader, and leadership entails immediacy—actions, not words.

V. Conclusion

Multidisciplinary practice is the reality and must, therefore, be the future of the legal profession. It has evolved in response to an increasingly consumer-driven, global economy, which presents fewer and fewer "pure legal issues". A number of the Model Rules, in their antiquated form, limit the ability of lawyers, qua lawyers, effectively to respond to client needs, and therefore menace the very interests they were designed to protect.

Thank you for your time and consideration.
Written Remarks of Irwin L. Treiger and William J. Lipton

CO-CHAIRS, NATIONAL CONFERENCE OF LAWYERS AND CERTIFIED PUBLIC ACCOUNTANTS

March 11, 1999

Mr. Chairman and distinguished Members of the Commission, we are pleased to be here today to represent the National Conference of Lawyers and Certified Public Accountants to assist you as you deliberate issues relating to multidisciplinary practice by professional service providers.

The purpose of the Conference is to foster excellence of professional performance in the public interest by providing a forum for identifying, discussing and proposing recommendations for the resolution of public issues of professional concern between representatives of the American Bar Association and the American Institute of Certified Public Accountants.

A. Introduction: The Tides Of Chance

The organizations that deliver professional services, including legal services, are changing dramatically throughout the world. Technological innovation and the continuing globalization of the economy affect market dynamics and cause lawyers, accountants and other professionals to reexamine long-standing professional service paradigms. This shift is most evident outside the United States, where the number of lawyers working in international professional service organizations is on the rise. But the tides of change are now lapping at our shores with increasing vigor, with U.S. professional service providers other than traditional law firms employing a growing number of lawyers. In fact, a December 1997 Accounting Today list of the ten service providers employing the largest number of lawyers worldwide reveals that accounting firms occupy four of the top five spots.

The ABA directed this Commission to investigate these changes in the market for professional services. But the legal profession is not alone in examining the new professional services landscape. The American Institute of Certified Public Accountants ("AICPA") recently undertook an extensive "Vision Project" designed to prepare its professionals for the next twenty years. Through this and other AICPA initiatives, the accounting profession hopes to enter the twenty-first century ready and able to satisfy the complex needs of clients active in the global marketplace. The largest firms have already transformed themselves by expanding their offerings far beyond the traditional accounting and auditing. The Big Five now provide clients access to the expertise of a broad array of specialists, including accountants, MBAs, economists, financial managers, actuaries and retirement plan experts.

In addition to all of the above, in Europe, Australia, and Canada, accounting firms also offer clients traditional legal services. The entry of these firms into the legal market has taken a number of forms, from the acquisition of or affiliation with existing law firms to the formation of new "captive" firms, to the lateral hiring of lawyers or groups of lawyers, to formal affiliations with law firms and law firm networks. The addition of legal practitioners into the mix of professionals is an important one, because so many business problems today have a legal component and so many legal problems a business component. The Big Five seek to provide clients with a complete range of professional
services through a variety of different practice structures, including multi-disciplinary practices within one partnership ("MDPs") where such partnerships are permitted by applicable law.

These MDPs claim to offer their clients significant advantages over traditional service providers. These firms maintain that the synergistic combination of professionals and abundant resources enable them to offer clients competent, efficient, and cost-effective one-stop solutions to global business problems. Importantly, consumers of legal services — including many corporate counsel — agree with such claims.

In this country, states regulate the legal profession. The state rules that govern lawyers currently preclude MDPs from expanding legal services into the market. Accounting firms have not, so far, acquired any law firms, nor do they hold themselves out as engaging in the practice of law. They are, however, increasingly offering services that have traditionally been thought of as legal services. This is most evident in the tax area, where, to the extent permitted by statute and regulation, accounting firms represent clients before the IRS, in the Tax Court, and before state taxing authorities. Beyond tax, accounting firms are reported to be hiring lawyers to offer business-related advice to clients in employee benefits, business planning and organization, insolvency, bankruptcy, loan restructuring/workouts, litigation support and alternative dispute resolution.

Historically, the organized bar has fought incursions by non-lawyers into the practice of law. The typical target of an unauthorized practice proceeding has been the untrained or poorly trained purveyor of questionable services. These historical precedents which related primarily to competence, are not, however, particularly relevant to the trends that are shaping legal and other professional services as the twenty-first century approaches and to the issues now before us relating to independence and professionalism.

In contrast to past efforts, the legal services the bar finds itself questioning today are provided by lawyers who are partners and employees of international professional service firms and who, like their law firm counterparts, graduated from accredited law schools, are duly admitted to the bar and are licensed to deliver legal services. Presumptively, they are competent. The debate has thus shifted from the traditional background of lawyers versus non-lawyers to lawyers versus lawyers. The issues revolve not around competence, but rather choices, for the consumer with respect to the models for the delivery of legal services and lawyers' affiliations within the framework of lawyers' professional independence. Should lawyers continue to insist that the traditional law firm is the only proper vehicle for the delivery of these services? Or has the time come for the bar to recognize — as other professional service providers already have — that legal services may appropriately be provided by lawyers practicing in MDPs that offer a variety of coordinated professional services to clients?

From the perspective of the National Conference of Lawyers and Certified Public Accountants, we think that as you consider these important matters, your focus must be the public interest, not either profession's interest. At the end of the day, the question you must answer is whether, assuming the necessary professional safeguards are provided, the public is best served by having its choice of legal service provider limited to traditional law firms.

B. Historical Background

Today's international accounting firms were originally organized to provide traditional audit and accounting services. Over time, with the increasing complexity of tax and regulatory issues, the accelerated pace of technological innovation, and the global expansion of business, these firms began offering a wider variety of services to increasingly sophisticated clients. As these firms expanded, law firms also grew in size and, to a more limited extent, in scope. But the bar's self-imposed prohibitions against the conduct of ancillary businesses resulted in the inability of traditional law firms to offer the wide variety of services to business clients which were being offered by accounting firms, to the detriment of lawyers practicing in large and small firms, in large and small communities.
The two professions first came into conflict when accounting firms began to offer tax planning advice in addition to routine tax return preparation services. What the accounting profession saw as a logical extension of tax return preparation services, many lawyers saw as an unwelcome competitive move and, possibly, the unauthorized practice of law.

When these differences first arose, the professions sought to resolve them in a cooperative and harmonious fashion. For more than forty years, the National Conference of Lawyers and Certified Public Accountants has advanced the notion that "the farmer and the cowman should be friends." An example of the National Conference’s work is the 1981 monograph, *Lawyers and Certified Public Accountants: A Study of Interprofessional Relations*, which deals with the functions of lawyers and accountants in the tax arena - at the time the most contentious intersection of the two professions.

Changing times, however, brought different perspectives. In 1993, the National Conference undertook a fresh look at the intersection between the legal and accounting professions. Its efforts were suspended by the commencement of an inquiry by the Federal Trade Commission ("FTC"). The FTC closed its file without taking any action, but the *in terrorem* effect of the FTC’s action resulted in no further examination by the Conference into the areas where the two professions have intersecting interests.

C. Forces Driving The Marketplace

Whether or not, ultimately, the organized bar will be able to influence the course of events is far from certain. Forces external to the legal profession appear to favor allowing legal services to be provided by non-traditional firms. These forces include client demand, globalization of the marketplace, competition from other professional service providers, and the regulatory environment.

1. Client Demand and Globalization

In a paper published in 1995, Gary Garrett and Ward Bower stated:

> Market conditions dictate a new paradigm whereby the client drives the price, delivery and efficiency of the service. Law firms are, so far, in a state of denial as relates to this new marketplace. Bar Associations clearly have not gotten the message. Through judicial deregulation, a “mature” legal services market has evolved, where the supply of legal services has outgrown the demand, characterized by increased client sophistication, supplier consolidation, evolution of brand name recognition, market segmentation, provider differentiation, price competition, geographic expansion and decreased barriers to entry.

One may question the applicability of these conclusions to all consumers of legal services. Nevertheless, there appears to be some evidence, based on experience over the past decade, that commercial consumers value independence, loyalty, and confidentiality less than the legal profession seems to believe. Particularly outside the United States where multidisciplinary services are available, the primary considerations for many sophisticated business clients include the sophisticated business and industry expertise offered by a professional service firm, the ability to look to a single firm for comprehensive business solutions, and the amount a professional service firm charges for its services.

The availability of "one-stop shopping" for a comprehensive, cross-disciplinary approach to business
problems is perhaps the biggest attraction of the multidisciplinary form of practice. As Steven A. Bennett, former General Counsel of Banc One Corporation, explained in testimony to this Commission in November:

There are no 'pure' legal problems today because legal solutions cannot be arrived at in a vacuum. The solution of the legal aspect of a problem invariably necessitates that other aspects of the problem be adjusted as well. If one just sends it to the lawyers, without input from the other disciplines, the problem just can't get solved.

Clients and the public are better served when those from diverse professions provide multidisciplinary solutions, whatever the form of the entity providing such services. It is at least arguable that to the extent that clients demand comprehensive business solutions and "one-stop shopping," meeting these client expectations is in the best long-term interest of both the legal profession and our clients and until rules permitting MDPs are in place, this vision cannot be achieved.

2. Competition

Professional service firms with their roots in the accounting profession are well positioned to offer multidisciplinary services. Lawyers, by virtue of their self-imposed restrictions, are not. Through the accountants' international networks and their resources they are in a position to offer competent, efficient, cost-effective, one-stop global solutions, whatever the form of the entity providing such services.

Lawyers in the United States are currently precluded by the rules of conduct from practicing law in multidisciplinary structures. These restrictions disadvantage lawyers who seek to meet client demand for unified, multidisciplinary global business solutions, and ultimately, the profession itself. As Steven Bennett noted:

Efforts by corporate purchasers of services to obtain optimal, comprehensive solutions carry with them the real possibility that, in the absence of change, lawyers practicing in traditional law firms in the coming century might find themselves all dressed up with no place to go.

3. The Regulatory Environment

State laws and regulations originally enacted to protect the public from incompetent, unregulated legal service providers have also had the effect of insulating the legal profession from market forces. In recent years, however, as protectionist measures such as minimum fee schedules and restrictions on advertising have disappeared, bar associations have had to consider whether some of the rules designed to protect the client are outdated and obstruct the maturation of the marketplace.

At present, mandatory rules of professional conduct - the most significant of which are discussed below - present significant barriers to lawyers in the United States who wish to practice across boundaries and outside a traditional law firm. By contrast, the trend internationally is to permit new forms of practice. With the changes abroad, questions are being raised as to how long the barriers in the U.S. can remain.

One force that may lower competitive barriers is the liberalization of international trade. For instance, the World Trade Organization's ("WTO") Working Party on Professional Services, which is currently addressing the delivery of accounting services by transnational organizations, has
indicated that its probable next area of inquiry will be the delivery of legal services. Part of the WTO's mandate is to ferret out anticompetitive trade barriers among member states and promote cross-border commerce, including the transnational provision of professional services. The ultimate goal is the negotiation of agreements for the mutual recognition of professional qualifications.

As competitive pressures increase, it is unlikely that current regulatory restrictions can continue to prohibit competent lawyers from offering their professional services through an MDP. Some lawyers may choose to oppose regulatory change, but any efforts by the bar to preserve rules that solely protect the profession's economic interests will be carefully scrutinized by the government, including antitrust and consumer protection authorities.

Persistent questions regarding lawyer-client confidences, avoidance of conflicts of interest, and maintaining the independent judgment of lawyers assume there can be an effective boundary between lawyers and other professionals engaged in serving the same client. Currently, practice rules in most jurisdictions presume that such a boundary can only be defined by a separate legal entity. There is, however, nothing in the nature of a separate legal entity that makes its borders any more impenetrable than those that separate different departments in the same firm. A lawyer in a law firm can maintain and protect client confidences, even though she may share them with her staff and retained professionals. She can operate a conflict identification and resolution system in her firm, which includes a screening system for lateral hires from firms which represented conflicted clients. And she can exercise independent legal judgment for a few trusted, crucial clients, some of whom may have conflicting business interests. A lawyer can just as easily do all of this as head of the law department of an MDP.

D. Policy Issues and Standards of Conduct

Lawyers must ask themselves whether they can adequately serve their clients in the new marketplace under the existing regulatory structure they have adopted. The U.S. bar must decide whether to insist on rigid adherence to the existing rules, or to recognize the changes in the marketplace and to prepare for the future by offering clients—and lawyers—new options for the delivery of legal, business and other relevant and related services. At the same time, the accounting profession must recognize that its rules must also change in the interest of providing adequate protection to the public and sufficient flexibility to accommodate competition.

Moreover, the bar and the accounting profession must decide whether the same rules should apply to the conduct of all lawyers in providing these services, regardless of the vehicle utilized in doing so, i.e., a traditional law firm or a MDP. If the ultimate decision is that the rules should be uniform, an effort must be made, as expeditiously as is possible consistent with the appropriate deliberate process to reconcile such rules.

The paramount consideration should be what is in the best interest of the public in general, and clients in particular. There is no reason to presume that the interests of clients and the economic interests of professional service providers are not aligned. Currently, the rules of conduct effectively prohibit MDP lawyers from offering traditional legal services. Historically, these rules have been justified as protecting clients and preserving the integrity of the legal profession. It is questionable, however, whether the rules of conduct that prohibit lawyers from practicing in a multidisciplinary setting are necessary to achieve such goals. The most significant of these rules as currently in effect in the several states include the prohibition on fee-splitting, the requirement of lawyer control, the rules concerning conflicts of interest (including imputation of information and knowledge within a firm), the rules promoting client confidentiality (again including imputation of information and knowledge within a firm), and the rules relating to ancillary businesses. Similarly, there are significant rules imposed by the accounting profession on its members which must also be re-examined. Several of these rules are discussed below.

1. Fee Splitting
Every U.S. jurisdiction (except the District of Columbia) prohibits a lawyer from sharing legal fees with a non-lawyer - the practice known as "fee splitting" - and from forming a partnership with a non-lawyer if any of the partnership's activities consist of the practice of law. These prohibitions may present the most significant obstacle to the delivery of traditional legal services by multidisciplinary firms.

Perhaps the competitive disadvantage resulting from this rule would be tolerable if it could be demonstrated that the prohibition on fee splitting served the public interest. The stated purpose of the prohibition is to protect the lawyer's professional independence of judgment. But there is no reason to believe that lawyers sharing fees with non-lawyers within a multidisciplinary structure would risk their professional reputation, diminish the quality of service or compromise their professional judgment any more than a lawyer would within a traditional law firm.

Even if a non-lawyer wanted to control lawyers through the payment of fees, the rules of conduct already provide multiple protections against non-lawyer interference with a lawyer's independent judgment. There has been no flood of horror stories emanating from those countries where fee splitting is permitted. In the District of Columbia, the only U.S. jurisdiction in which non-lawyers are permitted to be partners in law firms, fee sharing between lawyer and non-lawyer partners has had no known deleterious effects.

Indeed, the American Bar Association's Kutak Commission recommended doing away with the prohibition on fee splitting almost twenty years ago. Notably, opposition to the Kutak recommendation focused on the notion that eliminating the fee-splitting rule altogether could lead to the takeover of legal practice by corporations with their principal duties to their shareholders, not to clients. While this is not a far fetched notion (observe, e.g., the acquisition of CPA firms by such corporations as American Express), one must not approach the problems faced by the profession with the smug assumption that, because publicly-held corporations are bottom-line oriented, they are per se evil. It would be difficult to eliminate the profit motives of most large traditional law firms in this country. The burden, of course, always remains on the individual lawyer, so long as the same ethical rules are applied to all lawyers irrespective of where they practice. Note that there was no suggestion by the Kutak Commission or those opposed to that Commission's recommendations that fee sharing among partners in an MDP, wholly owned by the professionals providing services to clients, would be problematic.

It has been suggested that allowing fee splitting could encourage lawyers to act in their own economic interest rather than in the best interest of the client. However, there is no reason to believe that accountants or other professionals, who are not precluded from fee-splitting, are a less reliable source of objective, high-quality professional services than lawyers. Moreover, similar arguments might easily be made about lawyers in traditional law firms, who might, for example, sacrifice client interests in rapid settlement of a case for protracted discovery proceedings and trial.

Elimination of the fee-sharing rules would not, of course, require lawyers to share fees or enter into partnerships with non-lawyers. It would merely make an additional form of practice organization available. Ultimately, the best determinant of whether the fee-sharing prohibition advances or impedes client interests will be determined by the marketplace. Clients who value a fee-splitting ban will obtain legal services from a traditional supplier of legal services.

2. Lawyer Control of Legal Practice

State rules of conduct also require that firms offering legal services be controlled by lawyers. Notably, accountants face a similar requirement in their practices: firms providing public attest or audit services must be controlled by CPAs. These rules undoubtedly stem from an important purpose. It would be inconsistent with core notions of what it means to be a lawyer (or a CPA) — and harmful to client interests — for decisions about client representation to be made or influenced
These principles, however, need not preclude the practice of law within a multidisciplinary organization. There are in fact many instances where a lawyer may have a reporting relationship with a non-lawyer, and may even be subject to the non-lawyer's direction for some purposes. But such relationships do not inherently impair the lawyer's ability to practice law. Regardless of the terms of the lawyer's employment relationship, the lawyer remains obligated to, and must, exercise independent professional judgment. What is important is not who makes administrative business decisions about collateral matters, but that professional legal judgment remains under the control of a lawyer.

Far from constituting an impediment to multidisciplinary practice, a requirement that legal practice must be directed by the lawyers makes good business sense. Whether or not required by the ethics rules, it is appropriate for professionals in any discipline to be the ones making the decisions concerning clients' needs in that discipline.

3. Conflict of Interest Rules

State rules of conduct require lawyers to avoid representing clients with conflicting interests. In the modern economy, the conflict of interest rules pose a genuine challenge for lawyers working in traditional law firms. As law firms increase in size and scope, the potential for conflicts of interest - and the potential need to decline a representation because of a conflict — increases. The problems the conflict of interest rules create for large law firms are similar to those that a multidisciplinary professional service firms offering legal services would face.

The state rules of conduct concerning conflicts of interest are outdated in the modern economy and they should be revised to permit greater flexibility. Given the global reach, size and complexity of many business clients today — and the multi-city, multi-country practices of many law firms — it is time for basic notions of what constitutes an apparent conflict of interest to be reexamined. It may no longer be sensible to presume that the representation of Client X by the Tokyo office of a law firm conflicts with the representation of Client Y by the Brussels office of the same firm, merely because some unrelated business unit of X and Y are adversaries in a lawsuit in Madrid.

The accounting profession's rules currently in effect prohibit conflicts of interest, but they also provide exceptions in any case (even when the conflict is direct and adversarial) so long as there is full disclosure and client consent. The market place is the ultimate arbiter. The bar should study the possibility of utilizing these broader waiver rules, assuming appropriate fire walls, particularly in cases involving sophisticated clients (perhaps utilizing standards similar to the SEC standards for determining who is a sophisticated investor), as should the accounting profession.

Even without regulatory changes, the large business law firms have been able to grow and prosper in part because clients have often agreed to waive actual and possible conflicts of interest. (Indeed, the widespread use of waivers by major law firms is one indication that traditional conflicts rules are no longer meeting the needs of clients.) The same approach could easily be employed with respect to lawyers practicing in multidisciplinary partnerships. It should be remembered that the rules of conduct governing lawyers are justified only to the extent that they protect the interests of clients. If clients prefer to waive conflicts rules in order to obtain the services they desire from lawyers in large partnerships - whether they are major law firms or multidisciplinary professional service organizations - they should be free to do so, after full disclosure.

4. Client Confidentiality

The lawyer's duty to maintain client confidences - a long-standing principle inherent in legal practice, and one enshrined in the rules of conduct - also presents a potential issue for multidisciplinary partnerships. One concern that has been expressed is that "non-law" professional
Written Remarks of Irwin Treiger and William Lipton

service firms do not have the same culture of confidentiality as law firms. The concern is that non-lawyers within such a firm could gain access to confidential information in the lawyer's possession, thereby destroying any privilege associated with the information and potentially disclosing the information to others outside the firm. This concern is misplaced. First, there is no question that accountants do understand and adhere to principles of confidentiality. State accountancy laws, in fact, have long made it illegal for an accountant to disclose certain information except in limited circumstances, the Internal Revenue Code provides criminal penalties for improper disclosures of information by return preparers, and just last year Congress created a tax practitioner privilege applicable at accounting firms. In light of the new privilege, accounting firms have worked to create appropriate internal structures, and the accounting profession has developed training materials to ensure that its members understand the nature of the privilege.

The principal concern regarding confidentiality, however, is not that non-lawyers will "spill the beans" through carelessness. Rather, the concern is that, in some cases, non-lawyer professionals may have an obligation to disclose information that a lawyer would be obligated to keep confidential. For instance, an accountant performing an audit for a client may be required to insist that the client disclose certain information because it is material to the client's financial statements, while a lawyer performing work for the same client would be obligated to keep the same information confidential. There are several answers to this concern. First, a lawyer must generally advise her client to disclose information that is material to the client's financial statements in accordance with applicable SEC regulations. In fact, if the lawyer were aware that a required disclosure had not been made by the client, the attorney could not continue to represent the client at least in furtherance of the matter omitted and might even have to withdraw completely from all representations of the client. Accordingly, the confidentiality issues presented by multidisciplinary firms offering both legal and attest services would not be dramatically different from the situation lawyers already face when dealing with disclosure of matters that are material to a client's financial statements.

Second, some clients worried about confidentiality could simply choose not to use the same firm as both attorney and auditor, just as a client may today elect to obtain tax advice from a firm other than the organization that conducts the client's audit. Other clients may see value in obtaining multiple services from a single source, and especially from a firm that starts with the intimate knowledge of the client's business afforded by audit work. The ultimate decision should be the client's, after full disclosure of all of the considerations.

5. Regulating the Practice of Law

Lawyers function as officers of the courts and, as such, have traditionally been regulated by the courts of the jurisdictions in which they practice, usually with the assistance of the bar associations in those jurisdictions. Lawyers have also been regulated by governmental agencies which often impose rules of practice.

We recognize that issues abound relating to the regulation of the conduct of attorneys practicing in MDP firms. To cite just a few examples:

1. Should the rules of conduct be applied at both the firm level and the attorney level, or only at the individual attorney level?

2. Given the multi-state nature of the practice of MDP firms, must attorneys be admitted in all states in which they actually render services or is admission in one state sufficient? The courts of which state should have jurisdiction over such attorneys? Is practicing electronically "virtual" practice which requires admission? It should be noted that these issues are also applicable to multi-state...
traditional law firms. Should the rules governing MDP firms and multi-state traditional law firms be different?

3. Does an attorney working for an MDP firm retain her obligations to the public and to the courts with respect to such matters as the provision of pro bono legal services?

Issues such as those listed do not present insurmountable obstacles, but they do require open-minded and thoughtful consideration.

E. Conclusion

This Commission must address whether the current regulatory structure governing the practice of law continues to be in the public interest. To address these changes and to prepare for the twenty-first century, the bar has essentially three choices:

1. To do nothing, in which event external forces will become the sole determinants.

2. To wage a defensive and seemingly selfish battle.

3. To recognize the tides of change and attempt to help shape things to come by working with, not against, the agents of such change.

The National Conference thinks that the legal profession, like the accounting and other professions, should be responsive both to changes in the business environment and to the composition of the profession and the ways in which lawyers practice. Lawyers' services have expanded beyond traditional litigation and transactional services. Further, although current rules of conduct preclude the provision of legal services through a multidisciplinary structure, such rules are not necessary to ensure proper representation and protection of clients. Such rules may, in fact, harm clients by precluding lawyers from providing the type of services clients want — and harm lawyers by limiting their ability to practice their profession. Above all, an open-minded approach must be taken, eschewing natural and historical biases. The possibilities should be viewed as an opportunity rather than a threat. The organized bar owes it to the profession and the public to address the issues of the future of the delivery of legal services as objectively and realistically as possible. No less would be appropriate in considering an issue which, as ABA President Philip Anderson has suggested, may well be "the most important practice issue that our profession will face in its lifetime."

The National Conference is pleased to offer its assistance to the Commission and to the ABA and AICPA in attempting to address the issues with which the two professions are faced. Indeed, these issues relate to the raison d'être of the National Commission, which, because of its composition, is uniquely suited to the task.

End Notes

1/The definition of "traditional legal services," like the definition of "the practice of law" is unclear. These definitional ambiguities are making it increasingly difficult for professional service providers and regulators to provide guidance about what activities constitute the practice (or unauthorized practice) of law.

2/Although a description of developments abroad is helpful to understand what could happen in this country, it is beyond the scope of this paper. The expansion and growth of accounting firms, including their movement into the provision of legal services abroad, is well-documented elsewhere.


4/Rodgers and Hammerstein, Oklahoma! (1943).

5/Even before the issuance of the National Conference's monograph in 1981, questions were being raised about the propriety of such "statements of principle." See "Lawscape," ABA Journal, February 1980, p. 129.

6/Garrett and Bower, supra note 2, at 1.

7/Statement of Steven A. Bennett, Former General Counsel, Banc One Corporation to the ABA Commission on Multidisciplinary Practice, November 13, 1998.

8/Bennett, supra note 7.

9/See, e.g., Statement of Jan McDavid, Chair-Elect, ABA Section of Antitrust Law to the ABA Commission on Multidisciplinary Practice, November 13, 1998.

10/"[The Bar's] strategies must be pursued from the perspective of client and public interest, rather than self-interest of the profession. Nary a tear will be shed by the business community or the public if law firms are displaced by accounting firms and other service providers. Marketplace acceptance of nontraditional providers suggests that the public currently places little apparent value on the protections afforded individuals rights as a result of representation by trained, professional lawyers and firms of lawyers in the public court systems, as opposed to accountants, consultants or others in ADR." Garrett and Bower, supra note 2, at 11.


12/Supra note 11.

13/For example, ABA Model Rule of Professional Conduct 1.2(a) requires a lawyer to "abide by a client's decision concerning the objectives of representation," and, more specifically, to "abide by a client's decision whether to accept an offer of settlement of a matter." This rule prohibits a lawyer from allowing any organization to control decisions concerning settlement. In addition, ABA Model Rule 1.7 prohibits a lawyer from representing a client if the representation may be "materially limited by the lawyer's responsibilities to...a third person," such as the organization. This rule does allow a lawyer to represent a client despite conflicting interest, but only if the lawyer reasonably believes that the representation will not be adversely affected and the client consents after being fully informed. ABA Model Rule 2.1 requires that a lawyer exercise independent professional judgment in all circumstances, and ABA Model Rule 5.1 requires that firms of lawyers have systems in place to make reasonably sure that lawyers in the firm comply with the rules of conduct.


17/Examples include lawyers that serve as in-house counsel, lawyers that defend claims against insurance companies and even where lawyers must take direction from their non-lawyer clients.

18/See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.9, 1.10 (1997).

19/Supra note 3.
The concept of lawyer-controlled multidisciplinary practices is emerging as the focus of the MDP debate as state and local bar associations across the country investigate the issues raised by lawyers working in firms that employ other professionals.

While the American Bar Association’s Commission on Multidisciplinary Practice was releasing a draft recommendation to permit lawyers to share fees with nonlawyers in lawyer-controlled practices, a few regional MDP task forces have concluded their studies. But reports that favor relaxing the fee-sharing prohibition are likely to face stiff opposition when considered by the governing bodies of the various local bars.

**New Draft**

Last month, the ABA’s MDP Commission released a draft of a recommendation to the ABA House of Delegates for possible vote at the ABA’s July 2000 Annual Meeting.

The draft recommends that the ABA should amend the Model Rules of Professional Conduct to permit lawyers to share fees with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services, provided the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services. The draft recommendation defines nonlawyer professionals as members of recognized professions or other disciplines that are governed by ethical standards.

*The draft recommends that the rules permit lawyers to share fees with nonlawyer professionals provided the lawyers have the control.*

The draft recommendation provides that the change should be implemented in a manner that protects the public and preserves the core values of the legal profession. Regulatory authorities should enforce existing rules and adopt such additional enforcement procedures as are needed to protect the public interest, according to the recommendation.

Finally, the draft recommendation states that it does not alter the prohibition on nonlawyers delivering legal services and the obligations of all lawyers to observe the rules of professional conduct, nor does it authorize passive investment in a multidisciplinary practice.

A lengthy report is being finalized that will provide support for the recommendation and address criticisms and comments directed toward the MDP Commission’s prior recommendation and report, according to MDP Commission Chair Sherwin P. Simmons. That supporting report is unlikely to be completed in final form before April 15th, he said.

Last August the ABA House of Delegates rejected the prior report from the MDP Commission that recommended allowing fee-sharing between lawyers and nonlawyers. The delegates instead voted on a substitute resolution that there would be no change to the rules of professional conduct. The resolution provided that the issues raised by MDPs be subject to further study by all interested parties. (See Tax Notes, Aug. 16, 1999, p. 973.)

**Philadelphia Bar**

Meanwhile, the Philadelphia Bar Association became the first state or local bar association in the nation to ratify pro-multidisciplinary practice legislation, according to a March 24 story in the *Legal Intelligencer* by Jeff Blumenthal, “Philly Bar Approves Lawyer-Owned MDPs.” The bar’s board of governors approved by a 16-8 vote a proposal from an MDP task force that would allow MDPs as long as the entity is at least 51 percent lawyer-owned, the story said.

Other recommendations made by the 23-member MDP task force and approved by the Philadelphia bar’s board of governors would allow lawyer-controlled MDPs to practice without delay. However, other forms of MDPs should only be allowed after additional study and the enactment of appropriate regulations. An MDP should not be allowed to offer legal and audit services to the same client, according to the Philadelphia MDP task force report, and only lawyers in an MDP should be allowed to practice law.

The proposal was opposed by Philadelphia’s probate and trust law section, which had voted 13-1 against it, and by respected legal ethics expert Lawrence Fox, of Drinker Biddle & Reath, according to the *Legal Intelligencer* article.

While it may be the first bar association to formally approve MDPs since the ABA’s House of Delegates instructed local bars to study the issue last August, the Philadelphia action represents just one local bar association. The informal consensus of state bar presidents convening at the ABA’s midyear meeting in Dallas was that their associations were more inclined to enforce
rather than relax existing professional rules. (For prior coverage, see Tax Notes, Feb. 21, 2000, p. 1057.)

The Philadelphia action, however, could signal a changing of the tide.

**Pennsylvania Bar**

Last fall, the Pennsylvania Bar Association issued a preliminary report critical of the MDP Commission’s original fee-sharing recommendation and indicating that it would approach MDP proposals with “cautious skepticism.” The Pennsylvania Bar’s preliminary report also advocated more aggressive enforcement of existing ethical rules.

It would be prudent to require lawyer ownership of at least 75 percent, Wolfman said.

Recently, however, the Pennsylvania bar’s own MDP commission recommended allowing MDPs if they are at least 60 percent lawyer-owned. In a report that chronicles the extensive materials compiled by the ABA commission on MDPs, the Pennsylvania task force concluded that its proposal authorizing lawyer-controlled MDPs contains sufficient safeguards to protect the legal profession’s core values.

The report will be considered by Pennsylvania’s House of Delegates on May 12, and is therefore not the formal position of the Pennsylvania Bar Association.

**Lawyer Control**

Saying that the ABA MDP Commission’s recent draft recommendation was “not yet perfect,” Harvard law professor Bernard Wolfman said it is “an important turn in the right direction.”

And while it is very wise of the Philadelphia Bar to require lawyer control of MDPs, 51 percent lawyer ownership is far too little to assure control, said Wolfman, coauthor of Standards of Tax Practice (fifth edition, Tax Analysts, 1999). It would be prudent to require lawyer ownership of at least 75 percent, Wolfman said.

Any proposal should also make sure that de facto control does not pass to nonlawyers as a result of contractual arrangements made outside of the formal ownership percentage, Wolfman said. It is also very important that loans from other than independent financial institutions and trade creditors be treated as equity. For example, if an accounting firm has a nominal 20 percent ownership interest in a law firm and makes a loan to the firm as well, the loan should be treated as giving the accounting firm an additional equity interest measured by the amount loaned.

Wolfman said he is very hopeful that the ABA will craft something that will give everyone a good degree of confidence that MDPs subject to lawyer control will be the goal, with assurances that independent legal judgment is preserved. Core values should be made the standards for all in the MDP, he said, including confidentiality and avoidance of conflict of interest. “It’s in firm-wide imputation requirements as to the core values that the new recommendations are most in need of modification or clarification.”

The Philadelphia action, while a step forward, is not likely to produce a solution to the MDP issue, observed James Holden, Steptoe and Johnson, co-author of Standards of Tax Practice. Philadelphia is apparently adopting the D.C. rule, he explained, which has existed for some time and has not been adequate to satisfy the objectives of the accounting and finance firms, who wish to offer legal services directly to their clients. “It is not likely to stem the pressure to permit MDPs that are not lawyer-controlled,” Holden concluded.

**Divided Florida**

Through its special MDP committee, the Florida Bar, which takes credit for stopping the ABA vote on the MDP Commission’s recommendations last August, has created two comprehensive position papers representing the arguments opposing MDPs and those in favor of MDPs. Both reports were cited favorably by participants at the various discussions on MDP during the ABA’s midyear meeting in Dallas.

Florida’s Board of Governors has not yet taken a position on its own study commission reports, but will be debating MDP at its next meeting in April.

All bars studying MDP are attempting to prepare their positions before the ABA’s House of Delegates takes up the issue at the annual meeting in July.

**Full Text Citations**

- Draft MDP Commission recommendation. Doc 2000-9168 (2 original pages); 2000 TNT 60-21
- Philadelphia Bar Association report. Doc 2000-9636 (23 original pages)
- Pennsylvania Bar MDP report. Doc 2000-9637 (61 original pages)
- Florida Bar Pro-MDP report. Doc 2000-9327 (52 original pages); 2000 TNT 62-73
- Florida Bar Con-MDP report. Doc 2000-9329 (42 original pages)

TAX NOTES, April 3, 2000
More Bar Groups Weigh In on Multidisciplinary Practice

By Sheryl Stratton

One of the country’s most influential bar groups, the New York State Bar Association, has taken a conservative approach to the issue of multidisciplinary practice. At the same time, the pioneering Colorado Bar has recommended liberalizing professional rules governing lawyers, while the Florida Bar voted to “just say no,” to MDP.

With other regional bar associations weighing in weekly on how and even whether professional standards should address lawyers working in MDPs, this year’s meeting of the policymakers of the American Bar Association scheduled for July promises to again have a spirited but better-informed debate over MDP.

New York

On April 28 the executive committee of the New York State Bar Association endorsed a special committee’s report that has been described as recommending that lawyers be permitted to share costs, but not fees, with nonlawyers. On its release, the 400-page report was characterized in a May 3 Wall Street Journal article as a step toward MDPs. But a May 4 New York Law Journal report described it as a sound rejection of MDPs.

The NYSBA report ultimately reaffirms that lawyers should not be allowed to share fees with nonlawyers or engage in a practice in which nonlawyers have any degree of ownership or control over the practice of law.

While the NYSBA special committee report recommends allowing lawyers to provide ancillary nonlegal services and to provide services to clients in cooperation with nonlegal firms, it ultimately reaffirms that lawyers should not be allowed to share fees with nonlawyers or engage in a practice in which nonlawyers have any degree of ownership or control over the practice of law.

Characterizing evidence that a demand exists for integration of legal services with other professions as “equivocal at best,” the report says the demand can be satisfied by permitting lawyers to enter into strategic alliances and other contractual relationships with nonlegal professional service providers, as well as by permitting lawyers to own and operate nonlegal businesses.

In both cases additional regulation would be needed to ensure that lawyers remain completely in control of the rendering of legal services, according to the report. “The only substantive difference between this approach and that favored by those who would permit multidisciplinary partnerships is that this approach does not permit nonlawyers and lawyers to call each other ‘partner.’”

The report also calls for vigorous enforcement of the prohibition against the unauthorized practice of law and for a clear definition of the practice of law. The study was led by Robert MacCrate of New York, a former president of the American Bar Association, who chaired the 14-member Special Committee on the Law Governing Firm Structure and Operation.

While the report has been filed with the ABA in anticipation of action by its House of Delegates at its annual meeting in New York City in July, the NYSBA’s policymaking body will debate and vote on the report on June 24, 2000. (The full text of the report can be downloaded from the NYSBA’s Web site at http://www.nysba.org/media/newsreleases/2000/mdp.html.)

Although the views expressed in the NYSBA report are not “fully congruent” with those of Bernard Wolfman, coauthor of Standards of Tax Practice (fifth edition, Tax Analysts 1999), Wolfman said the special committee did an “excellent job.” The report shows that the committee was open-minded, factually searching, willing to be affected by the evidence it found, and thorough, said the Harvard law professor. “Its dedication to the values of the legal profession and the legal system, and its concern for the broader society, were front and center. The committee’s method and its product provide an example of the organized Bar at its best.”

Colorado

Meanwhile, a joint task force of the Colorado and Denver Bar Associations released its report concluding that professional rules should be amended to accommodate lawyers working in MDPs.

The Colorado report would require lawyers practicing in MDPs to have the control and authority necessary to ensure lawyer independence in the rendering of legal services. The task force said its recommendations should be implemented in a way that would protect the public and preserve the core values of the legal profession.

The report recommends requiring lawyers practicing in an MDP to enter into a written agreement in which the nonlawyer members...
agree to respect the independent professional judgment of the lawyers in the delivery of legal services and the lawyers’ ethical obligations. Lawyers could only enter into MDP arrangements with individuals in occupations that are subject to published ethical standards and who are subject to regulatory oversight and an enforcement mechanism.

A majority of the task force said it believes protection against conflicts of interest may not require that every client of the MDP must be deemed a client of the lawyers in the MDP for purposes of evaluating conflicts of interest. But since the issue is so complex and sensitive, the task force proposes to study it further. (For the full text of the report, see http://www.cobar.org/mdp/reporttoc.htm.)

And Others

Last month the Florida Bar’s Board of Governors took a strong position against changing bar rules to allow lawyers to participate in MDPs. By a 44-1 vote, the board held that lawyers may not engage in activities that diminish the core values of the legal profession. The board affirmed the bar’s position against lawyers practicing in settings where other services besides legal would be provided, where fees would be shared with non-lawyers, and where the firm is partially or wholly owned by nonlawyers.

The Florida Bar’s board approved in concept a draft resolution to provide guidance to Florida lawyers and to the bar’s delegates to the ABA. The bar president appointed a special committee to study how the Florida Bar should continue to vigorously enforce rules regarding the unlicensed practice of law, as well as rules governing lawyer conduct.

Earlier this spring the Philadelphia Bar Association became the first state or local bar association in the nation to ratify pro-multidisciplinary practice legislation. It recommended allowing lawyers to share fees with nonlawyers, as long as the entity is at least 51 percent lawyer-owned. About the same time, the Pennsylvania bar’s own MDP commission recommended allowing MDPs if they are at least 60 percent lawyer-owned.

In March the ABA’s MDP Commission released a draft of a recommendation that would permit lawyers to share fees with nonlawyers in lawyer-controlled practices. (For prior coverage, see Tax Notes, Apr. 3, 2000, p. 21.)

Forty bars are said to be studying MDP and are presumably attempting to prepare their positions before the ABA’s House of Delegates convenes in New York City on July 10.

**ERNST & YOUNG ACQUIRES TOP LOBBYING FIRM**

Ernst & Young announced May 8 that it is acquiring the lobbying law firm of Washington Counsel PC.

Unlike E&Y’s other recent creation, McKee Nelson Ernst & Young, the lobbying group will operate as a separate division of E&Y’s national tax department and will not practice law. And unlike the lawyers at McKee Nelson, Washington Counsel attorneys will not have to stop representing clients that are also E&Y’s audit clients.

While set up as a law firm, the four-year-old Washington Counsel conducted no significant practice of law, according to one of its principals, Mark Weinberger. Not all of its 11 principals and 3 associates are lawyers, he said. The whole group, which includes Nicholas Giordano, Robert Leonard, Jayne Fitzgerald, LaBrenda Garrett Nelson, Gary Gasper, and Robert Rozen, will be known as “Washington Council Ernst & Young.”

The change from “counsel” to “council” is merely a matter of being overly cautious, according to Weinberger, “to prevent confusion.”

The move will upset PricewaterhouseCoopers’s status as the only accounting firm in the top 10 lobbying groups in Washington. Once 51st on the Legal Times’s list for lobbying revenues in 1997, PwC jumped to number 13 in 1998 after it hired former Joint Committee on Taxation Chief of Staff Kenneth J. Kies. A recent survey by the National Journal placed PwC sixth and Washington Counsel ninth for lobbying firm billings.

But Weinberger says it is not a matter of going “head to head” with other Big Five accounting firms. “What we do is beyond the market of what an accounting firm can do,” he said. Washington Council is not limited to advocacy on tax issues, he pointed out. The new entity will also provide advocacy on e-commerce, health care, pension benefits, financial services, and energy issues, according to the E&Y press release.

The acquisition is a “good fit” for both sides, said Jeffrey Trinca of Van Scoyoc Associates Inc., now the last independent group among the top 10 lobbying firms. “Ernst & Young needed a little broader coverage,” according to Trinca. Combining the new group with such E&Y lobbyists as Phillip Moseley, Donna Steele Flynn, and Patrick Heck will put E&Y in the top five or six lobbying firms in Washington, he said.

— Sheryl Stratton
RESOLVED, that the American Bar Association amend the Model Rules of Professional Conduct consistent with the following principles:

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. "Nonlawyer professionals" means members of recognized professions or other disciplines that are governed by ethical standards.

2. This Recommendation must be implemented in a manner that protects the public and preserves the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and pro bono publico obligations.

3. Regulatory authorities should enforce existing rules and adopt such additional enforcement procedures as are needed to implement these principles and to protect the public interest.

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

5. Passive investment in a Multidisciplinary Practice should not be permitted.
Commission also recognizes, however, that many of the state and local bars that are studying these same issues will not have completed their review prior to the 2000 Annual Meeting. The Commission therefore urges the House to consider postponing any action on MDP-related issues until the 2001 Midyear Meeting.

Control and Authority

The legal profession has long acknowledged that lawyers may work in practice settings in which nonlawyers have supervisory authority and in which lawyers do not have an ownership interest. Prominent examples include government law offices, legal aid organizations, prepaid legal services plans, and in-house legal departments. Central to the ethical provision of legal services in these settings has been lawyers' ability to exercise independent judgment on their clients' behalf. The Model Rules of Professional Conduct insist on lawyer independence. They do not, however, dictate any particular organizational structure.

1) The Effect of the "Control and Authority" Principle on the Structure of an MDP

The "control and authority" mandated in the Commission's Recommendation can be satisfied in a variety of ways, depending on the practice setting. Percentage of ownership may be a factor in certain circumstances. Some members of the Commission would have added a specific requirement in the Recommendation that there be a lawyer majority ownership of an MDP or that decisions relating to the provision of legal services to the MDP's clients lie exclusively in the lawyer's province. Neither the percentage of ownership interest nor any particular wording in the partnership or shareholder agreement will conclusively determine either control or authority. The control and authority principle looks to substance not form.

Under the Commission's Recommendation, in a small-size MDP, such as one established by a lawyer, social worker, and certified financial planner to provide professional services to elderly clients and their families, the lawyer member might or might not hold a majority ownership interest. The partnership or shareholder agreement might specifically affirm that decisions relating to the provision of legal services to the MDP's clients lie exclusively in the lawyer's province. Neither the percentage of ownership interest nor any particular wording in the partnership or shareholder agreement will conclusively determine either control or authority. The control and authority principle looks to substance not form.

Lawyers in small firms have for many years functioned as dual professionals, offering legal and nonlegal services to their clients. They have had to observe various organizational safeguards designed to ensure that their legal and nonlegal services were separately conducted and that the clients who purchased these services understood the different roles. These organizational safeguards evolved over time on a state-by-state basis. The Commission does not believe that it should attempt to dictate the nature or mode of delivery of legal services by an MDP or interfere with the states' ability to identify and enforce the particular structures that they determine are necessary to protect the interests of clients.

In a large-size MDP, such as one including several hundred professionals in different disciplines, formal structures are certain to be needed. At a minimum, they should include: (1) structuring the MDP so that the lawyers who are delivering legal services to the MDP's clients are organized and supervised separately from the MDP's other units (e.g., business, technology, or environmental consulting services); and (2) establishing a chain-of-command in which these lawyers report to a lawyer-supervisor whose responsibilities include hiring and firing, fixing the lawyers' compensation and terms of service, making decisions with respect to professional issues such as staffing of legal matters and the allocation of lawyer and paraprofessional resources, and advising on issues of professional responsibility. In a large-size MDP practice setting, the structures could be modeled on ones developed by general counsels' offices for the purpose of fostering lawyer independence. These types of structural arrangements should contribute to fostering a culture of professionalism and help to preserve lawyer independence within large MDP organizations, just as they have in large in-house legal departments and law offices in government agencies. The articulation of the precise contours of the structural arrangements is best left to the individual states for adoption in light of particular local circumstances.

2) The Effect of the "Control and Authority" Principle on Referral Arrangements between Law Firms and Other Entities

Law firms and professional services firms, both large and small, have for generations referred clients to one another and these referral arrangements have benefitted both individual clients and the public. These relationships have facilitated the coordinated delivery of legal services without jeopardizing the lawyers' independence and without putting at risk other core values of the profession. Such relationships, provided that they are not masking a fee sharing or partnership arrangement with

respect to the control and management of the law firm, do not appear to violate the Model Rules. To some degree, such a relationship between a law firm and a professional services firm may be analogized to the relationship that exists among independent lawyers in a shared office suite who are not partners but refer clients to one another, use common facilities, and contribute to the costs and expenses of the suite. Such exchanges do not necessarily transform the lawyer members of the suite into partners.

Although lawyers and nonlawyers have traditionally worked together, they have always billed separately, not adopted exclusive referral policies, kept their personnel distinct and otherwise complied with their individual professional standards. Variations of these familiar arrangements are developing, which could, the Commission fears, pose risks to the public, and compromise the lawyers' independence of professional judgment and, among other values, jeopardize the lawyers' obligations of confidentiality, the avoidance of conflicts, and the like.

A preferential referral arrangement between a lawyer and a nonlawyer professional should not by itself result in any ethical or professional rule violation by the lawyer. However, the Commission recognizes that what may appear ethically acceptable in form may be otherwise in substance. The Commission believes that the prohibition against the sharing of fees covers not only the actual division of fees but also includes indirect sharing of fees by certain sharing of economic benefits (other than normal compensation and related employee benefits) with nonlawyers through the practice of law.

Some new forms of referral arrangements appear to lack the traditional characteristics of separation. Indeed, they suggest the creation of a virtual MDP with the potential to undermine the principle that lawyers must have the control and authority necessary to assure the conditions that allow them to exercise independence in the rendering of legal services. If the arrangement's practical effect is to create a joint enterprise in which nonlawyers are sharing in legal fees or otherwise benefiting financially from the practice of law (other than through normal compensation and related employee benefits) and in which the nonlawyers may be able to exert ownership-like control over the lawyers, the arrangement would violate the existing Model Rule 5.4 and the Commission's proposal. Even if there is no formal fee sharing, the relationship may so entwine the firms that they become a virtual single entity. Evidence of such interdependence might include, for example, the holding-out to clients and prospective clients that services are provided by a single enterprise or an association of linked enterprises; brand naming; providing concessions or other economic benefits to each other's clients or to affiliates, including foreign affiliated law firms; providing below market cost financing or other support; and guaranteeing or promising a minimum level of referral business with or without related guarantees of minimum compensation levels.

Where such interdependence exists, the law firm and the professional services firm should be treated as a single entity. Under the current rules, the lawyers might be subject to discipline for violation of Rule 5.4, among others. Under rules promulgated pursuant to the Commission's Recommendation, the lawyers would be subject to discipline if they did not have the control and authority necessary to assure lawyer independence of professional judgment. The lawyers also would be subject to discipline if they did not comply with their jurisdiction's rule on imputation of conflicts. The lawyers should treat the clients of both firms as if they were the clients of a single law firm. In order to help determine whether compliance is taking place, the states may want to require that arrangements between lawyers and nonlawyers be wholly transparent, that documents relating to the arrangements be filed with the appropriate regulatory authorities of any and all affected jurisdictions, and that these records be open to public inspection.

The mere fact that a law firm and a professional services firm frequently work together in teams to provide coordinated legal and nonlegal services to clients should not, by itself, be evidence of the establishment of a virtual MDP. That fact, without more substantial evidence of interdependence, should not, therefore, require that the law firm be disqualified under a theory of imputation from representing any clients adverse to the clients of the professional services firm.

3) Incentives for Compliance with the "Control and Authority" Principle

The Commission notes that there would be powerful incentives for MDPs to establish organizational structures to enable the lawyer members to adhere to the control and authority principle mandated in the Recommendation. In addition to subjecting the lawyers in the MDP to possible disciplinary sanctions, failure to establish these structures might, for example, ultimately lead to the imposition of civil liability if the lawyers failed to exercise independent judgment on a client's behalf, undertook a representation in violation of their obligation to provide conflict-free representation, failed to take reasonable and effective measures to assure confidentiality of client information, endangered the protection of the attorney-client privilege or committed any of a number of other possible violations of the rules of professional conduct or standards of practice. Moreover, the fact that a lawyer is not part of a separately organized unit supervised by another lawyer could be sufficient evidence under certain circumstances of a lack of compliance with the control and authority requirement, thereby creating a situation in which the lawyer is subject to discipline for aiding in the unauthorized practice of law by an entity that is not qualified to deliver legal services under the rule. An entity holding itself out as authorized to deliver legal services that fails
to conform to the control and authority principle, additionally risks being subject to civil liability for false advertising and unfair competition. 

As discussed more fully in the Appendix, the states' promulgation of rules embodying the Commission's Recommendation will considerably assist in clarifying the status of the 5,000 or more lawyers who currently work in professional services firms. This clarification is especially needed because of the increasing number of lawyers who are being hired by such firms.

The Meaning of "Professional Services"

The Commission has weighed carefully the merits of whether, as some have suggested, there should be any limitation on the vocation of the nonlawyer members of an MDP. It has concluded that the interests of the public would best be protected by defining "professional services" to mean "services rendered by a member of a recognized profession or other discipline that is governed by ethical standards." The Commission believes that identifying the included professions and disciplines should be left to the states' determination. However, it does suggest that, in a comment to the amended Model Rule 5.4, the definition be supplemented with a list of included professions similar to the lists and descriptions presently found in the comments to ABA Model Rule 5.7 and Rule 5.4 of the District of Columbia's Rules of Professional Conduct. The suggested list might include, for example, accountants, certified financial planners, engineers, psychologists, psychiatric social workers, and real estate brokers.

Competence

It is undeniable that competence is a core value of the legal profession and the Commission's original recommendation should have so identified it. The Commission is convinced that allowing lawyers and nonlawyers to join in a single entity that delivers both legal and nonlegal services will have no detrimental effect upon lawyer competence. Moreover, the Commission repeatedly heard testimony that the nature of the problems faced by individuals and organizations has become increasingly complex, requiring multidisciplinary assistance and not solely legal advice. The boundaries between the law and other disciplines are blurring. Providing clients with the option of obtaining the assistance they need from a single entity promotes the development of more efficient delivery mechanisms and contributes to lawyer competence by expanding the lawyer's integrated knowledge base.

Protection of Confidential Client Information

The Commission's recommendation to permit lawyers to practice in MDPs continues to emphasize the importance of the protection of confidential client information.

1) The Attest Function

Some commentators believe that the Commission's August 1999 Recommendation failed to state with sufficient clarity that the functions of providing legal and audit services to the same client are incompatible. The Commission explicitly recognizes their incompatibility. It does not believe that a single entity should be allowed to provide legal and audit services to the same client.

2) The Lawyer's Duty to Protect Confidential Client Information

The Commission acknowledges that, in addition to auditors, other nonlawyer professionals may also be subject to different rules governing the disclosure of client information to a third party (e.g., the disclosure obligations of mental health professionals in cases of suspected child abuse). Thus, there may be other situations in which an MDP should not be permitted to provide both legal services and some other form of services to the same client. Just as a lawyer who works jointly on a client matter with a professional services firm must now do, a lawyer in an MDP would have to make reasonable efforts to ensure that a client to whom legal services are being rendered sufficiently understands that the lawyer and the nonlawyer professional in the MDP may have different obligations with respect to the disclosure of client information and that the courts may treat the client's communications to the lawyer and nonlawyer differently. Furthermore, the Commission's Recommendation does not relieve a lawyer in an MDP from the obligation to ensure that the MDP implements safeguards to assure that a nonlawyer who assists a lawyer in the delivery of legal services will act in a manner consistent with the lawyer's professional obligations.

A lawyer in an MDP would also have to take measures to protect against a potential impairment of the attorney-client
privilege arising from the possibility that a client of the MDP would not be properly informed as to the separate functions performed by the MDP or that the members or employees of the MDP would not treat legal matters in a manner appropriate to the preservation of the privilege. Furthermore, the lawyer would bear the affirmative responsibility to assure (1) that the communications the lawyer and client intend to be protected by the attorney-client privilege satisfy the jurisdiction's applicable requirements, and (2) that the client understands that all other communications are not privileged. Finally, the lawyer would have to take measures to ensure that confidential information obtained from a client in the course of legal representation is not accessible, absent client consent, to members of the MDP not engaged in such representation.

3) Suggested Commentary for Amended Model Rule 5.4

To address concerns related to the protection of confidential client information, the Commission suggests that language be included in the Comment to the amended Model Rule 5.4 emphasizing the need for a lawyer in an MDP to take measures to clarify the lawyer's position within the MDP, the lawyer's relationship with the MDP's clients, and the obligation of the MDP to protect client and public interests. The measures should include informing clients concerning the lawyer's function as a provider of legal services and the likelihood that the client's communications with nonlawyers in the MDP that are unrelated to the provision of legal services would not be protected by the attorney-client privilege.

Loyalty to the Client through Avoidance of Conflicts of Interest

The Commission is convinced that amending Rule 5.4 to permit lawyers and nonlawyers to share fees and join with nonlawyer professionals will not threaten the core value of loyalty to clients through the avoidance of conflicts of interest. As part of the control and authority principle discussed above, the lawyers in an MDP, not the nonlawyer professionals, will determine the application of the conflicts of interest rules to the clients of the MDP seeking legal services. The Commission recognizes the divergence of opinion that exists among jurisdictions as to imputation of conflicts and the efficacy of screening. However, the Commission does not recommend any change to the existing rules on imputation, but defers to the Standing Committee on Ethics and Professional Responsibility and the Commission on the Evaluation of the Rules of Professional Conduct to make any such recommendation, which would affect not only MDPs, but also traditional law firms. If the delivery of legal services is involved, each client of an MDP is normally to be considered the client of each lawyer in the MDP, just as each client of a law firm is normally considered to be the client of each lawyer in the law firm.

Pro Bono Publico Obligations

The Commission acknowledges the unique role of the lawyer in society as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the administration of justice. Lawyers in law firms are expected to meet their professional obligations by providing a substantial majority of their pro bono publico legal services to persons of limited means or to charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the legal needs of persons of limited means. Lawyers in an MDP should fulfill that responsibility in the same way. Though recognizing that pro bono service is not mandatory, the Commission nevertheless believes it is a core value of the legal profession.

Passive or Equity Investment

The Recommendation does not propose any change in the existing prohibitions against third parties holding equity investments in an entity or organization providing legal services. Ownership would be limited to the members of the MDP performing professional services. The Recommendation would not permit an individual or entity to acquire all or any part of the ownership of an MDP for investment or other purposes.

The Commission acknowledges the complexity of the issues surrounding the ban on passive investment. In the view of some observers, equity investment poses a particular threat to lawyer independence of professional judgment. Other observers, however, worry that the ban on passive investment may have an unintended effect on law firms. They posit that if any form of MDP practice is ultimately authorized the ban will put traditional law firms at an economic disadvantage because, as a practical matter, bank financing is their primary source of capital. In contrast, professional services firms and consolidators will be able to draw upon their substantial earnings to finance and even subsidize the operation of their legal services unit. They will also be able to raise capital by going public and/or seeking passive investors.

Those observers who urged the Commission to recommend relaxing the ban point to the movement in New South Wales to allow public ownership of law firms and argue that an ownership interest can be structured in such a way as to insure that all decisions relating to the representation of clients remain under the control and authority of the firm's lawyers. In the end,
the Commission chose not to recommend any change.

Regulation

In the August 1999 Recommendation, the Commission proposed that the conduct of MDPs with respect to the delivery of legal services and that of the MDPs' lawyers who deliver legal services to the MDPs' clients be subject to audit and certification procedures designed to protect lawyers' independence of professional judgment. The Commission received a number of comments to the effect that the audit and certification procedures were unworkable. Accordingly, it decided not to include them in the current Recommendation. It does suggest, however, that a jurisdiction considering amending its rules of professional conduct to permit lawyers and nonlawyers to share fees and enter into a partnership may want to weigh carefully the advantages and disadvantages of audit and regulatory procedures such as those the Commission previously proposed or as others may formulate.

The Commission's current Recommendation continues the historic tradition of directly regulating only individual lawyers. No jurisdictions other than New York15 and New Jersey16 have rules regarding the exercise of disciplinary authority over law firms, companies with in-house legal departments, organizations employing lawyers to deliver prepaid legal services to the organizations' members, or government agencies employing lawyers. With the exception of law firms, each of these entities employs lawyers who are supervised by nonlawyers and who do not have an ownership interest in the organization. The key to the courts' "oversight" of these entities is that the courts can, and do, discipline the lawyers the entities employ if the lawyers act contrary to the rules of professional conduct. It would be no different for the lawyers employed in an MDP. Furthermore, as noted above, the prospect of civil liability is likely to be a powerful incentive for regulatory compliance.17

The August 1999 House Resolution

In August 1999, the ABA House of Delegates adopted the following resolution:

RESOLVED. That the 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.

In response to the Resolution, the Commission endeavored to obtain expert assistance regarding the nature, organization, and implementation of such a study. The responses it received expressed significant reservations about the study's feasibility. The Commission consulted with The Institute for Social Research (ISR) at the University of Michigan, the nation's longest-standing laboratory for interdisciplinary research in the social sciences. The ISR advised the Commission that "public interest", "independence", "loyalty", or "conflict of interest" were, as a practical matter, incapable of definition in a manner that was independent of perception. It suggested, but was not certain, that it might be possible to frame an inquiry to determine client perceptions about how business and ethical considerations currently affect the resolution of conflicts of interest in law firms and how those considerations would likely affect the conflicts' resolution if lawyers were permitted to deliver legal services in a multidisciplinary practice setting. The value of such an inquiry into "client perceptions" is not at all clear. Furthermore, the Commission's current Recommendation requires that the lawyers in an MDP must have the control and authority necessary to assure lawyer independence in the rendering of legal services. Accordingly, the weighing of such considerations in an MDP, would, by definition, be the same as in a law firm.

In response to the House of Delegate's August 1999 Resolution, the Commission also sought the assistance of the American Bar Foundation (ABF). The ABF asked two top economists about the "utility of conducting market research about the demand" and was advised that "questions about services in the abstract would not be effective in telling what people might actually do," and "that there is only one way to find out if there is a demand, and that is to see if there turns out to be a market."18 Thus, making the services available would not only determine demand, but also, the public's perception, as evidenced by that demand, of the maintenance of independence and loyalty. The Commission believes that the testimony it heard and the written comments it received demonstrate some public support for allowing MDPs, which would translate into demand if the services were available.

Conclusion

The forces of change are bearing down on society and the legal profession with an unprecedented intensity. They include:


10/17/00
continued client interest in more efficient and less costly legal services; client dissatisfaction with the delays and outcomes in the legal system as they affect both dispute resolution and transactions; advances in technology and telecommunications; globalization; new competition through services such as computerized self-help legal software, legal advice sites on the Internet, and the wide-reaching, stepped-up activities of banks, investment companies, and financial planners providing products that embody a significant amount of legal engineering; and the strategy of Big Five professional services firms and their smaller-size counterparts that has resulted in thousands of lawyers providing services to the public while denying their accountability to the lawyer regulatory system.20

The Commission believes that the legal profession must take a proactive role in regard to these events in order to best serve the public interest and maintain its crucial role in the maintenance of a democratic society. Amending the Model Rules in accordance with the Commission's Recommendation is the most progressive, preservative, and practical way to accomplish these goals. The Recommendation recognizes the realities of a changing marketplace, opens up new avenues of service to clients, responds to the suggestions of consumer advocates, and provides new opportunities for lawyers.

For all these reasons, the Commission urges the House of Delegates to adopt its Recommendation that the Model Rules be amended to permit lawyers to share fees and join with nonlawyers in a Multidisciplinary Practice provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services.

Respectfully submitted.

Sherwin P. Simmons
Chair, Commission on Multidisciplinary Practice
July 2000

FOOTNOTES

1 The Model Rules do not define the practice of law. In Appendix A of its July 1999 Report, the Commission provided a model of a possible definition of the practice of law, based upon District of Columbia Rule 49. The Commission has received numerous comments that the definition raised more issues than it solved. In light of these comments and the tradition of the states creating their own definitions of the practice of law, the Commission has decided not to present further suggestions in this area. However, the Commission's Recommendation reaffirms the prohibition on nonlawyers delivering legal services.

2 See infra Appendix, note 1.

"Professional services" as employed in this Report is a defined term. See infra at 8-9. For ease of reference, "nonlawyer professional" is used generically to describe the type of nonlawyer with whom a lawyer may form an MDP.

4 In each of these practice settings, the lawyer's client is the organization not the organization's constituents. See Model Rules of Professional Conduct R.1.13 (Organization as Client). As a practical matter, except in the rare instances of wrongdoing that is a violation of law, it is the non-lawyer who directs the lawyer's conduct. See id. cmt.1. Some have argued that in-house counsel are not a good example. Although in-house counsel has a single client, the corporation, counsel usually takes direction from individual members of management whose interests may not always be identical with those of the client corporation. Independence issues do arise. Rule 1.13 helps counsel address some of those issues.


6 Cf. Stevens v. Superior Court, 75 Cal.App.4th 594, 89 Cal.Rptr.2d 370 (1999) (the sale of insurance by an unlicensed broker violates the California Unfair Competition Act); Aponte v. Raychuk, 160 App.Div.2d 636, 559 N.Y.S2d 255 (1st Dep't 1990) (lawyer advertising subject to regulation by local consumer protection agency); Law Offices of Andrew F. Capoccia LLC v. Spitzer, 704 N.Y.S2d 356 (3d Dep't 2000) (declining to issue a writ of prohibition to stop the state attorney general from seeking an injunction to enjoin certain activities of a lawyer based on alleged fraudulent, deceptive, and illegal business practices in relation to the provision of debt reduction services to financially distressed individuals).
7 See e.g., testimony of Steven Bennett (Nov. 13, 1998); testimony of James Jones (Feb. 6, 1999); testimony of Theodore Debro (Feb. 12, 2000); testimony of George Abbott (Feb. 12, 2000).


9 If a jurisdiction considers it appropriate to continue the ban while permitting lawyers to practice in an MDP, it might consider adding language in the commentary to the jurisdiction’s amended rules of professional conduct similar to the language found in the commentary to Rule 5.4 of the District of Columbia Rules of Professional Conduct:

Paragraph (b) [authorizing lawyers to practice in an MDP] does not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes. It thus does not permit a corporation, an investment banking firm, investor, or any other person or entity to entitle itself to all or any portion of the income or profits of a law firm or other similar organization. Since such an investor would not be an individual performing professional services within the law firm or other organization, the requirements of paragraph (b) would not be met.

District of Columbia Rules of Professional Conduct Rule 5.4 cmt. 8.

10 See Appendix, infra at note 56.


12 The Conference of Chief Justices has appointed a committee to study MDPs. The committee has advised the Commission that it is not currently prepared to comment on the Commission’s August 1999 Recommendation. Furthermore, if the committee chooses to issue any statement or report concerning MDPs, it will not do so until after the ABA’s 2000 Annual Meeting.

13 The Commission respectfully takes issue with those critics who dismissed the procedures as “paperwork.” The audit and certification procedures have a valuable educational function. Moreover, the lawyers in MDPs and the MDPs’ chief executive officer and board of directors are most likely to appreciate the seriousness of any written undertakings that they must execute. Both the lawyers and nonlawyers are not likely to disregard a statement that they are signing under penalty of perjury and submitting to the highest court of the state. Furthermore, they will be cognizant that these sworn-to statements might be used against the MDP in any action for malpractice or breach of fiduciary duty in which the lawyers’ exercise of independent professional judgment is questioned.

14 By focusing on the audit and certification procedures contained in its prior Recommendation, the Commission does not mean to suggest that other regulatory mechanisms might not also serve the same purpose successfully. Other mechanisms are used to oversee the practice of foreign legal consultants, legal aid organizations, and prepaid legal plans. See e.g., Cal. Standards for Lawyer Referral Services, Rules 15-16 (1999); Rules of the Court of Appeals for the Licensing of Legal Consultants, 22 N.Y.C.R.R. § 521.8 (1999); Rules of the Supreme Court, Appellate Division, First Department, 22 N.Y.C.R.R. § 603.15 (1999).

15 See New York Lawyer’s Code of Professional Responsibility DR 1-102(A), 22 NYCRR § 1200.3(A) (“A lawyer or law firm shall not”); DR 5-105(E), 22 NYCRR § 1200.24 (E) (AA law firm shall keep records . . . and shall have a policy).

16 See New Jersey Rules of Disciplinary Jurisdiction, Rule 1:20-1(a) (“Every attorney and business entity authorized to practice law . . . shall be subject to the disciplinary jurisdiction of the Supreme Court . . . .”).

17See supra note 6 and accompanying text.

18The ABF's response also made the telling historical observation that there was a lack of demand for business litigation (except defense work and the collection of debts) and business consulting until these services became available, at which time a dramatic increase in demand occurred. Letter to Arthur Garwin dated March 28, 2000 from Bryant G. Garth, Director, American Bar Foundation. Additionally, the ISR suggested that a survey regarding demand might be possible, if proponents and opponents were able to agree on the statements that should be presented to those surveyed. The ISR estimated the cost at $250,000.

19These forces are impacting law firms' organization, capitalization, and delivery of legal services as well. Many law firms are growing larger, and their organization is becoming more business-like. To fund their expansion, they need greater access to capital. Clients are increasingly looking to law firms for integrated legal and non-legal advice.

20The Appendix describes the changes in the market for legal services, both in the United States and abroad, that have influenced the Commission's thinking.

Appendix

The Challenges Facing the Legal Profession in the 21st Century

Introduction

The witnesses the Commission heard, the documents it reviewed, and the dialogue it has held with state and local bar associations have convinced the Commission that the legal profession currently faces unique and powerful challenges to the efficient, cost-effective delivery of legal services to individual and business clients. Since its appointment in August 1998, the Commission has heard the testimony of over 95 witnesses, received 120 written comments from interested parties and groups, held 9 days of open hearings, and met 10 times in executive sessions. It has received input from bar regulators, both domestic and foreign, and from business and individual clients and groups that represent their respective client views. It has been in contact with the approximately forty-one state and local bar associations that are studying issues relating to MDPs. All aspects of the Commission's process have been open and transparent, and it has made full use of the Internet to encourage exchanges of information and communications among interested observers.1

The Commission has weighed carefully all of the evidence it has gathered and concluded that "changes [to the Model Rules of Professional Conduct to permit MDPs] will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients."

A. Client Interest in MDPs

The Commission is firmly convinced that there is substantial evidence of client interest in expanding the universe of legal service providers to include MDPs. It believes that the testimony it heard and the written comments it received demonstrate empirical support for its Recommendation. Of particular significance to the Commission were the views of the Councils of the ABA Section of Real Property, Probate and Trust Law and the ABA Section of Taxation and the Task Force of the Council of the ABA General Practice, Solo and Small Firm Section, noting the need for multidisciplinary counseling of individual and business clients and the inefficiencies in attempting to satisfy that need through the coordinated advice of professionals in nonaffiliated firms.2 The ABA Standing Committee on Specialization has also urged the Commission to "recommend ethics rules that preserve the fundamental ethical standards and duties without restricting the organizational form or setting in which lawyers practice."3 The ABA Standing Committee on Lawyers' Professional Liability has told the Commission, "MDPs will exist, and in our view the only issue remains, according to whose rules. "4

The ethics counsel of the Arizona State Bar told the Commission that she has received a substantial number of inquiries from lawyers in Arizona expressing an interest in forming a partnership with a nonlawyer.5 An informal survey of the opinions of state bar association ethics committees issued over the course of the past ten years indicates that the overwhelming majority of the inquiries on this subject appear to have been submitted by lawyers in solo or small firms.6 A survey by the Law Society of Upper Canada of its members in connection with the Law Society's review of issues relating to multidisciplinary
practice also revealed a significant interest on the part of lawyers in solo and small law firms in the possibility of entering into partnerships with nonlawyers. 7

1) The Views of Consumer Groups

The Commission believes that allowing MDPs subject to the safeguards proposed will facilitate efficient and comprehensive solutions to the multidisciplinary problems that many individual clients encounter. For example, noting the unmet legal needs of the poor and moderate income persons. Theodore Debro, President of Consumers for Affordable and Reliable Services of Alabama and affiliated with the Jefferson County Committee for Economic Opportunity, Birmingham Alabama, 8 argued persuasively that MDPs have an enormous potential for bringing together professionals in different disciplines to help solve these persons' complex socio-legal problems. He also noted the public's perception that the legal profession was "remote and out of touch with the needs and concerns of everyday people." He offered the prospect that the delivery of legal services by MDPs would allow lawyers to "regain the trust and business, of a segment of the population that has increasingly seen them as being more of a problem than a solution." 9

The Executive Director of the Consumers Alliance of the Southeast pointed out the benefits flowing from obtaining legal, financial, and other services from a single provider. 10 The representative of the American Association of Retired Persons agreed. 11 The Vice President of the Electric Consumers Alliance, noted that "many problems have only a legal component, and that other professionals may be needed to bring their expertise to bear on the other components of a particular problem." 12 and also remarked that more clients might actually use the services of a lawyer if that lawyer were practicing in a multidisciplinary professional services firm. Such services would be more user-friendly. 13 The President of Consumers First cited several examples of how an integrated professional services firm could best meet the needs of individuals and small businesses for multidisciplinary advice. 14 Consumer advocates and lawyers pointed out the particular need for such services in the area of family and juvenile law. 15

The Commission also received comments from other consumer groups urging changes in the Model Rules to facilitate the delivery of legal services by MDPs. 16 Finally, representatives of consumer groups indicated that many middle-income individuals with legal needs do not consult lawyers due to unfamiliarity, discontent or even fear. In the view of these witnesses, a large number of these individuals would have easier access to legal services provided by a lawyer in an MDP that was already providing them with other services. 17

2) The Views of Corporate Counsel

The American Corporate Counsel Association has adopted a resolution urging that the ethical barriers to the establishment of multidisciplinary partnerships be dismantled. 18 In addition, the Commission heard supporting testimony from witnesses with respect to the desire of corporate counsel to have the option of purchasing legal services from alternative service providers. 19

In sum, the Commission heard the testimony of 95 witnesses and received 120 comments from interested parties and groups. Not once did a client urge the Commission to maintain the status quo.

B. Pertinent Post-August 1999 Developments in the United States and Abroad

1) New Forms of Affiliation in the United States: McKee Nelson Ernst & Young

The forces of change described previously in the Conclusion to this Report 20 are clearly observable in recent events, the most controversial of which is the establishment of the law firm of McKee Nelson Ernst & Young. In November 1999, five partners from the Atlanta and Washington D.C. offices of King & Spalding broke away from that firm and formed a separate law firm in Washington D.C. 21 Based on the press release issued by Ernst & Young and articles in the legal press, it would appear that the law firm has entered into a highly unusual relationship with Ernst & Young. Ernst & Young has agreed to furnish a significant amount of start up capital to the firm and to lease it space in a building it owns. In exchange, the law firm has agreed to be known as McKee Nelson Ernst & Young. 22 The two firms have stated that they are separate entities, but many commentators regard the affiliation as a major step by the accounting firms toward the eventual establishment of

multidisciplinary partnerships that include legal services. A Wall Street Journal article observed: "the traditional walls are crumbling between U.S. law firms and accounting firms. . . . If successful, the arrangement, or variations of it, could become a blueprint for other major U.S. accounting and law firms eager to join forces. . . ."

2) Other Strategic Alliances in the United States

The establishment of McKee Nelson Ernst & Young is only one manifestation of the trend toward the formation of strategic and other alliances between law firms and professional services firms. For example, since 1997 a strategic alliance has existed between PricewaterhouseCoopers (PwC) and Miller & Chevalier, a Washington, D.C. law firm with a highly specialized practice representing domestic and international clients involved in high stakes, complex tax controversies in the United States. The popular press characterized the alliance as a "significant step on the path the big six firms are taking towards offering comprehensive legal services." In August 1999, KPMG announced the creation of a strategic alliance with certain law firms that are members of SaltNet, a network of state and local tax lawyers. Among the law firms that have entered into the alliance with KPMG are Morrison & Foerster and Horwood Marcus & Berk.

3) New Relationships between Law Firms and Professional Services Firms

The forces of change are also contributing to the establishment of other new and unique relationships between professional services firms and lawyers and law firms. In October 1999, Bingham Dana, LLP merged its money-management practice with Legg Mason, Inc., an investment firm. Their affiliation is reported to be the first partnership between a law firm and an asset management firm in the United States. The new entity has become a registered investment advisor and is intended to be a vehicle for offering wealthy clients more sophisticated investment advice. In January 2000, Bingham Dana formed a consulting entity to provide advice on state-specific concerns. The firm’s managing partner has observed: "Our philosophy is that delivering a variety of integrated products makes sense for law firms. The accounting firms have proven that." Even the ABA is not immune from the forces of change. In October, the ABA Section on Litigation and PwC announced that the Section had selected PwC as its "litigation consulting sponsor," an arrangement in which PwC provides enhanced benefits and resources to the Section’s members.

4) The Increased and Targeted Hiring by the Professional Services Firms

The Big Five are also acting separately to increase the scope and quality of their tax practices. The expansion is not simply a matter of the employment of more lawyers. While the quantitative growth in the number of lawyers is impressive, even more impressive is the firms’ success in recruiting tax partners from leading law firms and prominent government lawyers to join the Big Five and in persuading law students to join their staffs directly after graduation rather than following the more traditional law-firm career path.

Professional services and consulting firms are also employing more and more lawyers to provide law-related advice to their clients in areas other than tax. Those lawyers are operating outside the "regulatory tent," vigorously maintaining that they are providing nonlegal consulting services and thus are not subject to the rules of professional conduct or bar discipline. In many instances, it is seemingly impossible to distinguish the consulting services they render to the firms’ clients from those rendered to clients by lawyers in traditional law firms. (Lawyers at the professional service firms have stated that they do not draft contracts and that they advise their clients to have outside counsel review any of the products created by the firm.)

As discussed below, however, no fact finder has yet determined that such consulting services constitute the practice of law. The Commission believes that by having in place specific rules of professional conduct regulating the ethical behavior of lawyers in MDPs, bar regulators will have an efficient benchmark by which to measure the lawyers’ conduct and be better able to initiate disciplinary proceedings against those lawyers in MDPs who violate their professional responsibilities or assist their employer in the unauthorized practice of law.

5) Possible Reorganizations of the Professional Services Firms

A number of significant upheavals in the organization of professional services firms are on-going. For example, Arthur Andersen and Andersen Consulting are engaged in a bitter break up dispute. PwC has announced plans to spinoff its consulting from its auditing practices. KPMG has incorporated its consulting unit into a separate business and is seeking to sell a twenty percent interest in the business for more than $1 billion. Ernst & Young is selling its management-consulting...
business for approximately $11 billion.\textsuperscript{39} One accounting-industry analyst has suggested that this sale will provide Ernst & Young with a "cash hoard . . . to acquire law firms."\textsuperscript{40} Grant Thornton LLP, the sixth largest accounting and consulting firm in the United States, has also announced a restructuring plan, that will place its e-commerce consulting business into a separately incorporated business.\textsuperscript{41}

6) Mergers between U.S. and Foreign Law Firms

Finally, the Commission notes that between June 1999 and the date of this Report, U.S. and foreign law firms announced several mergers.\textsuperscript{42} In part, such mergers are both a reflection of the changes in the global marketplace for legal services and a response to competition they face from MDPs in countries outside the United States.\textsuperscript{43}

7) Enforcement of the Statutory and Ethical Prohibitions against the Unauthorized Practice of Law (UPL)

Some MDP opponents argue that certain of the developments discussed above can be stopped with greater UPL enforcement.\textsuperscript{44} They call for stepped up enforcement of (1) the ethics rules prohibiting a lawyer from assisting a nonlawyer in the practice of law and (2) UPL statutes prohibiting the delivery of legal services by corporations and other business entities controlled by nonlawyers.\textsuperscript{45}

The Commission notes that despite the considerable publicity about the alleged delivery of legal services by the Big Five and other consulting-type firms, regulatory initiatives have rarely occurred and where they have, the courts have not rendered a definite decision. For example, in 1998, the UPL Committee of the Texas Supreme Court announced that it would not file a complaint against Arthur Andersen after an eleven-month investigation.\textsuperscript{46} In 1999, Virginia bar counsel made a similar statement with respect to the compliance law services offered by an unnamed professional services firm.\textsuperscript{47} Furthermore, the courts have displayed a reluctance in many jurisdictions to interpret UPL statutes broadly in connection with the delivery of law-related services.\textsuperscript{48} Even if UPL efforts were initially successful, it is likely that professional services firms and clients would seek legislative intervention.\textsuperscript{49} This intervention could ultimately lead to an erosion of the independence of the legal profession.

C. Developments Outside the United States

1) The Expansion of the Big Five

The legal landscape outside the United States is also undergoing rapid change.\textsuperscript{50} Starkly illustrating the commitment of the Big Five to expanding their global presence in the market for legal services was PwC's announcement in October that it had selected the name "Landwell" for its network of globally affiliated law firms. PwC now employs one thousand six hundred lawyers in forty-two different countries.\textsuperscript{51} It has a publicly stated goal of being one of the world's five leading law firms by the year 2004. The Big Five are avidly exploring how the Internet can contribute to their expanding legal services. For example, Andersen Legal has entered into an Internet project with Network Solutions, Inc. in which the two companies have agreed to offer corporate clients one-stop shopping for, inter alia, domain name registrations.\textsuperscript{52} The Big Five are not the only law-firm rivals outside the United States. For example, in Johannesburg, South Africa, an investment bank acquired all the lawyers in the Edward Nathan firm except for the firm's litigators.\textsuperscript{53}

2) The Response of Foreign Bar Regulators

Regulators in certain other countries have determined that allowing lawyers and nonlawyers to share fees and join in partnership will further the public interest by making available more options for the purchase of legal services and will not threaten the legal profession's core values.\textsuperscript{54} Early this year, the Council of the Law Society of England and Wales approved the establishment of MDPs in the United Kingdom. Since implementing legislation will be necessary, it has authorized as an interim measure the establishment of a "legal practice plus" and a "linked partnership" that will allow, respectively, a nonlawyer partner in a solicitor firm and certain alliances between accounting and solicitor firms.\textsuperscript{55} Going even further, 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.\textsuperscript{56}

Bar associations in other countries are also studying MDPs and appear to be on the verge of giving them a go-ahead signal. For example, the International Practice of Law Committee of the Canadian Bar Association has issued a Report on Multi-disciplinary Practices and the Legal Profession in which it recommends that lawyers be permitted to enter into partnership with nonlawyers and share fees with nonlawyers subject only to the rules of professional conduct that regulate lawyers in traditional practice structures. The National Multi-Disciplinary Partnerships Committee of the Federation of Law Societies of Canada has recommended that the rules of professional conduct be relaxed to permit MDPs. Finally, the General Assembly of the Union Internationale Des Avocats has adopted a Resolution on Multidisciplinary Practice approving minimum standards for lawyers in MDPs in the jurisdictions in which MDPs are allowed. Those principles reflect core values of the legal profession similar to the ones identified in the Commission's Recommendation.

Conclusion

In sum, the Commission believes it imperative that the legal profession respond in the immediate future to unprecedented challenges ranging from the blurring of the boundaries between law and other disciplines, significant client dissatisfaction with the current delivery mechanisms for legal services, and the globalization of the economy. Adoption of the Commission's Recommendation is a critical first step in meeting these challenges.

FOOTNOTES

1. See <http://www.abanet.org/cpr/multicom.html>. For a detailed description of the Commission's activities from August 1998 to August 1999, see Reporter's Notes, American Bar Association Commission on Multidisciplinary Practice, Report to the House of Delegates, Appendix C at C1, C9-10 (August 1999). Since the House's adoption of the August 1999 Resolution, the Commission members have devoted considerable time to advising and communicating with state and local bar association committees studying MDP-related issues. The Commission has published two papers and posted them on its web site, seeking comments and suggestions; held one day of open hearings at the Midyear Meeting in Dallas; and met in executive session for one and a half days. In addition, ABA President Paul sponsored a Town Hall Meeting at the Midyear Meeting at which two members of the Commission spoke.


3. ABA Standing Committee on Specialization, Memorandum dated March 17, 2000 to the Commission.

4. Letter dated March 7, 2000 to Sherwin P. Simmons from Joseph P. McMonigle, Chair, ABA Standing Committee on Lawyers' Professional Liability.

5. Testimony of Lynda Shely (Feb. 5, 1999).

6. Many of the inquiring lawyers may share the lament of Charles F. Robinson, the former Chair of the ABA Law Practice Management Section, a member of a two-person law firm specializing in elder law. "I would like to form a consortium with a CPA and a money manager, and provide comprehensive services on a fee basis that's split among members of the consortium. I can't do that right now. It's not just a global fight with the Big Six." John Gibeaut, Squeeze, A.B.A.J., Feb. 1998, at 12. 46. See also Testimony of Charles F. Robinson, Feb. 5, 1999; written statement of Charles F. Robinson dated Feb. 5, 1999; statement of Philip Matthew Stinson, Sr. at the October 9, 1999 Commission hearing regarding his work with

the Individuals with Disabilities Education Act. Social worker organizations have expressed their support for relaxing the current bar against fee sharing and partnerships with nonlawyers. See e.g., letter to Sherwin P. Simmons dated December 22, 1999 from Ebonnie L. Simmons on behalf of the National Association of Social Workers, Pennsylvania Chapter; letter to Sherwin P. Simmons dated January 2, 2000 from Stuart K. Kaufer on behalf of the National Association of Social Workers, New York State Chapter.


8 See testimony of Theodore Debro (Feb. 12, 2000); written statement of Theodore Debro dated Feb 12, 2000.

9 Id. See also testimony of Wayne Moore (Mar. 11, 1999).

10 Testimony of Lora Weber (Mar. 11, 1999); letter dated Mar. 31, 1999 from Lora Weber. See also letter from the Washington Legal Foundation dated Apr. 6, 1999.

11 See testimony of Wayne Moore (Mar. 11, 1999). See also letter dated December 28, 1999 from Kenneth B. Crooks, Jr. on behalf of the Metro Columbus Urban League, Inc. (noting the increasing numbers of senior citizens and their families who are moving to Georgia and urging that MDPs be permitted to deliver legal services to this segment of the population).


13 Id.


15 See e.g., letter from Marna S. Tucker, Esq dated Mar. 30, 1999; statement of Philip Matthew Stinson, Sr. (Oct. 9, 1999) regarding his work with the Individuals with Disabilities Education Act; testimony of Theodore Debro (Feb. 12, 2000); written statement of Theodore Debro dated Feb. 12, 2000 (regarding Alabama District Attorney Offices multidisciplinary team to protect children from physical and sexual abuse).


17 E.g. testimony of Wayne Moore (Mar. 11, 1999); testimony of Lora H. Weber (Mar. 11, 1999).

18 "The American Corporate Counsel Association supports a broader range of choice for clients to select from service providers capable of formulating comprehensive solutions which address not only the legal aspect of their problems but various other facets as well. Subject to resolving important issues of ethics and professionalism in the best interests of the client and the public, such a broader range of choice could include multidisciplinary practices wherein lawyers are affiliated with nonlawyers." Adopted by the Board of Directors February 6, 1999. See also Charles W. Wolfram, In-House MDPs?, Nat'l L.J., Mar. 6, 2000, at B6 (exploring how permitting in-house MDPs would benefit corporate clients.)

19 Testimony of Steven A. Bennett (Nov. 13, 1998); written remarks of Steven Allan Bennett dated Nov. 13, 1998; testimony of James R. Silkenat (Nov. 13, 1998); testimony of Elizabeth Wall (Nov. 12, 1998). See also testimony of Simon Potter (Feb. 6, 1999); letter from Jose MaMarti dated May 12, 1999. A survey conducted by the Financial Times (London) of one hundred senior executives at large companies and financial institutions in the United States and the United Kingdom showed a willingness by the executives to purchase legal services from MDPs, if they could offer such services. Long arm of the law: The Big Five may be right that clients want them to move into legal services, Fin. Times (London), Sept. 9, 1999, at 29. While approximately two-thirds of the surveyed respondents indicated that they still preferred to purchase legal services from a traditional law firm, they also expressed support for a wider range of alternative legal service providers. But see Michael Chambers & Richard Parnham, Accountants in the Legal Market: Has the strategy failed?, 21Commercial Law. 40 (1998).
See Report, supra note 18 and accompanying text.

The Washington, D.C. version of Rule 5.4 permits a lawyer to form a partnership with a nonlawyer and to share legal fees with a nonlawyer. The "sole purpose" of the partnership must, however, be the delivery of legal services. In the press release announcing the establishment of McKee Nelson Ernst & Young, the firm was referred to as a wholly separate entity from Ernst & Young, implying that it was not attempting to take advantage of the Rule. Ernst & Young, News Release (Nov. 3, 1999).

Ernst & Young, News Release (Nov. 3, 1999); Susan Beck, The Trojan Accountant, Am. Law., Nov. 1999, at 18; Siobhan Roth, Inside the Ernst & Young Deal: Law Firm is launched with Big 5 loan; lawyers say that they remain independent, Legal Times, Nov. 8, 1999, at 1; Jonathan Gronerand & Siobhan Roth, Envisioning A Big 5 Law Firm: Ernst & Young Positioning to Offer Full Legal Services, Legal Times, Oct. 25, 1999.

See Siobhan Roth, New Firm: An Ethical Accounting, Legal Times, Nov. 8, 1999, at 17. Ernst & Young has also entered into an affiliation arrangement with a prominent law firm in Canada. See A.J. Noble, Ernst & Young Already Manages A "Captive" Law Firm in Toronto, Is This the Dawn of the Profession's Future?, Am. Law., July 1999, at 51. The codes of lawyer conduct adopted in the Canadian provinces, like the ABA Model Rules, also bar fee sharing and partnership with nonlawyers.


The Big Six Move In, Int'l Fin. L. Rev., Nov. 1997, at 25. According to the two firms, the alliance allowed them to offer their clients a seamless web of services:

US tax controversy work goes from the pre-examination stage to litigation. Up to the litigation stage [Price Waterhouse] can do the work, but sometimes a case cannot be settled and it has to go to court.

Sometimes clients like to have the stage set, with attorneys involved. Because we do not litigate, we cannot give the IRS the impression that we are ready to go to court. With Miller & Chevalier as part of a team, we are in a position to go to court if we need to.

Id.


Ritchenya Shepard, Legal and Financial Advice Under One Roof, Nat'l J., Nov. 9, 1999, at 5. The law firm of Fredikson & Byron, the fifth largest firm in Minnesota, expressed a similar sentiment in announcing the establishment of a consulting service for physicians and medical organizations. See <http://www.pioneerplanet.com/business/biz_docs/016107.htm>.

Sheryl Stratton, Pricewaterhouse Coopers to >Sponsor' ABA Litigators, Highlights & Documents, Tax Notes, Oct. 19,
In 1997, The Wall Street Journal reported that

Ernst & Young has 800 tax attorneys on its U.S. staff, double the
400 it had several years ago. Price Waterhouse has around 500
tax lawyers in the U.S. up from 250 three years ago. Arthur
Andersen has 1,000 tax attorneys, 20% more than it had in 1994.


Subsequent to the publication of this article, Price Waterhouse and Coopers & Lybrand merged, forming
PricewaterhouseCoopers (PwC).

(referring to a "high profile coup" by an accounting firm in hiring a noted tax partner); Tom Herman, A Special Summary and
law firm tax partner to an accounting firm); Jeffrey L. Jacobs, Multidisciplinary Recruiting War... The Tax Brain Drain to
Accounting Firms Intensifies, 17 Of Counsel 7 (1998) (same); Accounting Firms Hire Lawyers and Other Attorneys Cry
Foul, supra note 31, at B8 (same).

Mark Schauerte, Big Five Use Stock Options, Usable Hours to Woo Law Students, Chicago Law., Nov. 1999; Anna Snider,
Taking a Look Inside the Big Five, N.Y.L.J., Sept. 7, 1999, at S11. The senior vice president and general counsel at
Hildebrand, Inc. has commented:

The Big Six are recruiting at the major law schools, and not only
tax lawyers. They are telling students that if they come with
them, they will be doing M&A, litigation and other kinds of work
that goes well beyond tax counseling.

David Rubenstein, Accounting Firm Legal Practices Expand Rapidly: How the Big Six Firms Are Practicing Law in Europe:

At least one Big Five firm, Ernst & Young, has launched a new initiative, a Legal Management Services group, in which it
advises in-house legal departments on a wide range of matters, creating new competition for outside law firms. See A.J.
Noble, While the Profession Debates Where to Draw the Line Between Accountants and Lawyers, the Big Five Are Already

See infra notes 46 and 47 and accompanying text.

See generally Elizabeth MacDonald, Andersen Worldwide Files Counterclaim for $14.5 Billion Against One of Its Units,
Wall St. J., Nov. 22, 1999, at C26; Elizabeth MacDonald, Andersen consulting's Breakup Battle with Arthur Andersen Nears
Showdown, Wall St. J., July 28, 1999, at A2; Elizabeth MacDonald, Andersen Consulting Tried to Thwart Arthur Andersen's

Elizabeth MacDonald, PricewaterhouseCoopers Will Divide Into Two or More Parts, Under Pressure, Wall St. J., Feb. 18,
2000, at B8; Elizabeth MacDonald, PricewaterhouseCoopers Nears Plan for Restructuring Involving Split or Sale, Wall St.
J., Feb. 16, 2000, at C11; Elizabeth MacDonald, PricewaterhouseCoopers Plans Steps Assuring Auditor Independence, Wall

Raymond Hennessey, Consulting Unit of KPMG Files $1 Billion IPO, Wall St. J., May 8, 2000, at C21; Elizabeth
MacDonald, KPMG Draws Scrutiny With Investment by Cisco Systems in Consulting Unit, Wall St. J., Feb. 1, 2000, at A16;
PricewaterhouseCoopers Will Divide Into Two or More Parts, Under Pressure, supra note 37.

Kevin J. Delaney & Elizabeth MacDonald, Ernst & Young To Sell Business To Cap Gemini, Wall St. J., Feb. 29, 2000, at
Holland & Knight and Haim Steinmetz Haring & Co., an Israeli law firm, noting that the two firms did not formally merge because Israeli law prohibits profit-sharing between Israeli and foreign law firms, and that the Haim firm was being treated “as part of Holland & Knight.” Similar mergers are occurring within Western Europe. See Konstantin Richter, Legal Colossus May Be Forged Between U.K. & German Firms, Wall St. J., Apr. 10, 2000, at A25.

Ward Bower, The Future Structure of the Global Legal Marketplace, Metropolitan Corp. Couns., Oct. 1999, at 45. Depending upon the terms of the merger agreement, the U.S.-licensed lawyers may hold only a minority interest in the new firm. This creates the possibility that they will be subject to the control and authority of lawyers licensed in a foreign jurisdiction(s) whose rules of ethics may be significantly different from those that govern the conduct of U.S.-licensed lawyers.

For example, the Supreme Court of Indiana in October 1999 rejected the proposition that the use of in-house counsel by an insurance company to defend its insureds constituted the unauthorized practice of law by the employer-insurer. Of the thirteen states that have considered this issue, only two have condemned it. Cincinnati v. Wills, 717 N.E.2d 151 (Ind. 1999). See also Perkins v. CTX Mortgage Co., 969 P.2d 93 (Wash. 1999) (declining to find that the activities of a mortgagee in connection with the completion of financing documents constituted the practice of law); In re Florida Bar Advisory Opinion—Nonlawyer Preparation of Pension Plans, 571 So. 2d 430 (Fl. 1990) (declining to find that the law-related activities of ERISA consultants constituted the unauthorized practice of law); In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 422 S.E.2d 123 (1992) (concluding that CPAs may represent clients before agencies and the Probate Court without violating the state’s UPL prohibition). Compare George Shima Buick, Inc. v. Ferencak, 1999 WL 1313675 (Ohio Ct. App. 1999) (Ohio statute permitting a corporate officer or employee to present a contract claim in small claims court is constitutional) with Alliance Group, Inc. v. Rosenfield, 685 N.E.2d 570 (Ohio Ct. App. 1996) (same Ohio statute is unconstitutional because it violates the state constitutional doctrine of separation of powers).

In many jurisdictions, UPL is a creature of statute. A prime example of such legislative intervention occurred recently in Texas. The UPL Committee of the Texas Supreme Court successfully obtained an injunction against the publisher of Quicken Family Lawyer software. See Unauthorized Practice of Law Committee v. Parsons Technology, Inc., 1999 WL 47235 (N.D. Tex. Jan. 12, 1999), vacated and remanded, 1999 WL 435871 (5th Cir. June 29, 1999). At the same time, it was also pursuing a UPL investigation of Nolo Press, a legal publisher. See Rinat Fried, Texas vs. Publisher: Are Books Lawyers?, Natl L.J., Apr. 6, 1998, at A4; Anne Veigle, Texas Court May Lasso Self-Help Law Publisher, Wash. Times, June 16, 1998,

The Texas amendment is a striking example of how a state legislature will respond when UPL enforcement smacks of "turf" protection and bar regulators are unable to demonstrate how the challenged activity or product have harmed the public. See also Charles W. Wolfram, Modern Legal Ethics 842 (1986) (describing how in response to a restrictive UPL decision by the state supreme court, the voters in Arizona by a margin of over four to one, voted in favor of a constitutional amendment to permit real estate agents and title insurance companies to prepare legal documents in connection with residential real estate transactions). Some commentators speculate that a result similar to the ones in Texas and Arizona would occur if a court were to declare the employment activities of lawyers in professional service firms in delivering legal services to the firms' clients to be the unauthorized practice of law. See Siobhan Roth, Bar Going Nowhere Fast on MDPs, Legal Times, Feb. 21, 2000, at 1.

50See generally The Future Structure of the Global Marketplace, supra note 43. Those critics who claim that there is no empirical evidence of client demand for MDPs should take note that Andersen Legal's revenue for the fiscal year ending August 31, 1999 was $482 million, an increase of 30% over the prior year. Andersen Legal's rate of growth was more than double the rate of the average American Lawyer100 firm in 1998. See Arian Campo-Flores, King Arthur. Am. Law., Jan. 2000, at 17.


53See Bar Going Nowhere Fast on MDPs, supra note 49.

54At a program of the Section of International Law and Practice on Feb. 11, 2000 during the ABA Midyear Meeting, Ramon Mullerat, former president of the Council of the Bars and Law Societies of the European Union (CCBE) in commenting on the situation in Europe, noted that the Netherlands allows MDPs in the tax (tax advisors), real estate (notaries) and intellectual property (patent agents) areas; Spain allows MDPs unless the activities and behavior are incompatible with the legal profession; in Belgium the Brussels Bar is split, its Francophone section allows certain kinds of MDPs with reservations (the January 2000 agreement) and its Flemish section prohibits them. Since 1994, New South Wales, Australia has permitted MDPs provided that the lawyers hold a majority of the voting rights in the entity. See generally Laurel S. Terry, A Primer on MDPs: Should the "No" Rule Become a New Rule?, 72 Temple L. Rev. 869 (2000) nn.57-70 and accompanying text.


58Federation of Law Societies of Canada, National Multi-Disciplinary Partnership Comm., Multi-Disciplinary Partnerships: Report to the Delegates (Aug. 1999). See also The Bar Going Nowhere Fast on MDPs, supra note 49 (reporting that Donahue and Partners, an Ernst & Young affiliated law firm in Toronto, has grown to seventy lawyers).

59See Union Internationale des Avocats, Resolution on Multidisciplinary Practices (Nov. 3, 1999). The Commission notes that the CCBE has vacillated on the question of MDPs. In 1996, the CCBE adopted a position strongly opposed to
multidisciplinary partnerships between lawyers and nonlawyers. In 1998, a subsequent proposal to soften that position received a majority of votes cast but failed to pass because it did not meet a supermajority requirement. Testimony of Michel Gout (Nov. 12, 1998). The CCBE has now adopted a resolution disapproving the establishment of MDPs. "Position of CCBE on integrated forms of co-operation between lawyers and persons outside the legal profession" (Nov. 13, 1999, Athens).
RESOLVED, that each jurisdiction is urged to revise its law governing lawyers to implement the following principles and preserve the core values of the legal profession:

1. It is in the public interest to preserve the core values of the legal profession, among which are:
   a. the lawyer's duty of undivided loyalty to the client;
   b. the lawyer's duty competently to exercise independent legal judgment for the benefit of the client;
   c. the lawyer's duty to hold client confidences inviolate;
   d. the lawyer's duty to avoid conflicts of interest with the client; and
   e. the lawyer's duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.
   f. The lawyer's duty to promote access to justice.

2. All lawyers are members of one profession subject in each jurisdiction to the law governing lawyers.

3. The law governing lawyers was developed to protect the public interest and to preserve the core values of the legal profession, that are essential to the proper functioning of the American justice system.

4. State bar associations and other entities charged with attorney discipline should reaffirm their commitment to enforcing vigorously their respective law governing lawyers.

5. Each jurisdiction should reevaluate and refine to the extent necessary the definition of the "practice of law."

6. Jurisdictions should retain and enforce laws that generally bar the practice of law by entities other than law firms.
7. The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.

8. The law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised.

FURTHER RESOLVED that the Standing Committee on Ethics and Professional Responsibility of the American Bar Association shall, in consultation with state, local and territorial bar associations and interested ABA sections, divisions, and committees undertake a review of the Model Rules of Professional Conduct ("MRPC") and shall recommend to the House of Delegates such amendments to the MRPC as are necessary to assure that there are safeguards in the MRPC relating to strategic alliances and other contractual relationships with nonlegal professional service providers consistent with the statement of principles in this Recommendation.

FURTHER RESOLVED that the American Bar Association recommends that in jurisdictions that permit lawyers and law firms to own and operate nonlegal businesses, no nonlawyer or nonlegal entity involved in the provision of such services should own or control the practice of law by a lawyer or law firm or otherwise be permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person.

FURTHER RESOLVED that the Commission on Multidisciplinary Practice be discharged with the Association's gratitude for the Commission's hard work and with commendation for its substantial contributions to the profession.
NEWS

funds will be provided to the IRS in other appropriate bills, prior to the adjournment of this Congress." (See also pp. 1673 and 1674.)

Daschle also complained about the manner under which the package reached the floor. “Let’s just go from committee to conference. Let’s forget this chamber. This chamber might well be additional office space someday,” he said. “We don’t need a chamber anymore — not for deliberations, because there are none.”

“I don’t know what message it sends to our young members on either side of the chamber about the way we do business around here,” Daschle said. “But I don’t want to have it heard or said on the Senate floor anytime in the near future that this is the greatest deliberative body, because we aren’t deliberating. . . . It degrades us each time something such as this happens.”

Full Text Citations: Senate letter to appropriators. Doc 2000-24409 (2 original pages); 2000 TNT 185-33

Multidisciplinary Practice: Is the SEC Doing What the ABA Will Not?

By Sheryl Stratton

Recent actions by the Securities and Exchange Commission may have a bigger impact on the issue of multidisciplinary practice than anything the American Bar Association does or does not do. SEC Chair Arthur Levitt has challenged the Big 5 accounting firms to justify their aggressive expansion into nonaudit services and has criticized the American Institute of Certified Public Accountants for institutional stonewalling.

To ensure the independence of the auditing function, the SEC has proposed rules that would limit the scope of services provided by accounting firms to their audit clients. Several of the Big 5 have already separated their consulting operations from audit and tax functions or are in the process of doing so. It remains unclear, however, just how concerned the SEC is about some aspects of the firms’ tax practices relating to their audit clients, such as the sale of tax-advantaged strategies.

SEC Proposed Rulemaking

Last June the SEC approved the issuance of a proposal to modernize the rules governing auditor independence. The proposal would provide governing principles for determining whether an auditor is independent in light of investments by auditors or their family members in audit clients, employment relationships between auditors or their family members and audit clients, and the scope of services provided by audit firms to their audit clients. (The full text of the proposed rules can be found at http://www.sec.gov/rules/proposed/34-42994.htm.)

To ensure the independence of the auditing function, the SEC has proposed rules that would limit the scope of services provided by accounting firms to their audit clients.

The proposal would significantly reduce the number of audit firm employees and their family members whose investments in audit clients are attributed to the auditor. There has been widespread agreement that the rules were excessively outdated.

But more importantly, the proposal would identify some nonaudit services that if provided to an audit client would impair an auditor’s independence. The prohibited services include de-
designing and implementing financial information systems, appraisal and valuation services, actuarial services, internal audit functions, management functions, investment banking services, and legal and expert services. (The scope of services would not extend to services provided to non-audit clients.)

Two of the proposed principles for determining when an auditor’s independence would be impaired include when the auditor has a mutual or conflicting interest with the audit client and when the auditor acts as an advocate for the audit client. Advocacy is defined by reference to a footnote in the Arthur Young case. (Arthur Young v. U.S., 465 U.S. 805, 819, n.15 (1984).)

The SEC proposal further provides a limited exception for accounting firms that have certain quality controls and satisfy other conditions, and would require companies to disclose in their annual proxy statements information about non-audit services provided by their auditors during the last fiscal year.

Confrontational Remarks

In a September 18 speech to the National Association of State Boards of Accountancy in Boston, Levitt declared that the “bedrock principles of America’s accounting profession serve not only as the auditor’s guide, but more importantly, they give the auditor’s work its relevance.” The principles establish a covenant with investors that says the auditor will remain inquisitive, skeptical, and rigorous; that he will remain free from entanglements or arrangements that threaten his objectivity.

Levitt lamented that some entities once devoted almost exclusively to auditing now resemble large diversified professional practices. Management consulting services for traditional audit firms once represented just a small portion of their total revenue; today they account for one-half, he said. Meanwhile, revenues from auditing services have dropped to a third of total revenues, according to Levitt. As a result, he said, auditors who also provide consulting services for their audit clients must now serve two masters: shareholders to whom they owe a public obligation and management to whom they provide professional consulting services. “And when the two come into conflict, the independent audit — dwarfed by the more lucrative consulting businesses — too often may be compromised.”

How can the audit engagement partner truly be perceived as discharging his public duties if he’s auditing his own work, or shares a business relationship with his own client, or performs a function that is management’s responsibility, Levitt wondered.

As for talk about the so-called new economy, Levitt admonished that the sanctity of respected numbers is as much an imperative now as it ever was. “As history teaches us, the greatest threat to continued prosperity — to new opportunities and new frontiers — is a loss of perspective. Nothing guarantees a short-lived and uncertain future more than eroding the very cornerstones on which America’s marketplace rests.”

He railed at the “apparent willingness by some to discount the very ideals that give the accounting profession its credibility — a willingness to reap the benefits of this public-mandated franchise, but largely ignore the premise of its responsibilities.” Citing the ads placed on airport walls by big accounting firms, Levitt said they always extol their information technology talents, corporate finance capabilities, and financial planning tools. “But rarely do I see an advertisement that conveys to the public and their clients their passion for living up to their public mandate of keeping the sanctity of the numbers inviolate — never a mention of the public interest.”

Next Levitt criticized the AICPA for its proposed new credential that would qualify accountants to consult and administer a ‘whole host of diversified financial and professional services.’

Next Levitt criticized the AICPA for its proposed new credential that would qualify accountants to consult and administer a “whole host of diversified financial and professional services.” (For prior coverage of the XYZ credential, see Tax Notes, Aug. 14, 2000, p. 854.)

“Do we really believe that the investing public will see the auditor as having only rigorous, objective analysis on his mind if he also must consider how his work [affects] strategic planning, marketing, communications, and personnel decisions?” Levitt asked.

Also beyond the boundaries of reason in his view is the AICPA’s new Internet “portal,” in which the AICPA leadership would hold a financial stake and which would give commissions to accountants who order goods over the Internet for themselves and clients. Levitt called the idea “a commercialization of the significant responsibilities well performed by America’s professional auditors.”

Levitt next lambasted the AICPA for its lack of funding the Public Oversight Board. “Instead of discussing how to establish strong, independent oversight of the profession that would serve as a beacon of the public trust, some would rather
The SEC is aware of concerns that accountants will be restricted from offering the types of general business and tax advice they have been providing over the years to many of their clients, Levitt said. Despite what some in the industry with the “sky is falling” mentality have been alleging, he responded, the proposal does not restrict tax compliance and planning services, nor does it restrict general business advice. “The rule specifically states that auditors should be able to provide advice on internal controls and perform specific internal audit projects.”

Proposal Revised

Four of the Big 5 accounting firms stepped forward September 20 to testify on the first day of the third public hearing on the SEC’s proposed auditor independence rules. None testified at the earlier hearings. And the firms that did not maintain an appearance of cooperation with the SEC at this hearing suffered under Chairman Levitt’s questioning.

Heeding the SEC’s call this time were the chief executive officers of Ernst & Young and PricewaterhouseCoopers, Philip A. Laskawy and James J. Schiro, who appeared together to express their support for the concepts underlying the proposal. That support, however, was not unequivocal, as they disagreed with many aspects of the proposed rules, submitting instead a joint revised independence rule in the form of a red-lined version of the SEC’s proposals.

In the E&Y-PwC version, the four governing principles for determining impairment of auditor independence would be omitted. Laskawy and Schiro both testified that the principles were better suited to a preamble or to providing the conceptual framework for the rules, rather than being embedded in the rules themselves.

In the E&Y-PwC version, the four governing principles for determining impairment of auditor independence would be omitted.

The revised proposal would delete altogether expert services from the list of prohibited non-audit services. The SEC proposal defines expert services as “rendering or supporting expert opinions for an audit client or an affiliate of an audit client in legal, administrative, or regulatory filings or proceedings.”

The E&Y-PwC proposal would reword the SEC’s section on legal services to prohibit the provision of services to an audit client “under circumstances in which the person providing the service must be admitted to practice before the courts of a U.S. jurisdiction.” The SEC proposal covered the provision of any service to an audit client or affiliate thereof that “in the jurisdiction in which the service is provided, could be provided only by someone licensed to practice law.”

During his testimony, Laskawy asked the commission not to impose any rule that would adversely affect accounting firms’ ability to provide legal services outside the United States. Any change that would “impact” foreign affiliates would have “dire consequences,” he said.

Another point of departure from the SEC proposal is in the definition of “contingent fees.” The SEC proposal states that an accountant is not independent if the accountant provides a service for a contingent fee for an audit client or affiliate. The E&Y-PwC version provides that fees are not to be regarded as contingent if fixed by courts or other public authorities, “or, in tax matters, if determined based on the results of judicial proceedings or the findings of governmental agencies.”

Without having seen the revised version, the SEC commissioners were delighted to have the support of two of the Big 5 firms and were receptive to the idea of compromise.

Laskawy and Schiro also distinguished themselves from the other Big 5 in insisting that their firms would not be handicapped by separating their management consulting functions from their audit functions. Ernst & Young has sold off its consulting division and is not now “enfeebled” or “unable to perform effective audits or to maintain a top-notch audit and tax practice,” Laskawy said. On the contrary, he said, E&Y has succeeded in obtaining more new audit clients than ever.

E&Y’s experience contradicts the arguments of other firms that insist that their consulting practices are necessary to the effective operation of their audit functions, said Levitt.

On an afternoon panel, the heads of Arthur Andersen and Deloitte & Touche insisted the problem is a matter of attracting and retaining top talent. Beyond the synergies created by knowing a client’s business through the consulting side, accounting firms are having a hard time getting good auditors, they maintained. “If the SEC limits the accounting profession by new restrictions on services and isolates us from the business community, the most talented individuals will compare the narrowness of this field with other career alternatives, and they will not take accounting majors or go to accounting firms,” argued Joseph F. Berardino, a managing partner of Arthur Andersen.
There is no crisis that would indicate that action to limit the scope of services is required at this time, said James E. Copeland, CEO of Deloitte & Touche. He urged the SEC to go forward with its proposals for modernizing financial interests and family relationships issues, but to "set aside the portion of the rule dealing with scope of services."

Characterizing the morning's testimony from Ernst & Young and PricewaterhouseCoopers as "constructive and supportive of moving ahead with the process," Levitt asked Copeland and Berardino whether their firms had worked with KPMG collectively to address auditor independence issues. Copeland said they had discussed a "common position" and later said they would be willing to look at the Ernst & Young and PricewaterhouseCoopers revised proposal.

Levitt rebutted the repeated suggestion of several witnesses that decisions about limiting the scope of services would be best left to the Independent Standards Board. And according to Levitt, the public members of the ISB agree that the issue involves public policy and is best left to the government.

Full Text Citations
- Levitt's June 27 remarks on proposals. Doc 2000-24402 (3 pages)
- SEC June 27 fact sheet on auditor independence rules. Doc 2000-24403 (6 pages)
- SEC June 27 background information sheet on rules. Doc 2000-24404 (4 pages)
- E&Y-PwC revised proposal. Doc 2000-24407 (18 pages)
- Levitt's Sept. 18 speech. Doc 2000-24405 (10 pages)

Consolidated Returns Guidance Highlighted at ALI-ABA Conference

By Sheryl Stratton

Treasury and IRS officials reviewed upcoming guidance projects and recent litigation in the consolidated returns area at an American Law Institute-American Bar Association program September 14 and 15 in Washington.

Asset Acquisitions
The Service expects to finalize temporary regulations under section 338 by the end of the year, said IRS Deputy Assistant Chief Counsel (Corporate) Phil Levine. In January the Service and Treasury issued temporary regs (T.D. 8858) addressing purchase price allocations in asset acquisitions. "It is our goal, our intention" to finalize the regs, Levine said.

Mark Yecies of Ernst & Young noted the tension between the section 338(h)(10) regime and section 1060 in the case of an acquisition of a single corporation that holds subsidiaries. The two regimes give two different answers for allocating basis in that situation, he said.

The government is aware of the inconsistencies between sections 338(h)(10) and 1060, Levine responded, and has spent a fair amount of time trying to resolve it. But the solution proposed in the preamble to the regs did not exactly receive a "groundswell of support," he noted.

Another issue arising under the temporary regs is how much restructuring at the request of a buyer a seller can do in anticipation of a transaction, Yecies said. The antiavoidance rule in temporary reg. section 1.338-1T(c) allows some planning, Levine responded, as long as it is permanent. The government is concerned about "transitory" transactions, he said.

The meeting's coordinator, Mark Silverman, Steptoe & Johnson, pointed out a problem with the availability of the section 338(h)(10) election to the purchase of a group that includes insolvent corporations. Depending on the nature of the liabilities assumed, Silverman warned, the buyer does not automatically get basis for all liabilities assumed.

In discussing a deemed asset sale involving contingent items, Robert H. Wellen, of Ivins, Phillips & Barker, observed that the temporary regs require a contingent payment to be valued and realized at the time of closing. A new asset is created when the seller starts receiving the contingent payments, he said. Levine agreed that the new asset could best be characterized as a contingent payment instrument.
Despite ethics rules prohibiting lawyers and other professionals from practicing together, the multidisciplinary practice won't be stopped.
If I wasn't going to get an office, I told them I wasn't coming," says Los Angeles lawyer Jonathan F. Bank, recalling a near breakdown in negotiations with PricewaterhouseCoopers last year. With its consultants almost constantly on site at client facilities, the accounting and consulting firm provides permanent offices in its Los Angeles high-rise only to a select few. The rest of the personnel take whatever space is available during intermittent stays in its hotel-style office environment.

Although Bank anticipated the move from partner at Chadbourne and Parke would involve huge changes, there was a limit to how much adjustment he would tolerate. Ultimately, PricewaterhouseCoopers relented, providing him with a modest group of offices to launch its U.S. consulting operations for the insurance industry. One of California's top rainmakers, Bank walked away from a 30-year legal career and control of Chadbourne and Parke's international insurance and reinsurance practice group.

Although Bank denies he was effectively voting for multidisciplinary practice (MDP) with his feet, his career move typifies the so-called MDP controversy preoccupying the American Bar Association. After more than a year of debate, an ABA commission has issued a draft resolution on MDP that may be voted on by the board of governors at the ABA annual meeting next month in New York (see "A Tangled Web" on pages 39 and 40). Regardless of what action the board takes, however, new alliances between lawyers and other professionals are already testing the legal profession's core values and traditional business models.

For the purpose of debate, the ABA has defined MDP as "a partnership, professional corporation, or other association or entity that includes lawyers and non-lawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services." The only thing opponents and proponents of MDP can agree on is that no one can predict what will happen to the legal services market in the United States once lawyers and nonlawyers begin sharing clients and profits.

Although Bank got his office, for the first time in his professional career his business card does not include the phrase attorney at law. "A number of people shook their heads in disbelief," Bank says. "I can't think of why in the world you would do this," many of them said. "Why would you give up law?"

Bank isn't convinced that he has. "Thirty years of practice is not something that can be taken away," he says. "I have not given up on the law, nor has the law given up on me. If there is a way to capitalize on my skills by doing things a bit differently, I don't see that as an unintelligent move."

**WITH IT?**
What attracted Bank to PricewaterhouseCoopers was the opportunity to break free from the traditional role of outside counsel. "Businesses frequently categorize lawyers as firemen, and they don't think of calling until they have a fire that needs to be put out," Bank says. "I want to be seen as a person with many years of insurance and reinsurance experience who also has a J.D."

Bank says that since moving to PricewaterhouseCoopers, he has participated in international transactions in ways he never experienced before, even as a rainmaking partner. For instance, he was recently able to convince a U.S. insurance company that wanted to open a facility in India to retain his firm by offering them a full package of services. "I was so impressed with PricewaterhouseCoopers's partners involved in the process that I would have purchased the product myself if I was about to open in India," he says. "The client retained us in less than 24 hours, without the usual bidding and vetting that law firms often go through. Though I don't give legal advice, I can certainly expedite the process because of my experience."

Unlike pure legal practice, which often involves only the narrow issues presented by a problem, Bank's current position opens up an array of opportunities. "I would like to solidify the insurance practice under one banner so that all capabilities relating to the issues can be readily accessed and delivered," he says. "The bundle would include audit services, tax, regulatory work, business formation and planning, technology support, and litigation support—all services the company is already providing."

While there will always be room for niche players and premier law firms, Bank believes the shift to global and online commerce mandates the convergence of services permitted by multidisciplinary practice. "MDP will be very good for lawyers," he predicts, "but it could be very bad for law firms. They risk being left behind if they don't change some elements of their business model. They will have to adapt, whether or not bar associations amend the rules to allow fee splitting or interdisciplinary practice."

As trade barriers between nations vaporize, traditional models for delivering legal services have changed, too. Entrepreneurs confront an international jumble of economic, regulatory, and business variables that require high-level financial, consulting, and legal work. But they have neither the time nor the patience to build the teams of professionals necessary to complete deals. That's the reality on the ground.

Germany was the first nation to allow MDPs in the mid-1970s. Soon legal services were absorbed into the mix in several other European countries. During the early '90s the major international accounting firms began to acquire European law firms. The most powerful combinations then diversified and consolidated, creating the so-called Big Five: Ernst & Young, Arthur Andersen, PricewaterhouseCoopers, Deloitte & Touche, and KPMG. Many of the continent's largest independent law firms now practice as MDPs.

Poised to bring the revolution home, the Big Five ran head-on into the ethics proscriptions of the U.S. legal profession. Undaunted, Ernst & Young formed a legal management services group in 1998 that advises corporate legal departments on ways to deal more efficiently with outside counsel.

Meanwhile, the Big Five began hiring senior partners and in-house attorneys to run their "consulting" groups in the United States. Although these individuals didn't practice law in the traditional sense, they brought their legal training with them. And the Big Five tax departments have been generously populated by lawyers for years.

As the Big Five became an undeniable presence in corporate legal services, some lawyers accepted the result as dictated by the marketplace. Others, whether defending the guild or the sanctity of professional ethics, blocked proposals to permit MDPs in state and local bars. But a surprising number of lawyers have never even heard of MDP. "My guess is that 90 percent of lawyers either don't see the benefit of MDP, don't understand the issues, or are just afraid of change," says Joe Petito, a Washington, D.C.-based partner at PricewaterhouseCoopers who specializes in public policy issues. "About 5 percent see it as a tremendous opportunity because they want to serve multinational corporations around the globe in an integrated manner. The last 5 percent feel their competitors are going to sign on, so they need to do it too."

For lawyers in the high-tech industry, opportunities for collaboration in business ventures already exist. Often taking an equity position with start-ups, they use their legal skills in combination with consultants, venture capitalists, managers, and accountants. The financial and business rewards can be irresistible, attracting veterans and recent law school graduates in huge numbers. The startling hikes in first-year associates' salaries is just one consequence of the trend. For the first time, the nation's most prestigious law firms are competing against outside forces, not just among themselves, for top graduates from the best schools.

Dale S. Miller, a partner at Century City's Miller Holguin, says the "time and material" approach to law firm economics will have to adapt to the so-called New Economy. Miller's 22-lawyer boutique is heavily involved in transactional work and has a significant book of health-care-related regulatory and litigation business. Operating within the existing ethics rules, his firm has developed new alliances by implementing several models of practice that come into play, depending on the needs of the client as well as on the financial opportunities offered by taking equity or management role. "We help the clients by introducing them to other consultants—accountants, business planners, people who do revenue models and financial projections, and bankers," says Miller. "We even introduce them to potential employees of the company. We don't always have to partner directly with those consultants because we get the company to surround itself with the best people it can."

Even though these relationships can create the potential for ethics missteps, Miller doesn't favor significant change in the California Rules of Professional Conduct. To the contrary, he says the rules that prohibit interdisciplinary practice and fee-splitting (rules 1-310 and 1-
force lawyers to make decisions about which role they will play and help keep out shady operators who may take advantage of clients.

The greatest challenge, says Miller, is deciding how much of the firm's mix of business will include traditional legal practice and how much will include newer approaches.

Stephen P. Milner, a lawyer and a CPA with the accounting and consulting firm of Squar, Milner, Reehl & Williamson in Newport Beach, is another hybrid whose practice thrives within the current rules. With eight principals and 56 employees, Squar Milner offers a wide array of business-oriented services, including those closely related to the law. Milner, for instance, not only offers tax advice and business consulting but also is often retained as counsel by bankruptcy courts to investigate preferences, fraudulent acts, and related-party transactions. Though he acknowledges the ethics dangers, Milner says that sharp role distinctions are impossible to make since he brings accumulated knowledge to whatever part he is playing.

"Lots of people who are both lawyers and accountants do things that involve a combination of talents," says Milner. "What we will typically do for a business client is say, 'We'll review everything for you. We'll set it all up for you. We'll structure it for you. But we're not going to do the documents, since drafting them would clearly be the practice of law.' Nonetheless, we're supplying the clients with verbiage. We're editing."

The advent of MDP may alter the formality of such collaborations, but it will not significantly change what firms like Milner's actually do. Milner says the Big Five accounting firms, with their international scope and size, will benefit most from MDP. Hurt most, he believes, will be the largest, most- eminent law firms. Since those firms sign off on 90 percent of initial public offerings, it will be difficult for them to maintain their transactional practices without some affiliation.

"If you take the largest law firm in California and compare it to the accounting firms, the law firm is dwarfed in terms of size and name recognition," says Milner. "We have a global securities market, with people from all over the world buying stock on the NYSE and NASDAQ. I wouldn't be surprised to see legal opinions coming from the same firms that are doing the auditing statements."

A ll of this innovation has put the ABA on edge. Its Commission on Multidisciplinary Practice has gone to great lengths to solicit comments from members, accumulating a mountain of "evidence" in the process. Accused at times of fact-finding overkill, ABA officials refuse to be pushed into making what could become the biggest decision in its history.

To be fair, the ABA's reluctance to embrace new practice models is more than stodginess. At stake are fundamental rules of professional conduct that guarantee the client's right to a confidential relationship with an independent counsel. ABA Model Rules that enforce standards of independence of judgment, confidentiality, privilege, conflict of interest avoidance, imputed disqualification, and a number of others are all on the line as interest groups jockey for position. Although the Big Five's threatened alliance of lawyers, accountants, and consultants is the most immediate problem, an MDP environment opens the door to other combinations as well.

Where to draw the line—or even whether to draw a line—raises serious public policy and guild issues. A State Bar of California report submitted to the ABA Commission on Multidisciplinary Practice last July warned, "It will be commonplace for lawyers to form MDPs with non-lawyers whose only contribution to the enterprise is as a source of referral business. There is no limitation on who can be a 'partner' in an MDP or the nature of the partner's contribution to the enterprise. Personal injury lawyers will benefit from MDPs that include chiropractors, tow truck operators, and insurance adjusters. The same would be true for real estate lawyers in MDPs with
Maybe MDP is a new trick, and lawyers are just a bunch of old dogs." — State Bar President Andrew J. Guilford

brokers, agents, and appraisers, and for family lawyers in partnership with family counselors.

A lot would have to change, of course, before any of those combinations could occur. Whatever the ABA decides, its conclusions are advisory only. Real change will be made on a state-by-state basis. Meanwhile, the Securities and Exchange Commission (SEC) has weighed in with its own concerns. "While the SEC has taken no position on multidisciplinary practice per se, the SEC has long made clear that its independence rules prohibit an auditor from certifying the financial statements of a client with which his firm also has an attorney-client relationship," stated Harvey J. Goldschmid, SEC general counsel, in a letter to the ABA Commission on Multidisciplinary Practice last July. Citing a recent order (Matter of Falk, 1999 WL 311802 (SEC) (May 19, 1999)), Goldschmid stressed that "the SEC reiterated its long-held position that the attorney-client relationship is inconsistent with the independence required of accountants in reporting to investors."

Nevertheless, the Big Five have already shown their willingness to restructure in order to continue profiting from the myriad of services they want to offer clients. Last year, for instance, independent consultants determined that almost half of the partners of PricewaterhouseCoopers had investments in 2,159 corporate audit clients—a violation of SEC auditor independence rules. In response to the pressures, PricewaterhouseCoopers announced in February that it would spin off parts of its business. Its affiliated law firms now use a common name, Landwell, and its stated intention is to become one of the largest law firms in the world within five years. KPMG and Ernst & Young also agreed to restructure after their mix of accounting and consulting services came under SEC scrutiny.

But those changes haven't slowed down any of the accounting firms. In 1999 Baker & McKenzie lost nine top U.S. tax partners to the Big Five accounting firms, including five of the ten partners in its Washington, D.C., tax practice. Last November, Ernst & Young announced an alliance with two former tax partners from Atlanta's King & Spalding. The new firm, McKee Nelson Ernst & Young, is based in the nation's capital, where liberal rules permit the inclusion of nonattorneys' names on firm letterhead.

"We are very excited about this new alliance and expect it to demonstrate that a closely coordinated practice with lawyers can be devised which preserves the core values of the legal profession while giving lawyers the opportunity to join with others to offer a broader, more valuable solution to their clients' needs," says William J. Lipton, the Ernst & Young vice chair responsible for tax services. According to Lipton, McKee Nelson expects to add 50 more lawyers within its first year.

But questions immediately arose following announcement of the deal. Critics claimed the financing arrangement between the lawyers and Ernst & Young was a clever subterfuge for sharing profits. Mark W. Foster, a partner in Washington, D.C.—based Zuckerman, Spackler, Goldstein, Taylor & Kolker, who represented the lawyers in the deal, bristled at the claims, saying the firm is totally independent and operates within the existing rules. "People are always envious of others who are successful, and it doesn't surprise me that there are some sour grapes from people who don't have the facts," Foster says. "You can say it's hard to tell the difference between debt and equity, but that's baloney. Sure the lines start to blur if there's profit participation, kickers and equity sharing. I'm not telling you how their loan is structured, because it's their business. But I can tell you that when I go out in public and say that Ernst & Young do not have an equity interest in this law firm, I mean it, and there's no upstreaming going on."

Ultimately, Foster says, the lawyers and accountants will able to do what they wanted within current guidelines. He acknowledges, however, that "there are some constraints: artificialities in the way the thing is structured that were caused by rules some claim are outdated and anomalous."

Declining to take a position on MDP, Foster nevertheless conceded that it "isn't a threat to everyone; it's just a threat to a few lawyers." An Ernst & Young spokesp
Doug Kranwinkle, managing partner of O'Melveny & Myers in Los Angeles, says, "MDP doesn't mean much of anything." He sees the controversy as a drive primarily by accounting firms to enter lines of service more profitable than auditing that have traditionally been handled by lawyers. "The big concern is that accounting firms—which are huge—could come in with their financial muscle, undercut pricing, and steal a bunch of work," Kranwinkle says.

Still, Kranwinkle doesn't object to rule changes that would allow MDPs. "Competition is good," he says. "Clients should be able to pick who they want to work with, and if they want to work with the accountants as their lawyers, that's their choice. They want to work with, and if they want to work with the accountants as their lawyers, that's their choice. They shouldn't be kept out with artificial barriers."

Whether California will make that change, however, isn't at all clear. "I think the whole thing has been set back ten years by Pricewaterhouse-Cooper's problems with the ethics rules of the accounting profession and the SEC," Kranwinkle says. "I hear a lot of talk at the State Bar that, 'If those guys can't abide by their own ethics rules, how will they ever abide by ours?' Because accounting ethics rules are pretty easy."

Mary B. Cranston, managing partner at San Francisco-based Pillsbury Madison & Sutro, says MDP is one of the significant "moving pieces" in a market that has a "lot of significant moving pieces." Rather than focusing just on MDP, she says creating a successful law firm marketing strategy requires that "you keep your eye on all of them."

Cranston says that if one state takes the lead on MDP, it could cause a domino effect of rule changes to occur quickly throughout the nation. "The markets that clients are facing are much broader [today]," she says. "So a law firm has to meet its needs in a way that looks more like the organizational structure of an accounting firm. There are going to be significant parallel developments that will make law firms better placed to be strategic partners with accounting firms. The whole market is going to create more flexibility at the level in which my law firm plays."

Standing in the way are ethics rules that often aren't relevant in the current marketplace. Cranston says that revised guidelines should address the thorny issues created by tension between the duty of disclosure and the obligation to maintain confidentiality. Like it or not, she says, rapid global market changes merit rethinking old constructs.

"This ought to be addressed by legislators and regulators who are thinking out of the box," Cranston says. "If you take the current structure and try to cram it into this mess, it doesn't fit. For instance, there may need to be separate divisions of the bar with well-defined rules that permit structural separation with ethics barriers."

The debate over what could be the biggest threat to the legal profession in decades is being held in cyberspace. An ABA-sponsored Web site on multidisciplinary practice (www.abanet.org/cpr/multicom.html) contains documentation of two years of hand-wringing over whether ethics rules (Model Rules 5.4 and 5.7) should change to accommodate professionals from various fields who want to practice together and share their income.

In February, at its midyear meeting in Dallas, the ABA staged a live webcast, a three-hour "town hall" symposium during which members e-mailed questions and comments to a broad range of experts. A month later the ABA's Special Commission on Multidisciplinary Practice released a "draft of a possible recommendation," a description that speaks volumes about the group's lack of consensus. The critical sentence reads, "Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that deliver 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." The recommendation, a proposed exception to ABA Model Rule 5.4, stressed the importance of preserving "the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and pro bono publico obligations."

Although the arguments over MDP focus on the public interest, guild issues underlie the debate. How will multidisciplinary practice affect competition between lawyers and change the nature of law practice? Is the disruption that rule changes would bring worth whatever benefits the public may derive from one-stop shopping?

The ABA tabled an expected recommendation at its annual meeting last year, adopting instead a Florida State Bar proposal to avoid any rule changes "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."

At the center of the controversy is Sherwin P. Simmons, head of the tax group of Miami's Steel, Hector & Davis and, since August 1998, chair of the ABA's MDP commission. Simmons justifies the extensive commentary as a way of assuring that any changes ultimately serve the public interest. "The core values that protect the public have to continue to be protected in a nontraditional setting," he says.
Some law firms are already bending to the inevitable. Last year San Francisco–based Morrison & Foerster became the driving force in a "strategic alliance" between KPMG and a network of state and local tax lawyers called SALTNET. The legal network includes Horwood Marcus & Berk of Chicago; Holland & Knight of Lakeland, Florida; and Walter Hellerstein, a University of Georgia law professor. According to Thomas Steele, head of Morrison's state and local tax group, the alliance does not preclude either KPMG or SALTNET from referring work to law or accounting firms outside the alliance, nor does it involve any fee sharing. It is designed to offer sophisticated advice to clients involved in tax problems that occur in multiple jurisdictions.

Alan K. Austin, the managing partner at Palo Alto's Wilson Sonsini Goodrich & Rosati, contends that MDPs will affect clients more than law firms. "Good lawyers will always be able to earn a living, no matter what the rules are," Austin says. Nevertheless, he notes that smaller, consumer-oriented firms could go the way of independent drug stores, whose number rapidly declined once chain stores were permitted to offer pharmaceutical services. Last year Wilson Sonsini encountered encroachment firsthand when Ernst & Young hired away Glen A. Kohl, chair of the firm's tax department and a member of its executive committee. "We are definitely in the wait-and-see period," Austin says of MDP. "At this point, we don't know what the implications will be."

Spending more time along the sidelines seems prudent. Already, e-commerce is showing signs of fundamental weakness, causing stock prices to falter from stratospheric highs. If there is a shakeout in the securities market, the bloom could be off the rose of the New Economy. And that might mean the clamor to converge business services would abate. In such a case, the core values of the legal profession might be upended without any public benefit.

"My move did not make me any more of a supporter of MDP than I was before," says Jonathan Bank of PricewaterhouseCoopers. "As a lawyer, I wasn't particularly worried about MDP before I left my firm. It all comes down to the marketplace. The marketplace is usually good in selecting the best provider of services."

---

Michael Jonathan Grinfeld is a contributing writer for CALIFORNIA LAWYER based in Fullerton.
The Big 5 Know What Clients Want

Management

BY MELCHIOR S. MORGON

A little more than a year ago, reports of the Big 5 accounting firms’ acquiring law firms and practicing law in Europe, hiring lateral partners out of major U.S. law firms, and snapping up tax lawyers leaving government service were dismissed by many as just a passing fancy. Too remote to have any real impact on the practice of law in the United States. 

Think again! They keep coming—picking off top partners in major firms, paying big compensation packages, setting up strategic alliances with law firms, and funding "new" law firms. They're getting closer. And if you continue to ignore them and stand frozen in your tracks, they will eat your lunch.

If you're a partner in a major firm, perhaps you don't feel the threat is real. After all, you're at the top of the profession, and you compete against peers' law firms. Why should you be concerned with these Philistines who are trying to intrude on your hallowed ground?

Well, to appreciate the scope of what can be done, just compare your tax practice—by American Law Media - 1720 M Street, N.W., Suite 832 • Washington, D.C. 20036 • Fax (202) 785-4539

Next week...consultant Holly English takes questions from lawyers about dealing with colleagues and sticky workplace situations in a new column, "Internal Affairs."
The End of the Legal Profession?

Law is a profession filled with traditions. And, as it should, the law usually changes slowly, carefully. Maybe that’s why lawyers can be resistant to change. But the world is changing, and the global marketplace will force the legal profession to change. On the front lines of the changing world is the practice of tax law. Tax lawyers need to be prepared now.

Maybe that’s why a plenary session during the January meeting of the American Bar Association’s Section of Taxation was entitled “Ends of the Legal Profession” — to get everyone’s attention. Participants at the session drew analogies to sex and drugs and riding dead horses to drive their message home. And the message was anything but fun when they reviewed how the legal profession has prepared itself for the global marketplace and competing with multidisciplinary professional service firms.

The consensus of the panelists was that the bar had to create a business vision and change its outdated rules.

Where Are We?

“We are looking at the question of where the legal profession is going kind of late in the day,” said Phil Mann, Tax Section chair and program moderator, in his opening remarks. The teaching of law, the making of law, and the practice of law have not really changed much in response to the information and technological revolution, and the globalization of the marketplace, in Mann’s view.

Panelist Charles Robinson of Edgewater, Fla., agreed, suggesting that the session title could well have been “the end of the legal profession.” In the face of the most profound change since the Industrial Revolution, the legal profession has tried to insulate itself from change, he said. When the economics have turned upside down from a producer-driven market to a consumer-driven market, the legal profession, like the medical profession, has responded with a lodge culture that reinforces an unrealistic view of life and work, according to Robinson.

There is not a “lawyer exception” for change, he went on, even if professionalism is a great hiding place for avoiding it. The big question is what does unprecedented change imply for a precedent-oriented profession, he asked.

The Vision 2000 project of the American Institute of Certified Public Accountants should serve as a model for the bar, whose last long-range planning occurred a decade ago. Transactional lawyers, and some litigators, are now feeling the heat because the bar has not envisioned the future, Robinson insisted. The Florida bar declined to adopt his suggestion that its new slogan be “walking through life backwards preserves stare decisis,” he joked.

The ABA could practically copy the core values delineated and developed from the AICPA’s study of the trends, Robinson believes. The AICPA vision values include CLE and lifelong learning, competence and integrity, attunement with business opportunities, and objectivity.

Mann questioned the high-mindedness of a professional goal that revolves around letting the better ideas ultimately prevail in a condition of competitiveness. What about the obligation to the courts, to the community, to pursuing humanitarian goals, and maintaining respect for legal tradition, he asked.

“We don’t have to be low-minded to treat our clients more as our partners,” Robinson replied. Lawyers don’t have to be condescending and patronizing — that has been a mistaken view that has been defined as professionalism, he said. He cited the example of an allergy drug company’s aggressive campaign directing people to demand from their doctors the drug they want, rather than leaving it up to the professional’s discretion.

There is a competition in the universe of ideas about what is best for the marketplace between letting everyone do what he or she wants versus adhering to ethical standards to preserve things like duties to responsibilities, Mann said.

In the face of the most profound change since the Industrial Revolution, the legal profession has tried to insulate itself from change, Robinson said.

The bar needs to take a new look at some of those ethical rules, Robinson said, but first it needs to study where it wants to go. The choices include extending the lodge mentality and wasting more money pursuing unauthorized practice actions, or drifting along without changing the ethical rules and “watch the multidisciplinary world engulf us.” Or, “we could ask ourselves what it is we really good at, what do people really need,” he said. What can the profession do to carve out a piece of the future that is high, professional, and serves the public good. Some ethical rules are impediments to that future, he maintained.

Large Law Firms

Mann turned to Paul Sax, the Tax Section’s chair-elect, to provide a view of how large law
firms are handling the changing global marketplace. The harsh reality, according to Sax, who is with Orrick, Harrington, and Sutcliffe in San Francisco, is that large law firms don’t tolerate people who aren’t capable of or willing to pull “90 beats per minute.”

Large firms have tried to expand into new businesses but the bar’s rules hamstring growth, Sax said. In business consulting, the Big Five accounting firms dominate — they have more services to offer and lawyers aren’t players, he said.

**Like so many corporate takeovers, the battle for control of legal service markets in a new global economy, ‘may be over before attorneys realize it has begun.’**

Law firms have accelerated the use of technology and are turning over the business end of their practices to nonlawyers. But “we still lag sadly in marketing and promotion,” he lamented, citing the “stunning number” of 10,000 clients that receive the client memo of a similarly situated partner at PricewaterhouseCoopers compared to Sax’s 200.

In finance work, large law firms have figured out that globalization is the key, “but you can’t compete with a global network without one of your own,” he insisted. In litigation, the large firms have been asleep, and so far, so have the Big Five. “This may break fast but you can’t count on the bar.” There’s a race on, and the Big Five, in Sax’s view, are destined to solve their impediments to practice before a court before the bar can enact enforceable rules that make sense.

The historical argument has been that lawyers offer a relationship of trust, confidence, and personal business, while accounting firms sell services as a commodity, he explained. Law firms have had quality on their side. But accounting firms have figured out how to buy high talent, Sax said. Furthermore they understand that quality sells only at the interface level, and where most of the work is done, clients view legal work as a commodity. They don’t ask for the qualifications of the rest of the team, he noted. As in the medical profession where excellence and reputation used to matter, now clients take the professional who is “in their plan.”

We could push the bar for rules that work fast, now, and not 48 legislatures from now, he suggested. Law firms can also “get an identity,” because identity counts in competing for talent. They can develop a business focus and expand related businesses to provide a complete service, he suggested. The bar has to get past the ancillary business rule to compete and have a level playing field, he insisted.

Law firms have to be able to offer one-stop shopping, Sax argued. In a consumer-driven economy, clients will choose to go to Ernst & Young in San Francisco knowing that Ernst & Young New York is on the other side of the transaction. The last item large law firms are doing and doing well is getting all nonpolicy management out of the hands of the lawyers. “Of course we can do it better ourselves, but we just can’t do it cheaper.”

Mann asked if Sax thought the legal profession will divide between the business lawyers who will be out there with the rest of the business consultants, and the lawyers who represent individuals providing traditional legal services.

That is clearly the path the bar is on, Sax responded. Deductive reasoning will lead law firms to “spin off direct adversary litigation and jump into bed with a Big Five firm,” he believes. The closest analogy is the advice afforded the man going to prison: find the biggest, meanest S.O.B. you can, jump into his arms, and say “honey, I’m yours!” Sax joked.

Unless we can bring some vision to the process in which the ABA commission on multidisciplinary practice is engaged, that is where the bar is headed, Sax said. (See related story on p. 951.) Unless the bar can think of a new way to look at the rules that has made the profession so important to the economy of the country, unless it finds a way to bring the values of client confidence, loyalty, and avoidance of conflict of interest to bear on the way we practice law, then we will follow that path, Sax asserted.

**The Lovely War That Was**

Like so many corporate takeovers, the battle for control of legal service markets in a new global economy “may be over before attorneys realize it has begun,” according to Irwin Treiger, co-chair of the National Conference of Lawyers and CPAs, quoting a friend. There has been a sea change in the delivery of legal services globally over the last decade. Statistics will show that the Big Five occupy 50 percent of the slots in the top 10 employers of lawyers in the world.

The bar is fully the responsible party, in Treiger’s view, because of its lack of vision. The accountant’s Vision 2000 was budgeted at $20 million. The accounting firms started with ample resources and rapidly built them through consolidations and through aggressive employment of capital and talent, including the hiring of
lawyers, he explained. It is at the point now where the resources these accounting firms have available to them cannot be matched by any law firm in the country, and probably in the world, he said.

The pursuit in Texas of an accounting firm for the unauthorized practice of law illustrates the power of those resources, Treiger said. Arthur Andersen's expenditure for the defense was considerable, and the bar had to rely on pro bono volunteer services of lawyers in the state.

The accountants are not hesitating to use their resources to market aggressively, build brand names, hire aggressively, and to build a tremendous technology base far beyond anything law firms can match, Treiger said. "As a profession they have done some extremely intelligent things that we have just watched."

Accounting firms can be owned by non-CPAs, while lawyers are still saddled with Model Rule 5.4, he pointed out. Accounting firms have adopted national standards, ethics, and licensing. Lawyers are still faced with licensing in 50 jurisdictions.

If the bar's current mentality does not change, there is no hope that law firms will be engaged in transnational business.

But the real competition ultimately facing the bar and the accountants, may be the financial services corporation, according to Treiger. Accountants are responding to changes here as well. Treiger cited the New York CPA firm that was allowed to spin off its audit function into a separate entity, leaving the rest of the firm to be acquired by American Express. Nothing is preventing American Express from growing, he said, noting that it is the seventh or eighth largest CPA firm in the United States.

Nothing is preventing American Express from growing, Treiger said, noting that it is the seventh or eighth largest CPA firm in the United States.

The bar had its first opportunity to begin changing with the times in 1981 when the Kutak commission proposed modifying Model Rule 5.4 to permit ownership in law firms by nonlawyers, Treiger recalled. It was defeated by the argument that "we'll next see legal services being offered in the window of Sears Roebuck." And maybe that is where the market is telling us all they should be delivered, he said. "We need an immediate reexamination of our rules."

MDP Commission

The ABA is a bit late to the party, acknowledged Sherwin Simmons, chair of the ABA-appointed commission to study multidisciplinary practice (MDP). It's to be hoped the lateness will be made up by what the MDP commission brings to the party in terms of the quality of its report and recommendations, he said. The commission is charged with the responsibility of studying the development of multidisciplinary practice by professional service firms, a definition that extends beyond the Big Five, Simmons stressed. American Express, Century Business Systems, and engineering firms are all hiring lawyers, he noted.

"When you discover you are riding a dead horse, the best strategy is to dismount."

"We are not engaged in a turf war" but approaching the issues with a view toward dealing with them, not turning back the clock, Simmons said, noting that his commission's recommendations will be advisory only.

The commission needs feedback on two points, Simmons said. There is the conflict of interest problem, even though sophisticated corporate clients don't need protection. The commission is also interested in hearing what people think about James P. Holden's proposal for federal legislation regulating professionals. (For prior coverage, see Tax Notes, Nov. 23, 1998, p. 937.)

Sax urged the MDP commission to scrap the ancillary business prohibitions. "The consumers don't want them and the reasons for having them are subordinate to the legitimate demands of the consumers."

Furthermore, the notion that law practice can't be supervised by nonlawyers is "utterly silly" in view of the bar's acceptance of inhouse lawyers, Sax said. "Nothing is going to happen unless the commission starts it moving."

Strategic Architecture

Big picture questions must be asked, Robinson maintained, before rules can be changed. What forces are already at work that have the potential to profoundly shape our profession's structure, he asked. Which new benefits will the legal profession offer to clients over the next 10 years, what new competencies will lawyers need to create those benefits, and how should the profession reconfigure the client interface to provide the most effective client access, Robinson asked.

Attitude is the bar's problem, he said. "We must move forward." He then repeated a piece of
Dakota tribal wisdom that says, "When you discover you are riding a dead horse, the best strategy is to dismount.

The lawyers' solutions to the dead horse problem, according to Robinson, would be buying a stronger whip, changing riders, saying things like "this is the way we've always ridden the horse," appointing a committee to study the horse, arranging to visit other firms to see how they ride dead horses, increasing the standards to ride dead horses, declaring at a meeting that the horse is better, faster, and cheaper dead, or perhaps harnessing several dead horses together for increased speed.

— Sheryl Stratton

The Bar Must Change Model Rules, MDP Panel Told

The bar must abolish or amend the ethical rules that prevent lawyers from engaging in some form of multidisciplinary practice, according to an overwhelming majority of witnesses appearing before an American Bar Association commission in Los Angeles February 4-6.

But developing new rules poses obvious difficulties for the commission on multidisciplinary practice (MDP), which is charged with studying the issues and making recommendations to the ABA. The legal profession's inability to define the practice of law so as to distinguish it from the array of business services being offered by professional and financial service firms presents perhaps the biggest problem.

Few witnesses could provide much guidance on the definition, but prominent among those trying to was Ernst & Young's general counsel Kathryn Oberly. The only U.S. representative from the Big Five accounting firms to appear before the commission to date, Oberly emphasized that the present state of affairs is unacceptable. She echoed ABA Tax Section Chair Stefan Tucker's testimony that law firm lawyers cannot compete in today's market and attorneys in accounting firms are prevented from doing what they did in law firms.

It is shortsighted of the bar not to try to bring together lawyers, accountants, and consultants, Oberly said. The Model Rules should be modified to focus on the individual's responsibilities rather than the firm's, she asserted.

It is shortsighted of the bar not to try to bring together lawyers, accountants, and consultants, Oberly said.

Lawyers must face the reality that "one-stop shopping" is here to stay and the bar must permit lawyers to enter into partnerships or fee-sharing arrangements with nonlawyers, Tucker said. "Changing the Model Rules would pose absolutely no risk of impairment to a lawyer's independent professional judgment," he said. He also urged revisions to the imputed disqualification rule and prohibition on referral fees.

While Tucker viewed the changes in terms of "federally imposed deregulation," it was clear that the MDP commission remains concerned with the questions of which lawyers would be regulated, and how, if MDPs were permitted.
Law-Firm Mergers Take a New Turn
As Plans for a 14-Way Union Are Set

By MARGARET A. JACOBS
Staff Reporter of THE WALL STREET JOURNAL

In the latest twist in law-firm consolidation, a small Washington firm plans to merge with 13 other small law firms—12 overseas and one in the U.S.—and possibly acquire an accounting firm.

The new firm, to be known as Shawn-Coulson, would combine 10 firms that are now linked informally through a 50-firm legal-referral network known as Eurolink, plus four others, and would have 200 lawyers. In addition to Washington, the new firm would have offices in London, Dublin, Antwerp, Belgium and Geneva, as well as Hartford, Conn.

Under its partnership agreement, the firm will be based in Washington to take advantage of the city’s bar rules allowing law firms to combine with accounting firms and various other nonlaw businesses, said William H. Shawn, managing partner of the Washington firm Shawn, Mann. Mr. Shawn would become co-managing partner of Shawn-Coulson when it is formed next month; he is to share the post with Frances Coulson, a litigator in the London firm Moon Beever.

The move comes as law-firm consolidation and globalization accelerate. As business becomes more global, big American firms have opened overseas offices. The New York law firm Rogers & Wells plans to merge by year end with Clifford Chance, one of England’s top firms.

European firms have merged to meet competition from large accounting firms that have expanded their legal services in Europe, where lawyers have been less reluctant to combine with other businesses. Small and midsize firms have responded to the changes by forming networks to refer business and share information across continents.

Talks on the Shawn-Coulson merger began 18 months ago, after Eurolink’s Italian member began facing increasing competition from large accounting firms and was losing referrals from European firms that were acquired by larger firms, an attorney familiar with the discussions said. Many Eurolink clients said they wanted to deal with one international firm rather than the 11-year-old network, which has 50 members.

“Talks on the Shawn-Coulson merger began 18 months ago, after Eurolink’s Italian member began facing increasing competition from large accounting firms and was losing referrals from European firms that were acquired by larger firms, an attorney familiar with the discussions said. Many Eurolink clients said they wanted to deal with one international firm rather than the 11-year-old network, which has 50 members.”

Under its partnership agreement, the firm will be based in Washington to take advantage of the city’s bar rules allowing law firms to combine with accounting firms and various other nonlaw businesses, said William H. Shawn, managing partner of the Washington firm Shawn, Mann. Mr. Shawn would become co-managing partner of Shawn-Coulson when it is formed next month; he is to share the post with Frances Coulson, a litigator in the London firm Moon Beever.

The move comes as law-firm consolidation and globalization accelerate. As business becomes more global, big American firms have opened overseas offices. The New York law firm Rogers & Wells plans to merge by year end with Clifford Chance, one of England’s top firms.

European firms have merged to meet competition from large accounting firms that have expanded their legal services in Europe, where lawyers have been less reluctant to combine with other businesses. Small and midsize firms have responded to the changes by forming networks to refer business and share information across continents.

Talks on the Shawn-Coulson merger began 18 months ago, after Eurolink’s Italian member began facing increasing competition from large accounting firms and was losing referrals from European firms that were acquired by larger firms, an attorney familiar with the discussions said. Many Eurolink clients said they wanted to deal with one international firm rather than the 11-year-old network, which has 50 members.

“This has a little more connection between the partners than a legal network. It’s like a giant family. If Bill [Shawn] says, ‘I have an attorney in Milan,’ I don’t have to think about it,” says client Victor Lombardi, chairman of NetFax Inc., a Germantown, Md., company that owns the patent rights to technology that converts fax images into digital images.

Another 10 foreign firms with a total of 100 lawyers are expected to merge with the new firm in the next year, Mr. Shawn said. Administrative offices would be in Washington and London.

The largest firm involved in the merger deal is in Dublin and has 60 lawyers, Mr. Shawn said. His Washington firm has 25 members, including lawyers and lobbyists who primarily represent foreign companies in litigation, intellectual property and general corporate work. The Italian firm decided not to merge and left Eurolink.

Though the firm has no immediate plans to open an accounting arm, one of the biggest draws to merge was that ‘option,’” Mr. Shawn said. “The Europeans especially don’t think law firms should forfeit the field to accountants.”

Law-firm consultant Bradford W. Hildebrandt, chairman of Hildebrandt International Inc., said the merger is “gutsy” though not surprising since many law-firm networks are struggling to compete with international law firms. Success will depend “strictly on the quality of the law firms and whether the merger is focused on specific client needs,” he says.
Multidisciplinary Practice

By Daniel R. Fischel

INTRODUCTION

Multidisciplinary practice—the ability of lawyers engaged in the practice of law to combine and share profits with non-lawyers—has been described as the most important issue facing the legal profession in the past 100 years. The issue arises because clients, particularly clients involved in complex business transactions, routinely hire both lawyers and non-lawyer service providers (e.g., accountants, consultants, investment bankers, actuaries). In an unregulated marketplace, clients would have the choice of hiring a single firm that provided all of these services or multiple firms that specialized in some subset. Service providers would have a similar choice. They could offer clients one-stop shopping, specialize in particular areas, and have contractual relationships with other service providers, or simply specialize with no formal relationship with other firms.

But the marketplace is not unregulated. Rule 5.4 of the Model Rules of Professional Conduct (Model Rule 5.4 or Rule 5.4), adopted by every state, prohibits lawyers from forming multi-disciplinary practice firms and requires lawyers to disclose to clients any non-lawyer participation in the provision of legal services.


   (a) A lawyer or law firm shall not share legal fees with a non-lawyer . . . .
   (b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.
   (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.
   (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if . . . a non-lawyer owns any interest therein . . . .

   Id.

Either, Ernst & Young contends, because it does not own the law firm but is merely acting as a lender that expects to be repaid with interest.11 Few are persuaded, however, by this claim that Rule 5.4 is not being violated. No functional difference exists between what practicing lawyers do (other than possibly litigating in court) and what the supposedly non-practicing lawyers do as "tax compliance experts," "estate planners," and the like. As one critic has observed, "The argument that these lawyers are not engaged in the practice of law has as much merit as President Clinton's that he did not engage in sex."12 Ernst & Young's characterization of its new law firm also appears to be a sham. Ernst & Young is not engaged in the banking business. Its only interest in forming a law firm is to capture the benefits from client demand for MDPs.

The American Bar Association (ABA) has had great difficulty reacting to these developments. In August 1998, the ABA created a Commission to study whether MDPs should be authorized, and if so, on what terms. After conducting extensive hearings, the Commission issued a report recommending that the ABA amend the Model Rules to permit MDPs, but only under conditions limiting their effectiveness.13 Still, the Commission's recommendations generated such intense opposition that the ABA decided to table the issue and 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.14

11. See Herman, supra note 8, at B10 (quoting Ernst & Young spokesman as insisting that accounting firm will be lender and will neither own any part of new law firm nor share any fees or profits of new law firm).
12. See id.
13. See ABA Comm. on Multidisciplinary Practice, Report to the House of Delegates (Aug. 1999), available in <http://www.amblaw.org/cps/wwksrmao5/wwksrmao5.asp> [hereinafter ABA Final Report]. The Commission endorsed MDPs but recommended that other restrictions such as the ban on public investment and the imposed conflicts rule remain in effect. See id.; see also ABA Comm. on Multidisciplinary Practice, Report to the House of Delegates, Recommendation (June 30, 1999), available in <http://www.amblaw.org/cps/wwksrmao5/wwksrmao5.asp> [hereinafter Updated Report] (quoting Adopted Resolution of the Florida Bar). This is not the first time the ABA has considered the issue of multidisciplinary practice. In 1981, the Task Commission urged the ABA to adopt a proposed Model Rule 5.4 which would have permitted lawyers to combine with non-lawyers and share profits and fees with certain limitations. This proposed rule was rejected in its entirety by the ABA House of Delegates which ultimately adopted current Model Rule 5.4. This history is summarized in Edward S. Adams & John H. Matheson, Law Firms on the Big Band: A Proposal for Multidisciplinary Practice in Law Firms, 86 Cal. L. Rev. 1, 10-11 (1998).
The subject continues to be debated actively within the ABA and other professional organizations in the United States and around the world. 15 I argue here that the organized bar's opposition to multidisciplinary practice is misguided and ultimately futile. The legal profession should welcome multidisciplinary practice as creating new opportunities and challenges for its members.

**MULTIDISCIPLINARY PRACTICE AND LAWYERS' INDEPENDENCE**

Model Rule 5.4, which prohibits MDPs that engage in the practice of law by banning fee sharing with a non-lawyer, is titled "Professional Independence of a Lawyer." 16 Similarly, MDP critics claim that fee sharing resulting when lawyers combine with non-lawyers is incompatible with lawyers' independence. 17 Nowhere in Rule 5.4, however, is there any definition of lawyers' "independence" or discussion of why it matters. MDP critics have done no better, contenting themselves with endless rote repetition of the importance of lawyers' independence without giving the term any content. 18

Who or what are lawyers independent from? Certainly not from clients. Lawyers are agents 19 and, like all agents, owe fiduciary duties to their principals. 20 Lawyers are also not independent in the sense that they frequently are employed in a subordinate capacity by organizations (i.e., in house corporate counsel, lawyers in law firms run by an executive committee, associates, etc.). Lawyers employed by MDPs would not seem to be any more or less "independent" than lawyers in these other relationships.

Lawyers, whatever their employment relationship, are expected to form opinions and make recommendations based on their expertise. Perhaps this expectation of independent judgment based on specialized knowledge and expertise is what independence means. This definition leads nowhere, however, because the same is true of all economic actors with expertise. Automobile mechanics, no less than lawyers, are hired with the expectation that they will use their specialized knowledge and judgment to form an "independent" opinion on the appropriate course of action. The automobile owner, like the lawyer's client, is then free to accept or reject the "independent" opinion offered.

Another possible definition of lawyers' independence is freedom from government regulation and control. The claim is not a general skepticism of government intervention into private ordering, but rather is based on the premise that there is something special about lawyers. 21 But what? Why should lawyers be treated differently from farmers, drug manufacturers, insurers, etc.? The claimed entitlement to be free from government regulation rings particularly hollow because the legal profession, like other interest groups, has been more than willing to use the government when it was in its economic self-interest to do so (i.e., to create and enforce entry barriers). 22 The problem then is not government regulation per se but only that regulation which does not further the economic self-interest of the profession.

One possible justification for treating lawyers differently from farmers and other groups, one that is particularly favored by the organized bar, is that law is a profession rather than a business. Even if true in the sense that the study of law requires extensive education and study (although, this can also be viewed as an entry barrier), so what? What difference does it make for whether a group should be subject to government regulation, let alone whether MDPs should be permitted, if law is viewed as a profession rather than a business?

According to the ABA, the term "professionalism" is an "elastic concept" which "refers to a group ... pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of a livelihood. Pursuit of the learned art in the spirit of public service is the primary purpose." 23 For others engaged in business or "mere trade," by contrast, economic gain and earning a livelihood, not public service, is the primary motivation. MDPs, with their overtly business character, may be viewed as making the legal profession...
more like a business and thus less likely to serve the public. As ABA President Jerome J. Shestack, who opposes MDPs, stated, "[t]he legal profession it's a matter of maintaining independence. 'This is something that infringes on the traditional values of the legal profession . . . I think the profession has served this country well and I don't want it reduced to a balance sheet.'"

There are many responses. One is that it's already too late. Law firms today, at least the larger firms in urban centers, are already run like businesses. Practices such as billable hours and revenue targets for lawyers, use of professional public relations and marketing firms to boost image, creation of equity and non-equity partnerships, and willingness to lay off lawyers including partners (raising the question of what it means to be a partner) are now commonplace. The bottom line focused nature of contemporary law firm practice is unlikely to change—if anything it is likely to intensify—regardless of what happens with MDPs.

Also, the notion that lawyers are somehow more virtuous and public minded than others is an obviously self-serving characterization without empirical support. In fact, conventional legal doctrine imposes greater public responsibilities on accountants, the principal organizers of MDPS, than on lawyers. Unlike the lawyer who is an "advocate . . . whose duty it is to present the client's case in the most favorable possible light," the accountant certifies a company's financial statements and thereby "assumes a public responsibility transcending any employment relationship with the client."

Nor is there any reason to believe that lawyers are more altruistic than other groups. Lawyers do many good deeds but so do others—is representing a convicted murderer trying to avoid the death penalty morally superior to merchants giving away food and clothing to the needy at Christmas?

There is even a more fundamental point. The key premise of the profession/business dichotomy is that pursuit of profit is easily distinguished from, and inferior to, dedication to public service. But this premise is problematic because, among other reasons, public service is nowhere defined. Does it mean employment in the public or non-profit sectors? How about working for reduced or no compensation? Probably neither of the above, because the profession's self-congratulatory description of itself is not limited to lawyers in these categories. Maybe the definition is purely one of motive—a desire to "help people" rather than make money regardless of how much money a lawyer in fact makes. This definition, however, even if only aspirational rather than operational, in no way distinguishes lawyers from those in other occupations. Nor, obviously, does it distinguish lawyers who work in MDPS from other lawyers.

But let us assume for the sake of argument that lawyers who are attracted to MDPS are more likely to be motivated by the prospect of economic gain and couldn't care less about public service. Once again, so what? Self-interested economic behavior in a market economy tends to further social welfare (abject externalities) by creating jobs and producing goods and services that consumers want to buy. Those who are successful in these activities also have the resources to engage in philanthropy and other charitable acts (as well as pay more taxes).

The same is true for lawyers, whether or not employed by MDPS. Lawyers should define their role in society by the value of what they do—enforce property and contract rights, resolve disputes, facilitate transactions which move assets to higher valued uses, and safeguard the rights of citizens against the state—on the purity of their hearts. One only has to look at the chaos in the former Soviet Union to appreciate how important a well-functioning legal system is to a civilized society.

Lawyers who are the most motivated by economic gain and career advancement will frequently also be the ones most willing to work the hardest and do the best job for clients. And if MDPS are more profitable than traditional law firms because they offer superior services to clients, this is also not a cause for concern. The opposite is true. It is precisely the prospect for economic gain that creates the incentive to innovate with organizational structures to better serve client demand.

In any event, no reason exists to assume that MDPS will make lawyers less interested in furthering the public interest (however, this is defined) than they are now MDPS. For example, will likely continue to support pro bono activities by lawyers. First, pro bono activities can be extremely lucrative and therefore attractive to profit maximizing firms? as well as for the profession as a whole. More generally, MDPS, like law firms, benefit

24. Terry & Houman Mahoney, supra note 15, at 11 (omission in original) (quoting John Gibeaut, Squires Play, ABA J. 42, 45 (Feb. 1990)).
25. United States v. Arthur Young & Co., 465 U.S. 805, 817 (1984) (italics omitted). There are limits to the attorney's duty to his or her client. For example, attorneys cannot defraud third parties, particularly courts, and cannot aid clients in the commission of a crime. However, lawyers are less able than other agents to disclose confidential information to protect third parties from harm. See generally Daniel F. Fischel, Lawyers and Confidentiality, 65 U. Chi. L. Rev. 1 (1998).
to the extent that pro bono activities help recruit and train lawyers, boost morale, and generate favorable publicity. Lawyers who want to pursue pro bono activities on their own time for idealistic reasons will still be able to do so.

There is one last possible definition of lawyers' independence that has been injected into the MDP debate, the idea of lawyers' autonomy. More specifically, critics have relied on claimed analogies to recent developments in the medical profession to argue that legitimizing MDPs would turn once proud lawyers into low level bureaucrats with no ability to control the quality of service:

"[T]he real world has already offered us a laboratory where you can learn just how fragile a value professional independence is and how assiduously we all must work to defend it. . . .

Look at our colleagues in the medical profession. A decade ago the rules on physicians working for non-physicians. Suddenly a flood of pseudo-prosperity opened up and a tidal wave of cash spread across the land, offering the docs thousands, even millions for their practices. . . . But where are the physicians today? Can you find a happy doc? Of course not and why would one expect to? Having sold out to Mammon they now find themselves acting as supplicants in endless phone calls with high school clerks who decide for the physicians which medicine to prescribe, which procedures to undertake and how soon their patients are thrown out of their hospital beds. If this is what happens to a vulnerable value -- professional independence -- when literally matters of life and death are on the line, can we expect a different result . . . ?"

The medical analogy is rhetorically effective, but fundamentally flawed. To the extent the point is that MDPs will prevent lawyers from offering high quality legal services -- analogous to physicians being unable to prevent their patients from being "thrown out" of hospital beds -- this is entirely a self-correcting problem. Clients will then simply look elsewhere when purchasing legal services. The debate about managed care is premised on the assumption that patients, either because of lack of resources or government regulation, frequently lack meaningful choice when making health related decisions. The same cannot be said for the purchasers of integrated financial services offered by MDPs. These clients are typically sophisticated repeat players sensitive to both the quality and cost of services provided. If MDPs do not meet their needs, other service providers will.

30. Id.
32. See Fox Written Remarks, supra note 12 ("[C]lient protection alone provides more than enough justification for our present regulatory framework.")
[C]lients are not aware of the fact that the service provided is incompetent, unethical or unauthorized. Do we not have an obligation, a responsibility to the public to bring attention to these matters and vigorously protect the public interest against what amounts at times to unscrupulous as well as illegal conduct? . ..

Our obligation to the public, to those we serve, must be fulfilled with effective, efficient and aggressive enforcement of violations of the unauthorized practice of law.33

The difficulty of defining "the practice of law," as discussed more fully below,34 makes this proposal impractical. But practical problems aside, the claim that the bar needs to protect clients from themselves—that without intervention from the legal profession, clients will hire service providers who are "incompetent" and "unethical"—is completely counterintuitive. Are clients too uninformed to make a rational choice? Are they being misled? Why are lawyers who have a self-interest in avoiding competition complaining on clients' behalf rather than the clients themselves? Unless there is some credible answer to these questions, it is impossible to characterize clients as victims of greater choice when hiring service providers.

But this client as victim scenario is particularly implausible in the MDP context. The clients fueling the current international boon in MDPs—typically general counsel of major corporate or commercial entities—are among the most sophisticated purchasers of legal services.35 These clients are experienced in hiring lawyers and monitoring performance. They are also repeat purchasers who comparison-shop among multiple service providers. If non-lawyers are members of teams that provide "legal services" it must be because their services are valued by these sophisticated clients.

The MDPs themselves are also monitors of performance. What incentive do these firms have to assign unqualified personnel to work on important projects? Such unqualified personnel will lower the quality, or at best increase the cost, of the services provided. Such a strategy could only lead to a loss of clients and business and thus will not be pursued. Rather, these firms have strong incentives to staff projects with personnel, whether lawyers or non-lawyers, that will deliver a high quality product. There is, in short, no problem that needs to be addressed. The need for customer protection in this market is non-existent.

Providing Legal and Auditing Services to the Same Client

MDPs have the potential to offer legal and auditing services to the same client, particularly if the client is a publicly traded corporation. Under current ethical rules, lawyers are required to advocate the client's position zealously and not disclose any information obtained without consent because of the attorney-client privilege. The firm's auditors, by contrast, are required to be "independent," meaning that they owe primary duties to the public and not the client. As such, they are required to exercise skepticism when dealing with the client's management and its lawyers. Several interesting questions are raised by these different ethical responsibilities played by lawyers and accountants. Will the higher fees paid by the client that uses one firm for auditing and legal services give the client too much leverage? In particular, will the MDP's auditors be less vigilant in investigating the accuracy of the client's financial statements because of fear that the client will leave, costing the firm both the auditing and legal fees?36 And does a conflict exist between the lawyer's duty of confidentiality and the auditor's duty to ferret out information whether favorable or not?

Analysis of these questions requires an understanding of the economic function of accountants as reputational intermediaries.37 Publicly held corporations (the type of firm that hires accountants to certify its publicly disseminated financial statements) are characterized by a separation of ownership from control more accurately, separation of the management from the risk-bearing functions. This separation allows investors to capture the benefits from efficient division of labor but subjects them to the risk that their funds will be used for managers' personal benefit. Investors have neither the expertise nor the incentive to monitor management misbehavior. Absent some check, rational investors will discount the price they are willing to pay for shares to compensate for this risk of managerial misbehavior.

To minimize the size of this discount, entrepreneurs who raise capital have strong incentives to establish institutional and monitoring arrangements that protect investors. Independent accountants are one such type of monitoring arrangement. By examining a company's financial state-

34. See infra note 63 and accompanying text. Despite the publicity about the delivery of legal services by accounting firms and other integrated firms, regulators have thus far been unwilling to challenge the practices as engaging in the unauthorized practice of law. In 1998, for example, the Unauthorized Practice of Law Committee of the Texas Supreme Court announced that it would not file a complaint against Arthur Andersen & Co. after an eleven-month investigation. See Arthur S. Hayes, Accountants v. Lawyers: Is the Line Clear?, NAT. L.J., Aug. 10, 1998, at A4.
35. Of course, not all MDPs are legal global organizations and not all clients of MDPs are sophisticated corporate entities. MDPs may consist, for example, of affiliations between finance or estate planning lawyers with financial planners to provide superior services to individual clients. But here too clients benefit when non-lawyers are allowed to aid in the delivery of "legal" services. See Deborah L. Rhode, The Delivery of Legal Services by Non-Lawyers, 4 GEO. J. LEGAL ETHICS 209, 214-16 (1999).
36. The U.S. Securities and Exchange Commission (SEC) has taken the position that in its view the role of auditor and lawyer are incompaitable under federal securities law. The Commission on Multidisciplinary Practice has now reevaluated this same position. See Updated Report, supra note 14, pt. 2(9).
ments and opining on whether management's representations are accurate, accountants deter fraud and minimize the need for ill-equipped investors to engage in costly monitoring activities. As a result, investors are willing to pay a higher price for shares of companies that hire independent accountants. The better the accounting firm's reputation for independence, the higher the price that investors are willing to pay. This explains why public companies voluntarily hired independent accountants long before the securities laws were enacted. 38

But now suppose a client wants to misrepresent its financial condition and tells its accountant, in effect, to go along or lose the business. Arguably, this threat is more credible with MDPs because the business lost potentially includes foregone legal as well as audit fees. A firm faced with a threat of loss of business unless it cooperates with a fraudulent scheme must balance the short-term loss of revenues if it refuses to go along, against the long-term damage to its reputation (and other costs such as lawsuits and penalties) if it participates in the scheme. This, in turn, depends on the importance of the wrongdoer client to the MDP's current and expected future revenue base. That the client has the potential to withdraw legal and accounting fees means the numerator in the above comparison is greater. But the fact that the MDP offers both types of services (among others) means that the denominator is greater also because the firm is larger. And the larger the firm, the lower its incentive to compromise its reputation for independence on behalf of any individual client and risk losing its other existing and future clients.

Still, the question may fairly be asked why a client with self-interest in choosing an independent accounting firm would ever purchase legal services from the same firm. By purchasing accounting and legal services from different firms, clients could get the benefit of a stronger reputational bond offered by a larger firm while avoiding any inference that purchase of multiple services from the same firm compromised independence.

Some clients might still want to hire a single firm. Lawyers, like accountants, are reputational intermediaries. Both benefit from reputations for honesty and integrity. Sometimes this reputation is more valuable to a lawyer than skill as a vigorous advocate and partisan. For example, a client that needs to convince a regulatory agency not to take an adverse action may prefer to hire a lawyer from a firm with a reputation for "independence" to make its position more credible. The client in this situation has an economic self-interest in purchasing legal services from a firm with a reputation for independence that is no different from its incentive to hire an independent accountant. 39

38. See Ross L. Watts & Jerold L. Zimmerman, Agency Problems, Auditing, and the Theory of the Firm: Some Evidence, 26 J.L. & Econ. 613, 615 (1983) (analyzing qualitative evidence and concluding that the existence of independent auditors was not the result of regulatory requirements). 39. For an elaboration of this argument that the economic function of lawyers and accountants is more similar than commonly assumed, see Daniel R. Fischel, Lawyers and Confidentiality, 65 U. Chi. L. Rev. 1, 17-21 (1998).

But presumably there is more than one firm with a reputation for independence so this still does not explain why a client would want to hire a single firm to provide both legal and auditing services. One reason to do so is to capture the benefits from purchasing different types of financial services from a single integrated firm. MDPs are premised on the assumption that different service providers within a single firm can share information about clients' needs and coordinate possible strategies more efficiently than if the same services are purchased from multiple firms. It is possible, in other words, that a firm which purchases audit and legal services from an MDP might receive superior services in both areas (or equivalent services at lower cost) than would have occurred if the same services were purchased from different firms. Clients might well conclude that these efficiency gains outweigh any losses from questions about independence. But if the efficiency gains are small or non-existent, clients may prefer to purchase accounting and legal services from different firms even if single firms offer both services.

A market test of the effect of combining audit with other services already exists. In recent years, accounting firms have diversified into multiple lines of business other than auditing and have developed large consulting practices. Clients in need of auditing and consulting services face the same trade-off of potential efficiency gains with losses from compromised independence when deciding to transact with one firm or multiple firms. 40

That this trade-off exists, or that different clients may reach different decisions based on their particular needs, however, has not prevented accounting firms from offering both services.

No reason exists why legal services can not be added to the mix. One possible complication is the attorney-client privilege. This privilege gives clients an absolute right that information communicated to their lawyers will not be disclosed without their consent. MDPs will not protect this fundamental right, critics argue, because of the alleged conflict between the lawyer's duty to maintain confidentiality and the auditor's duty to ensure accurate public disclosure of material information. 41

40. The impact of providing consulting services on auditor independence has been discussed extensively. See, e.g., U.S. GENERAL ACCOUNTING OFFICE, THE ACCOUNTING PROFESSION: MAJOR ISSUES, PROGRESS, AND CONCERNS 44-62 (Sept. 1996) (documenting studies and concluding that some of these studies reported any combined evidence of diminished audit quality or harm to the public interest, or any actual impairment of auditor independence, as a consequence of public accounting firms providing advisory or consulting services to their audit clients). Nevertheless, the SEC is pursuing accounting firms to separate their auditing from their consulting businesses. See, e.g., Elizabeth M. Dowd, Poor Huthwaite Cooper's Hill Tumbles into2 Given More Power Under Revisions, WALL ST. J., Feb. 10, 2000, at B10.

41. See Fox, Written Remarks, supra note 12.
This argument is unconvincing. Auditors routinely seek information from clients and their lawyers when deciding whether to certify financial statements. Clients and lawyers must decide whether to provide the information requested or refuse based on the attorney-client privilege. If privilege is invoked, the auditor has to decide the consequences of refusing to provide the requested information. The auditor might, for example, qualify its opinion or even resign in extreme cases if the information requested is highly material and not available from another source. This interaction can occur whether or not the lawyers or auditors are in the same firm. In fact, it occurs already in accounting firms because of the recently enacted tax preparation privilege for accountants. This new privilege requires accounting firms to create procedures to preserve confidentiality while performing their audit functions.

But perhaps this is wrong and the retention of MDPs will make it harder for clients to invoke the attorney-client privilege successfully, perhaps because sharing of information within the firm for other purposes creates a risk that the privilege will be waived. Faced with the realization that it will be harder to keep information secret from auditors, some clients may decide not to purchase legal and auditing services from the same MDP. But other clients, particularly those with nothing to hide, might reach exactly the opposite conclusion when faced with the same realization.

Recall that clients have strong incentives to choose independent accountants to minimize the discount that investors will charge as compensation for management misbehaviors. The value of accountants as reputational intermediaries depends, however, on the accountants having access to relevant information about the firm and its finances. If privilege is invoked, and this is disclosed, investors will rationally conclude that negative information is being withheld because the firm has something to hide. Why else withhold the information?

Thus, the claim that clients will be harmed by MDPs because the attorney-client privilege will more likely be breached may well be backwards. Firms who want to communicate credibly to the market that they have nothing to hide might choose MDPs for this reason. By doing so, such firms would have a comparative advantage in attracting capital because investors would have greater confidence that the firm's financial statements accurately reflected its true financial condition.

**FIRM SIZE AND THE IMPUTED CONFLICT RULE**

Law firm size is limited by governing ethical rules on conflicts of interest. A lawyer may not simultaneously represent a client and a second client with an adverse interest to the first even if the two matters are completely unrelated. But may another lawyer in the same firm represent the second client? The general answer is no. Law firms are governed by a rule of imputed disqualification: the law firm is disqualified from representing a client if any lawyer in the firm is disqualified from representing the client. Whether any confidential information obtained from the first client is shared with the second client or its lawyers is irrelevant. So is location, subject matter, or connection to the case. This rule of imputed disqualification can have draconian effects. Say, for example, a junior partner in a law firm's Los Angeles office accepts a small matter for a minor subsidiary of a major corporation. The next day a different client attempts to hire the law firm's Washington office in a completely unrelated matter against the subsidiary's parent corporation. The rule of imputed disqualification prevents the law firm from accepting the second engagement.

Accounting firms, by contrast, are not governed by a rule of imputed disqualification. Such a rule would have prevented the Big Five accounting firms from growing to their present size. Accounting firms rely on structural separation and Chinese walls to protect clients with adverse interests rather than on broad rules of disqualification.

The Commission on Multidisciplinary Practice recommended in its report that MDPs be authorized but that the rule of imputed disqualification be retained and extended:

With respect to an MDP, imputed disqualification of a lawyer applies if the conflict in regard to the legal services the lawyer is providing is with any client of the MDP, not just a client of a legal services division of the MDP or of an individual lawyer member of the MDP.

The MDP is disqualified from providing legal representation to a client, in other words, if any client of the MDP, not just a legal client, has an adverse interest. Such a rule, if ultimately adopted, would severely curtail the ability of MDPs to offer integrated financial and legal services.

One caveat: the conflicts rule might not matter at all if the parties can contract for a different rule. MDPs might attempt to contract around the imputed disqualification, for example, by requiring clients to waive the rule as a condition for accepting the engagement. The difficulty

43. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1999).
44. See id. Rule 1.10. There are separate rules for government lawyers who move from the government into the private sector. See id. Rule 1.11.
45. See Fox Written Remarks, supra note 12.
is that such blanket waivers may not be enforceable. Attempts to secure waivers from the first client when the second client becomes known are also problematic. The first client in this situation has strong incentives to behave opportunistically and withhold consent. Side-payments are possible but the bargaining game in a bilaterial monopoly may not produce the right outcome and will waste resources at a minimum. Thus, the ability of parties to contract cannot be relied upon to produce the efficient result regardless of the rule.

So the choice of rule matters and a strong argument can be made that the imputed disqualification is obsolete and should be discarded. The rule arose at a time when law firms tended to be much smaller and confined to one or two geographical areas. Perhaps it made sense in this context to impute the knowledge of one lawyer to all the lawyers in a firm. But the imputed conflict rule is much costlier in a world where many law firms are large organizations with offices around the world. The rule is also a major barrier to mobility. A lawyer's ability to move from one firm to another is significantly affected by whether the lawyer's conflicts from his previous firm are imputed to the new firm.

The rule should be discarded altogether. MDPs (and law firms) could then grow to their efficient size unimpeded by the rule. Clients would be protected from information sharing by Chinese walls and structural separation as currently occurs in accounting, consulting, banking and other firms. Of course, Chinese walls may not work perfectly and the risk that information obtained from one client will be shared with another client with an adverse interest is not zero.

But there are several reasons not to be overly concerned about this possibility. First, firms have strong reputational incentives to set up internal monitoring systems to protect against information sharing. This probably explains why Chinese Walls appear to have worked well in those situations such as those involving former government employees joining law firms.

48. See Fox, Written Remarks, supra note 12 (“A lawyer's [sic] duty of confidentiality is not waivable for the benefit of the lawyer and, even if it were, a prospective waiver would be void since by definition it could never be known and intelligent.”); see also Nathan M. Crystal, Disqualification of Counsel for Unrelated Matter Conflicts of Interest, 4 GEO. J. LEGAL ETHICS 273, 306-07 (1990) (criticizing a form for a blanket prospective waiver recommended by the Attorneys' Liability Assurance Society (ALAS)). Some have argued that prospective waivers should be enforceable. See Letter from Drafting Group on Waivers of Future Conflicts, Ad Hoc Committee on Ethics 2000, ABA Section of Business Law to ABA Commission on the Evaluation of the Rules of Professional Conduct (Sept. 15, 1999) (on file with The Business Lawyer, University of Maryland School of Law). The letter states:

Such uncertainty at the time lawyers and their clients are attempting to establish the terms of their relationship serves no one and impedes their ability to enter into agreements for the rendering of legal services. Moreover, uncertainty concerning the validity of prospective waivers can prejudice other clients of the lawyer, depriving them of legal services they expect to receive and their lawyer expects to be able to render.

where the risk of information sharing already exists. Second, the concern about information sharing is probably exaggerated. Information about business plans and strategies, for example, often depreciates rapidly and is frequently available from other sources in any event (such as through discovery in litigation or from former employees of the client). Finally, any client who is still concerned and distrusts Chinese Walls always can contract with the MDP to limit its ability to take on other clients with an adverse interest. If there is sufficient client demand for this view, some MDPs might voluntarily adopt the imputation rule to attract business. That no accounting or other service provider with access to confidential information from clients appears to have followed this course suggests, however, that client demand for the imputation rule is minimal.

MDPs AND PUBLIC OWNERSHIP

The Commission on Multidisciplinary Practice recommended that lawyers be allowed to share fees with non-lawyers in an MDP but stopped short of authorizing public ownership. If the Commission's proposals were adopted, "[p]ublic 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 ownership of an MDP for investment or other purposes." Under the Commission's proposals, in other words, MDPs would not be permitted to raise capital by selling equity claims to the public or to private investors such as venture capitalists. The question arises whether any basis exists for so limiting MDPs' ability to raise capital.

Recent developments have highlighted the importance of this question. For many years, the conventional wisdom was that personal service firms like law firms were unsuitable for going public so the regulatory prohibition on non-lawyer ownership made no difference. Investors were assumed to be unwilling to invest in personal service firms whose value was based on the specific human capital of individuals such as the primary rainmakers who could leave at any time. At the same time, law firms operated on a relatively small scale and had no need to raise capital from accessing equity markets. In recent years, however, numerous economic consulting and investment banking firms have successfully gone public thus challenging the conventional wisdom about personal service firms. And law firms have grown dramatically in size and revenues, making the prospect of accessing equity markets a more realistic possibility.

MDPs, because they would have the potential to operate on an even larger scale, would make this prospect greater still. MDPs could raise eq-

49. See Model Rules of Professional Conduct Rule 1.11
50. ABA Final Report, supra note 13 (quoting from the section titled "Professional Independence of Judge").
51. Id.
utility capital to acquire other professional service firms (including law firms), to invest in new technologies or computer systems, or for working capital to finance expansion into new product lines or geographical areas.

No reason exists why MDPs (or law firms) should be precluded from raising equity capital. Such a proposal would, to be sure, raise the same host of arguments that have been raised against MDPs generally that equity ownership would make law a business and not a profession because lawyers would be accountable to shareholders whose principal concern is maximizing return on their investment rather than preserving lawyers' independence, etc.57. Once again, so what? Return on equity will be maximized when MDP service providers work hard, operate efficiently, and develop a reputation for serving their clients. If equity ownership creates incentives to further these objectives, so much the better.

To say that MDPs should be allowed to sell equity claims to passive investors does not mean, of course, that they all will do so. The public form of firm organization involves costs, both direct and indirect, as well as benefits and thus will not be optimal for every firm. The point is simply that this decision should be made by the firm and its investors free of misguided ethical prohibitions.

There is one subtle issue. One of the purposes that capital might be raised to finance litigation. Currently, litigation is financed principally by clients or by lawyers using contingency fee arrangements. Opening equity markets to MDPs and law firms creates an alternative mechanism for financing litigation. This may make the litigation credit market more competitive to the benefit of litigants (equity investors, for example, may accept less than the standard thirty-three percent contingency fee arrangement plus expenses charged by plaintiffs' lawyers). But it may also decrease the cost and thus increase the amount of litigation, which might not be socially desirable.58

There exists an analogy here to the common law rule against champerty, now in decline, which prohibits the sale of claims to finance litigation.59 This common law rule, like the prohibition of equity claims on law firms, can be understood as intended to minimize wasteful litigation. The problem with these rules, however, is that there is no theory of the optimal amount of litigation. And even if the conclusion that the amount of litigation is socially excessive is assumed, the better approach is to attack this problem directly by changing substantive or procedural rules, or by requiring parties to bear the full costs of using the legal system. Particularly now that the validity of contingency fee arrangements is firmly established, there is little logic in denying litigants the benefits of a more competitive credit market in financing litigation.

MULTIDISCIPLINARY PRACTICE AND THE STRUCTURE OF THE LEGAL PROFESION

For much of the twentieth century, the practice of law was a restricted profession organized as a cartel.55 Entry was restricted by the requirement that candidates attend an accredited law school and pass a state bar examination. Competition within the bar was limited by the canons of ethics.56 Advertising was banned; minimum fee schedules were adopted and enforced. Conflict of interest rules operated to limit the size of individual firms ensuring that legal work would be doled out among multiple firms. Unauthorized practice of law rules prevented non-lawyers from competing with lawyers by offering similar services at lower cost. And the prohibition against fee sharing protected lawyers from competition by prohibiting lawyers from expanding output by combining with non-lawyers.

But cartels are notoriously unstable because of the incentives members have to cheat by expanding output and lowering prices. Events in the past several decades have destabilized the cartel by simultaneously increasing the incentive to cheat and decreasing the ability of the profession to police cheating. Increased regulation of the economy (perhaps caused in part by lawyers attempting to increase the demand for their services),57 a robust

55. See e.g., Posner, supra note 28, ch. 1 (describing the legal profession in the United States for much of the twentieth century as an "intricately and ingeniously regulated cartel" that has "weakened since the 1960s").


57. Richard Posner rejects the popular belief that "lawyers create their own demand," Posner, supra note 28, at 65, but others support the idea. See, e.g., Paul H. Rubin & Martin J. Bailey, The Role of Lawyers in Changing the Law, 23 J. LEGAL STUD. 807, 807 (1993) (arguing that "the law is driven by the preferences of lawyers, not of litigants or of judges"); Peter H. Schuck, Legal Complexity: Some Causes, Consequences, and Cures, 42 DUKE L.J. 1, 26-30 (1992) (arguing that law has become more complex because, among other reasons, lawyers tend to benefit from complexity).

58. See generally Steven Shavell, The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System, 26 J. LEGAL STUD. 575 (1997) (discussing the possibility that socially beneficial litigation may be brought if the private costs of that litigation are too great). Equity financing will not necessarily increase the amount of litigation because defendants too will have access to additional sources of financing. Some plaintiffs may be deterred from bringing suit as a result.

economy and an unprecedented increase in the number and size of both
domestic and international transactions, and a comparable increase in the
volume and scope of litigation have all increased the demand for, and
the resulting supply of, lawyers. These developments have also increased
the demand for large firms with broad geographic coverage at the same
time that advances in information technology have lowered the costs of
communication from different physical locations. Law firms have ex-

60. For an empirical analysis of the dramatic increase in the number of lawyers, see

is commercial speech entitled to First Amendment protection); Goldfarb v. Virginia State
Bar, 421 U.S. 773, 791-93 (1975) (minimum fee schedules invalidated under antitrust law).

62. See generally Deborah L. Rhode, The Delivery of Legal Services by Non-Lawyers, 4 GEO. J.
LEGAL ETHICS 209 (1990) (describing the history and demise of unauthorized practice re-
strictions).

63. See Pozner, supra note 20, at 63-64 ("Although the profession has not been thrown
open to free entry, an accelerating accumulation of legal and especially economic changes
over the past three decades has transformed the profession in the direction of competitive
enterprise.").

64. See Background Paper, supra note 1, pt. I (describing and collecting studies on how
accounting firms in many foreign countries can offer legal services directly to clients which
would be prohibited in the United States).

term and the definitions that exist are typically circular and self-referring
i.e., the practice of law is defined as what lawyers typically do.
In reality, there are no bright line distinctions distinguishing what lawyers
and non-lawyers do other than perhaps advocacy in court. This creates obvious
enforcement problems, particularly given the general lack of enthusiasm
for enforcing unauthorized practice prohibitions. As a result, firms are
becoming increasingly brazen in flouting the prohibition on fee sharing to
meet client demand.

The interest group dynamic within the profession has changed as a
result. Traditionally, lawyers benefited from the prohibition on fee sharing
because it restricted competition. But the ban imposes costs as well, be-
cause it has limited lawyers' ability to share in the gains from participating
in integrated financial firms. Whether the profession as a whole still ben-
efits from the prohibition on fee sharing in light of recent developments
discussed above is unclear. This question is made more complicated by
conflicts within the profession itself. Tax lawyers, for example, are in the
most demand by large accounting firms and have the most to gain by
repeal of the prohibition. Large law firms will also likely benefit from
repeal. These are the firms losing their leading tax partners and other
rainmakers to the accounting firms. These firms too are losing business
from clients involved in large-scale international transactions to the big
five accounting firms, and other MDPS. Some of these firms might be-
come attractive takeover candidates without the prohibition (with the re-
resulting ability to sell at large premia) because of their client relationships
and subject matter expertise. Alternatively, large law firms could them-
selves become MDPS by diversifying into ancillary businesses. Going
public would also be an option for these firms regardless of what strategy
they pursue.

Smaller law firms, however, appear to have less to gain from repeal of
the MDPS ban. They are less likely to have the client base or specialized
skills that other firms will be willing to pay to acquire. For the same reason,
they are more vulnerable to price competition because their work product
is more homogenous and fungible. For these firms, the status quo may seem preferable even if evasion of the MDP prohibition continues unabated. Any reduction in competition for these firms may seem better than nothing.

This view incorrectly assumes, however, that smaller firms have nothing to gain from multidisciplinary practice. As the accounting and legal professions become more concentrated, there will likely be niche opportunities created for smaller firms. This is exactly what has occurred in other fields such as banking, which are evolving toward a two-tiered system in which nationwide and regional banks co-exist with smaller local banks.66 If parallel two-tier system evolves in law, elimination of the prohibition against fee sharing may help smaller firms and solo practitioners attract clients by providing integrated services.67

Not everyone shares this view. Indeed, one of the consistent themes of multidisciplinary practice opponents is the adverse effect of increased competition on solo practitioners and lawyers in mid-sized firms. Typical is the following statement to opposing an earlier attempt to amend Rule 5.4 and authorize fee sharing made ABA delegates:

You each have a constituency. How will you explain to the sole practitioner who finds himself in competition with Sears why you voted for this? How will you explain to the man in the mid-size firm who is being put out of business by the big . . . [accounting] firms? How will you explain that?68

At least the speaker should be commended for candor. There is usually at least a pretense of using public interest rhetoric when making protectionist arguments. Not so here. What is left unsaid, however, is why lawyers will be unable to compete with MDPs.

That MDPs might be able to offer clients a superior product at lower cost is the most obvious competitive threat. A firm with lawyers, accountants, tax specialists, and financial planners might be more attractive to clients involved in divorce, estate planning, or the sale of a family business than contracting with each of these professionals separately. The same is true for firms with other combinations of professionals such as litigators and mediators, transaction lawyers and valuation experts, labor attorneys and employee benefits consultants and countless others. If law firms cannot compete because MDPs offer a superior product, then the law firms' position is exactly analogous to horse and buggy manufacturers faced with the invention of the automobile. They should either adapt or go out of business. Protectionist arguments by lawyers to avoid, or more realistically, delay this choice should be understood for what they are: self-serving claims inimical to clients' welfare and reverse indicators of desirable social policy.

There are other possible explanations for lawyers' fear of competition, but none withstand analysis. Perhaps the concern is that MDPs will use their market presence to steer clients to their own legal or other departments even if unqualified law firms are more qualified. But this concern about providing bad advice to maximize business (in the short run) is in no way unique to MDPs.69 A law firm corporate department, for example, could deliberately provide poor advice to a corporate client to increase the likelihood that the client will require the services of the firm's litigation department. Or in the hope of eventually increasing the group's surgical business, a group medical practice could refuse to inform patients of a simple preventive measure.70

This incentive to provide misleading information is minimized because a firm's reputation is a critical asset that controls the firm's long-term viability and business prospects. A firm that misleads its clients in an attempt to drum up business will quickly find itself with a tarnished reputation and sharply reduced prospects. This is as true for MDPs as for other types of firms.

In fact, MDPs are less likely to mislead clients than smaller, non-integrated service providers. As discussed above, the larger size of MDPs suggests that they will be more vigilant in monitoring acts that damage reputations, such as providing misleading advice to clients.71 Also, because MDPs offer integrated services, they have greater incentive to provide clients with unbiased advice regarding what services they need. Law firms and other single service providers, by contrast, have incentives to promote what they are selling (subject to the reputational check discussed above) even if other services would be superior.

Other possible explanations for the competitive advantage of MDPs such as that MDPs will engage in predatory pricing to drive law firms out of business or tying arrangements where the MDP's clients in other areas would be forced to use the firm's legal department are even more implausible. The literature on predatory pricing and tie-in sales is vast, and the author makes no attempt to discuss this here.72 Suffice it to say that both practices can occur under extremely limited circumstances such as where sellers have substantial market power and entry is extremely difficult. No

68. Adams & Matheux, supra note 11, at 10 n.40.
69. See Daniel R. Fischel et al., The Regulation of Banks and Bank Holding Companies, 73 Va. L. Rev. 301, 323-326 (1987), for a similar discussion of biased advice in the context of financial institutions offering multiple product lines.
70. Id. at 325.
71. See infra notes 37-38 and accompanying text.
claim has been made that the market for professional services satisfies these conditions. Predation and tying arrangements, which are illegal in any event under the antitrust laws, cannot explain the purported competitive advantages of MDPs.

CONCLUSION

The legal profession should welcome MDPs as creating new career and economic opportunities for its members. Instead, the ABA and other organized bar groups thus far have taken the opposite approach, capitulating to interest group pressure from those segments of the profession covering at the prospect of increased competition from other service providers. Although defenders of the ban on fee sharing have attempted to cloak their arguments in the rhetoric of “professionalism,” “lawyer’s independence,” and the “public interest,” their goals are no different from any other trade union or interest group pursuing economic protectionism.

How successful the ABA and the organized bar will be in the long run is less clear. MDPs that provide legal services will continue to proliferate in both other countries where the practice is permitted and in the United States by firms evading the prohibition on fee sharing so long as clients demand one-stop shopping from integrated service providers. If this occurs, current “ethical” rules will provide less and less protection from competition and interest group support for the status quo will continue to wane and will eventually collapse. As the recent repeal of the Glass Steagall Act—a another type of multidisciplinary practice restriction which attempted to separate “banking” from “commerce”—demonstrates, regulation can override market forces for only so long. The ban on fee sharing will likely suffer the same fate, the sooner the better.

U.S. Securities Fraud Across the Border: Unpredictable Jurisdiction

By Lewis D. Lowenfels and Alan R. Bromberg*

INTRODUCTION AND BACKGROUND

We live in an increasingly global financial community. In recent years transactions involving securities often extend across national borders. Under these circumstances, parties who view themselves as defrauded in connection with securities transactions that are predominantly extraterritorial in nature, but have some connection to the United States, may attempt to seek redress in U.S. courts usually under the broad antifraud provisions of section 10(b) of the Securities Exchange Act of 1934 (Exchange Act or 1934 Act)* and U.S. Securities and Exchange Commission (SEC) Rule 10b-5 promulgated thereunder. Parties seeking such redress must first

* Lewis D. Lowenfels, A.B., Harvard University; J.D., Harvard University, is a partner in the New York law firm of Tolias & Lowenfels; Public Governor of the American Stock Exchange 1993-1998; Adjunct Professor of Law, Seton Hall University School of Law; co-author with Alan R. Bromberg of Securities Fraud and Commodities Fraud (1999), a six-volume treatise published by West Group.

Alan R. Bromberg, A.B., Harvard University; J.D., Yale University, is a University Distinguished Professor of Law, Southern Methodist University; counsel, Jenkins & Gilchrist, a Professional Corporation; co-author with Lewis D. Lowenfels of Securities Fraud and Commodities Fraud (1999), a six-volume treatise published by West Group.

1. Exchange Act § 10 (b) provides:

   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange

   (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.


2. Rule 10b-5, first promulgated in 1932, now provides:

   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
Dan's World: A Free Enterprise Dream; An Ethics Nightmare

By Lawrence J. Fox*

The great Section of Business Law asking me—a mere trial lawyer—to respond to the legendary Dean Dan Fischel of that bastion of economics over law—the University of Chicago School of Multidisciplinary Practice—was an invitation too delicious to resist. Could I articulate the arguments why we as a legal profession must not succumb to the forces of economic hegemony—after economics as destiny was so persuasively presented in the May issue of this Journal by Dean Fischel? That is a question only you, gentle reader, can answer. But to observe that I enjoyed the challenge vastly understates my delight in putting this response together.

Dean Fischel taught us in the May issue of this Journal that the marketplace yields far better results for our clients than any regulatory arrangement we lawyers can construct, that mandatory principles of professional independence, conflicts of interest, confidentiality, and even professional licensure were unnecessary in a world where free enterprise was permitted to flourish, that multidisciplinary practice was an idea whose time had come and that rather than cling to our outdated ethical rules, such as Rule 5.4 which prohibits sharing legal fees with non-lawyers,

*Partner, Drinker Biddle & Reath; Member, ABA Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000); Chair, ABA Death Penalty Representation Project; Former Chair, ABA Section of Litigation; Former Chair, ABA Standing Committee on Ethics and Professional Responsibility. Professors Susan Martyn of the University of Toledo School of Law and Jonathan Macey of Cornell Law School, without endorsing any of the views of the author, were kind enough to review this paper, and provide astute editorial comments for which I am grateful.

1. Though one does oppose Dean Fischel with some trepidation. See Karen Donovan, Milberg Weiss' $50M Mistake. Nat'l L. J., Apr. 26, 1999, at A1 (describing how the law firm, rather than risk an outsized punitive damage award, settled with Dean Fischel for $5,000,000 more than the initial verdict in Fischel's lawsuit against Milberg Weiss alleging abuse of process).

2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1998). Rule 5.4, Professional Independence of a Lawyer, states in part:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money over a reasonable period of time after the lawyer's death, to the
as a transparent subterfuge for maintaining our professional monopoly, we lawyers should embrace the new model in which anyone can offer legal services on any terms, and the clients will vote with their pocketbooks.

The brashness of Dean Fischel's approach left me weak of knee, my forehead beaded with perspiration, palpitations interrupting my ability to think straight. But then I recovered, recalling my commitment to the ideas that lawyers are not just another set of service providers, that what separates us from a world of auditors, investment bankers, and insurance salesmen is our commitment to a higher set of values, that placing lawyers in alternative practice settings in which they were mere employees or even partners of others would destroy the bulwark that has been our profession's best defense against the compromise of these values, that the laboratory of the Big 5 has demonstrated, better than any chalkboard economic calculations, how the principles Dean Fischel celebrates are destructive of the protections we offer our clients, and that if the Big 5 reflected the alternative universe which Dean Fischel considers the ideal, we should collectively pray our profession is not forced to travel there.

ACCOUNTING STORIES

PRICEWATERHOUSECOOPERS' INDEPENDENCE

My response does not start with lawyering at all. Rather I invite you into the boardroom of the closed end investment companies for which I have served for a decade as an independent director. It is early February 2000. On the agenda is the question whether we will recommend the retention of PricewaterhouseCoopers to be the independent auditors of the funds. The PricewaterhouseCoopers' slick written presentation was sent weeks before the meeting; it is annotated through an in-person appearance by the partner in charge who walks us through the information. After a discussion of audit scope, audit personnel, and audit fees, we arrive at the question of PricewaterhouseCoopers' independence. In the written materials is a disclosure of all ties between PricewaterhouseCoopers and our fund's adviser. While principles of confidentiality prevent me from sharing the details of this presentation, suffice it to say that PricewaterhouseCoopers had a multimillion dollar consulting contract, two engagements in connection with proposed transactions whose fees, in the millions, may double with the result (as we used to say in the old days, you
could live on the difference), and other financial relationships with an affiliate of our adviser that were in the millions.

Our reliance as independent directors upon PricewaterhouseCoopers for audit services is profound. Our closed end funds hold many securities with a thin or no market. Every day those securities must be fair valued so that the world knows our funds’ net asset value, and therefore the true discount or premium at which our closed end shares trade. That work is done conscientiously by our adviser and others; but knowing that independent auditors, with no axe to grind, come in annually to review our internal controls, income statement, and balance sheet gives the investing public and us directors great confidence in the integrity of our operation. With our annual audit fees of less than $40,000, however, could PricewaterhouseCoopers be considered independent given its involvement with our adviser and its affiliates?

I asked our lawyer, who wondered the same thing. Nonetheless, I was informed that even if we were inclined not to approve PricewaterhouseCoopers as our independent auditor, we would accomplish nothing because the other four Big 5 firms would reflect similar intertwining with our adviser. In other words, so long as we wanted to be audited by a Big 5 firm (an absolute necessity in a world in which only these behemoths can provide the generally accepted “Good Housekeeping” seal of approval) we had no real alternative. With only five choices, sometimes you have no choice at all.

PRIC WaterhouseCOOPERS’ INFRACTIONS

The same meeting produced a second story line. The PricewaterhouseCoopers’ engagement partner in charge was required to discuss that firm’s recent difficulties with the Securities and Exchange Commission (SEC) relating to firm partners, employees, and their relatives owning shares in companies PricewaterhouseCoopers audits. A press release from the SEC had announced that half the partners of PricewaterhouseCoopers, including 31 top executives, had violated the auditor independence rules that prohibit investment in audit clients of the firm. The SEC found “‘widespread’ noncompliance, which reflects ‘serious structural and cultural problems in the firm.’” The statistics regarding the PricewaterhouseCoopers’ violations were just staggering. A total of 1885 staffers committed a total of 8064 violations, “owning investments in 2,159 of the firm’s 3,170 SEC-registrant corporate audit clients—including almost half of all partners and 6 of the 11 senior managers who oversee the firm’s

independence program."4 The SEC suggested that 52 companies hire another firm to replace PricewaterhouseCoopers.5

While the public response from the offending firm had been alternatively dismissive ("the vast majority of [the] infractions resulted from an honest failure to appreciate the importance of compliance. Failure to check restricted investments, and a 'lack of understanding of the intricacies of the rules'");6 defensive ("[a]t no time was the integrity of our audits compromised");7 and apologetic (we are making "sweeping changes to our processes"),8 our partner was clearly embarrassed that these transgressions had taken place. Forced to confront us—his clients—his remarks reflected remorse, regret, and renewed determination that PricewaterhouseCoopers was taking all the necessary steps to assure it did not happen again. I felt sorry that because of the conduct of his colleagues our PricewaterhouseCoopers partner was placed in this awkward position to have to apologize to us.

But, whatever comfort I took from that presentation quickly disappeared when I learned that while PricewaterhouseCoopers might be acting contrite, anonymous leaders of the accounting business were reacting to the SEC action against one of the colleague firms by attacking the regulations themselves as outmoded, antiquated, and annoying. The growth of the Big 5 firms, it was argued, made it ridiculous to imagine that it was important that everyone at a Big 5 firm (and their families) avoid owning shares in clients the firm audited. It was quite enough, went the litany, that those directly involved in the audit refrained from owning shares in the audited company, and that the famous accounting firm "firewalls" would safeguard independence.9 Instead of prosecuting PricewaterhouseCoopers for its violations, these accounting industry spokespersons asserted, the SEC should be examining its regulations and revising them to comport with the reality of the modern world.10

In recent months, one of these individuals finally was willing to be quoted for attribution on this explosive topic. In going public, Stephen Butler, Chairman of KPMG, threw down the gauntlet. "What I see is [Arthur] Levitt, [Chairman of the SEC] waking up to the realization that these rules are outdated . . . . You can pound people for technical viola-

6. See MacDonald & Schroeder, supra note 3, at A3 (quoting a confidential letter to staffers from PricewaterhouseCoopers' Chairman, Nicholas Moore, and Chief Executive Officer, James Schiro).
7. Id. (quoting Kenton Sicchitano. PricewaterhouseCoopers' global managing partner of regulatory and independence issues).
8. Id.
9. See discussion infra at 1558.
10. See MacDonald & Schroeder, supra note 3, at A3.
tions, but there will be a backlash if these rules are not fixed quickly. What Mr. Bulter means by a “backlash” was not made clear.

In other words, just like the way the accountants wish to repeal the legal profession’s imputation rules governing conflicts of interest (“if we impute conflicts beyond the individuals working on the engagement we’d have to turn down so much business”), which is the legal profession’s core value governing loyalty, they also hope to repeal the rules governing the independence of their own profession so that no one will look askance at the millions in non-audit services they are billing their audit clients, and everyone will be comfortable with accountants and their families investing in companies their firms audit.

**PRICEWATERHOUSECOOPERS’ BREAK-UP**

The third story line discredits one of the principal arguments invoked by the supporters of multidisciplinary practice argument: the economic forces at work are so powerful that the only choice the profession has is to lie supine on the beach, let the tsunami sweep over us, and get drenched by the new paradigm of one-stop shopping, open competition for services, and lawyers working for non-lawyers—our once great profession reduced to the lowest common denominator role as just another profit center at a department store for consulting services. Yet on February 16, 2000, as predicted by our PricewaterhouseCoopers partner, it was reported that PricewaterhouseCoopers was splitting off its tax and auditing work from its other consulting business, which in turn might be split into two or more entities. Of course, the devil is in the details, which have not been announced (and how the ownership is allocated among the principals of these new firms will determine whether what we are dealing with is form over substance); it does appear, however, that this one Big 5 firm recognizes that the SEC will not tolerate the threat to auditors’ professional independence caused by its offering of so many other services to audit clients of the firm.

The second shoe dropped on March 1, 2000 when the accounting firm of Ernst & Young announced that it would be selling its non-audit business to Cap Gemini S.A. of France, a public company with its headquarters in Paris. Again, we do not yet know how “independent” these various busi-

---

11. See Barr, supra note 4, at 54.
12. Not long after these remarks, the rest of the Big 5 reversed an earlier decision not to fund a probe by the Public Oversight Board into their own stock ownership issues. Michael Peel & Adrian Michaels, “Big Three” in Probe Climbedown, FIN. TIMES, May 20, 2000, at 8.
nesses will be—one from the other—but it would appear that Ernst & Young’s audit clients will have to go to the great inconvenience of making a second call if they want to secure other services from the auditing firm’s former colleagues.16

Nor have the other three firms gone untouched by these events. Everyone knows about the on-going feud between Arthur Andersen and Andersen Consulting that on August 7, 2000 ended in an arbitrator’s decision that will result in a divorce.17 KPMG Consulting will split from KPMG, LLC, the accounting house, and has filed to sell approximately $2.5 billion of its stock to the public.18 Finally, Deloitte & Touche is said to be prepared to maintain an integrated firm unless “it was placed under extreme pressure from regulators.”19

The lessons from these recent and planned divestitures are profound. Consolidation, we have been told, is as inevitable as it is irreversible. But these announcements prove both of those propositions wrong. There are centrifugal (albeit non-market) forces at work that are more powerful than the centripetal forces that brought all this “consulting” together.20 And if PricewaterhouseCoopers can be split into a number of enterprises, the civil disobedience of the accounting firms in employing thousands of lawyers can be reversed as well. The fait accompli with which our profession has been presented (“now that we’ve hired 5,000 lawyers we dare you to do something about it”) is far more easily undone than the splitting off of all of Ernst & Young’s consulting business will turn out to be.21

These stories tell our profession a little about lawyers and the practice of law. But they speak volumes about Dean Fischel’s “market” and about what we can expect from multidisciplinary practice if we lawyers succumb to this movement.

First, we learn that without regard to its effect on independence, the Big 5 accounting firms have long ago aggressively embarked on a campaign to capitalize on their audit entree into the entire world of public companies to sell a broad range of non-audit services with little or no

16. An advertisement in the June 2, 2000 New York Times suggests that the firms will not be totally independent from each other, for example, using the same name. N.Y. TIMES, June 2, 2000, at A11.


18. KPMG Consulting in Filing Gives Details of Stock Offering. N.Y. TIMES, Aug. 8, 2000, at C22.


21. For further thoughts on what may lie ahead for the Big 5, see Reed Abelson, After Andersen War, Accountants Think Hard About Consulting, N.Y. TIMES, Aug. 9, 2000, at C1.
regard to whether the dollars generated by these other endeavors vastly outstrip the audit fees or even whether the audit partners are compensated from the consulting fees they help generate.

Second, we learn that, without any limitations on concentration, these firms have managed to consolidate, first by buying up literally hundreds of practices around the country; and then merging down from the Big 8 to the Big 5 so that the entire public company world is divided among them, almost like *omnia Gallia, in quinque partem*.

Third, these five firms can set the rules any way they want—on independence, on loyalty, on fees—because the consumers, as powerful as they are, have no choice. You want a Big 5 firm that provides a higher level of customer loyalty than the rules currently offer, yet even if you are in the market buying, no one is selling.

Fourth, accounting professional independence is a fragile commodity that will be seriously compromised by the announced intention that auditors and their consulting partners be permitted to buy shares in clients, a result that means if one wanted a higher level of independence one would be required to go outside the Big 5.

Fifth, we must rely on the clout of the SEC to impose a more stringent role on share ownership in audited enterprises by auditing firm employees. Indeed, the only thing that will save the current concept of independence of the accounting profession is regulation by a determined and effective SEC.

Which leads to the question, given the foregoing, will our clients be better off if we lawyers all end up as employees of Arthur Andersen or KPMG? The answer to that has to be a decided “no.” If the Big 5 take such an aggressive attitude toward undermining their own important concept of professional independence, if they treat the idea of regulation with such disdain that, instead of complying with the existing rules, they ignore them and, when caught, scream that the rules should be changed, then what chance do our profession’s unique principles and policies of client protection have of surviving where the law business becomes just another product extension evaluated on the sole basis of how it affects the bottom line?

Indeed, as I have argued elsewhere, we do not need to extrapolate what would happen to lawyer values at the Big 5 if they became Multi-disciplinary Practices (MDPs) offering legal services. These firms have already hired 5000 lawyers who systematically engage in civil disobedience,
not only disingenuously arguing they are not practicing law to escape the effects of Rule 5.4's prohibition on sharing fees, but also ignoring many of our other rules, including those governing confidentiality, conflicts of interest, limitation of liability, and solicitation of clients.

Alas, this last fact does not carry the day with Dean Fischel. In his world, none of these rules or the principles they reflect are worth protecting or perpetuating. Most of his May article was dedicated to a series of sustained salvos designed to demonstrate that these values, many of which he claims are simply imagined anyway, should be jettisoned along with the podium-pounding rhetoric that surrounds them. Thus to me falls their defense. an assignment I gleefully accept, starting with a discussion of professional independence.

PROFESSIONAL INDEPENDENCE: A RALLY CRY OR A SUBSTANTIVE CONCEPT?

What a treat to get an opportunity to explain professional independence to Dean Fischel. Having accused us apologists for Rule 5.4 as having "goals ... no different from any other trade union or interest group pursuing economic protectionism," but "cloaking our arguments in rhetoric about ... professional independence,"24 I leave it to you, kind reader, to decide whether lawyer professional independence means anything or is it, as Dean Fischel suggests, simply a null set? Then, if you conclude that the former is true, you must determine whether any aspects of "professional independence" might be threatened by the MDP movement. It is my thesis that professional independence in fact reflects a number of different client-centered values and that each of those is far more at risk—some mortally at risk—if we abandon Rule 5.4.

JUST SAY NO, OR WORSE, RESIGN

"In representing a client," Rule 2.1 mandates, "a lawyer shall exercise independent professional judgment and render candid advice."25 Some would argue that telling the client what the client may not want to hear is the very essence of the lawyer's duty. As the comment to Rule 2.1 provides:

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer

should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.26

This concept has often been summed up in “the old counselors’ dictum that about half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.” 27

Is this an easy mandate to accomplish? Practicing lawyers know that is not the case. To appreciate fully this point one must start not with the lawyer, but with the client. One of the biggest problems faced by lawyers is the clients’ inclination not to tell all to their lawyers, because clients worry about the consequences of such candor. The lawyer might criticize the client; the lawyer might not show sufficient ardor for the client’s cause; the lawyer might not be willing to help the client accomplish the client’s goals. So the lawyer must nurture a feeling of trust, explain how much better fully informed advice from the lawyer will be for the client, and describe the importance of confidentiality and the attorney-client privilege, all to convince the client to “open up.”

Having coaxed the client into sharing her greatest hopes and fears, the lawyer is not yet over the hump. The lawyer has to overcome the lawyer’s reciprocal natural reluctance to share bad news with the client. The difficulty of this task is compounded when the lawyer recognizes (as any experienced lawyer must) that the client tends to “not to hear” that which the client does not want to hear. How many times have lawyers been confronted with the disappointed client who failed to hear (or remember) the lawyer’s early warnings that the IRS might challenge the client’s tax position, that a jury might reject the client’s version of the facts, or that the SEC might not approve the client’s public offering statement in a certain form? Thus, the obligation is not just telling the client something that will not be welcomed, but telling it convincingly and repeatedly so that it is clear that the client has in fact received and processed the message.

All of this has to be accomplished without provoking the shooting of the messenger. That, of course, is what makes fulfilling this responsibility so difficult. We do not want to deliver bad news, disappoint our clients, or lose their trust, let alone scold or remonstrate with them, and we fear the consequences of doing so. Will the client stop paying? Will the client switch lawyers? Will the client sue the lawyer for malpractice? All are possible consequences of fulfilling our duty of candor to our clients—and they come with the lawyers’ territory.

Will the lawyer be less likely to fulfill this duty in the context of an MDP? The answer has to be, sad to tell, a ringing affirmative. If the client who is about to be disappointed or, worse, when the client learns bad news is also receiving a broad range of other services or products from the

26. Id.
27. MARY ANN GLENDON, A NATION UNDER LAWYERS 75 (Farrar, Straus & Giroux 1994). The quotation is usually attributed to Elihu Root.
lawyer’s MDP employer (and, of course, that will be the MDP’s goal. indeed its reason for being), how much pressure will the lawyer be under to keep the client happy, pressure exerted by the lawyer’s MDP colleagues who are providing the client with lucrative consulting services, investment advice, insurance, financial products, and other goods and services. Suddenly, the fulfilling of an ethical mandate becomes not just the risk of the loss of a client but the destruction of the MDP’s business plan. the loss of commissions, the cutting off of the consulting fee spigot. financially jeopardizing the lawyer’s non-lawyer colleagues who are not schooled in, subject to, or sensitive about, the lawyer’s obligation to independently provide candid advice to the client. Perhaps Lynn Turner, the Chief Accountant of the SEC, in discussing this same problem in the context of professional independence of auditors, put it best, “When [audit partners] are a marketing channel, they can’t piss off the client; otherwise they can’t sell the other services.”

The pressure on the lawyer gets even more intense when the lawyer has to demonstrate the ultimate act of professional independence—firing the client. Our rules of professional conduct mandate lawyer withdrawal when the continued representation would result in a violation of the rules of professional conduct or law. This includes, of course, when a representation becomes a violation of our rules governing conflicts of interest, when the lawyer may find her services are aiding and abetting client fraud or perjury, or when the services of the lawyer may require disclosure of client confidential information.

Again, the lawyer in an MDP will be confronted with a decision that in this case will end a representation, but one that will also result in the inevitable jettisoning of a “profit center” for the MDP, if the legal client is also a consumer of the other services and products the MDP offers. Will the pressure on the lawyer not to take such drastic action from her non-lawyer colleagues at the MDP be greater than if the lawyer were only part of a law firm that offered legal services? Anyone who thinks that will not be the case still believes in the tooth fairy.

LOYALTY

One foundation stone of professional independence is our duty of loyalty. When lawyers promise our clients professional independence, one of the guarantees we are delivering is that the zealous representation of our client will not be compromised by our obligations to other clients, third parties, or our own interests. We provide this guarantee, not just as a

28. See Barr. supra note 4.
29. Rule 1.16(a)(1) provides: “(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law. . . .” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1998).
personal matter as to the lawyers actually working on the client's engagement, but as to all lawyers with whom we are affiliated. To implement this rule, we agree, before undertaking an engagement, to disclose to the client any possible conflicts, to seek informed consent to waive any waiveable conflict, and to abide the client's decision if a waiver is sought.

This is far from a trivial or immaterial matter. The legal profession recognizes how important it is to provide our clients with confidence that their confrontation with the confusing, complicated, and threatening world of law will be one where they can count on the unfettered advocacy of their counsel. We know all too well how clients can feel insecure and uncertain when facing a major transaction or a litigated matter. The last thing we want to add to that calculus is doubt about how committed the lawyer and law firm is to the client's matter.

Our role governing imputation is the highest embodiment of that commitment. Not only are the independent lawyers assigned to the matter free from any undisclosed outside influences, but so too are all of the other lawyers with whom the clients' lawyers practice. If punches are pulled, they are pulled because that is in the best interest of the client—not because divided loyalty is interfering with good judgment.

Does an MDP practice compromise lawyer loyalty? On this point we need not engage in prognostication in which both sides of the debate can claim the ability to predict alternative visions in the future. No, here we have already seen what would happen in the MDP setting because the Big 5 have provided us with a living laboratory for client "loyalty." And the first casualties in that endeavor are imputation of conflicts among all firm personnel, the concept of non-waiveable conflicts, and an objective standard for measuring impairment, all of which have ended, if you'll pardon the mixed metaphor, on the Big 5 cutting room floor. When clients go to the Big 5 for services they never learn whether the Big 5 firm is even performing non-audit services for adverse parties, unless the conflict is one in which the accounting firm seeks to represent both sides of a matter (a conflict that lawyers, but not accountants, consider non-waiveable). No conflicts memos are ever circulated. Each decision on loyalty is made by the individuals assigned to the matter who ask themselves, applying a totally subjective standard, "How do I feel about taking on this engagement?" While the service providers next door or across the hall or in another office are receiving huge fees from adverse enterprises, the client only gets to hope that loyalty to the other entity will not interfere with the Big 5 firm's loyalty to it. No objective standards; no imputation. How independent can these service providers be?

I should note that the accounting firm rules governing loyalty probably were precisely the correct formulation for them at a time when they were still minding their knitting, not disparaging their birthright, and just providing auditing services. For that role, conflict of interest rules should be irrelevant. Because the last thing the SEC or the investing public wants
from auditors is advocacy, and the services were provided outside of the context of competition among aggressive enterprises, it should have made no difference that Peat Marwick audited all of the oil companies. Today, the Big 5's work has evolved into advising on mergers and acquisitions, consulting with enterprises competing for the same broadcast channels or cell phone franchises, litigation consulting, testifying as expert witnesses, and myriad other fields. The problem with these expanding services is that the Big 5 have sought to maintain the same rules governing loyalty, even where the new services are anything but objective and advocacy is the commodity that is being purchased and the clash of competing interests is real. One recent, almost incredible example will demonstrate how tone deaf the Big 5 can be.

Without informing either client of the other representation, two lawyers from HSD Ernst & Young, the French law firm, agreed to testify as expert witnesses on French law for each side in a proceeding in the U.S. Court of Federal Claims between IBM and the federal government. When the attempt to double the firm's pleasure, double its fun, became known and the clients protested, HSD Ernst & Young promptly dropped the work for the government, for which it had been working for three years, even though the IBM expert work had only began one month earlier. This odd choice of who to drop was reached on the basis that IBM was a longstanding client of Ernst & Young, the accounting firm, though apparently, up until that point, no one had ever bothered to inform IBM that HSD Ernst & Young was working against IBM's interests. On motion by the government, HSD Ernst & Young's selection of preferred client was overruled and the French law firm was disqualified from working on behalf of IBM.

The case speaks volumes about the inability and unwillingness of MDPs to establish and maintain conflict checking systems and the questionable loyalty MDPs can be expected to offer their clients. In addition, it raises the curious question why any professional firm would get itself in a position where it could never bat more than .500 unless being profitable becomes a higher value than being right.

YOU CAN PAY ME/YOU DON'T CONTROL ME

The representation sounds fascinating. The directors of the bio-tech company have been sued in a derivative claim that they should never have approved applying to the Food and Drug Administration for field trials of a controversial new method of cloning dogs. Their directors' and officers' insurance carrier has retained your firm to defend the outside directors.


Your first meeting with them suggests that your new clients, a university president, an investment banker, and an entrepreneur, are a fascinating and conscientious lot. Then you receive the letter from the carrier. "No expert witnesses shall be retained without our prior permission, which shall not be granted until a firm trial date is less than 60 days away. No dispositive motions shall be filed until they are cleared by our claims adjuster." who you know is paid a bonus for keeping defense costs down, and "all invoices for professional services must be sent to an outside auditor for its approval prior to payment."

The way the lawyer deals with these directions defines one aspect of professional independence. Can a lawyer accept instructions from someone other than the client because that person or entity is responsible for paying all or part of the lawyer’s fee?

The rules of professional conduct provide the current ethical requirements in this regard. Rule 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.32

Rule 5.4(c) amplifies the point: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services."

These rules, we all recognize, are written against a reality backdrop that cannot be ignored. While these lawyers are enjoined from letting the third party interfere with the lawyer’s professional judgment as to what is in the best interests of the client, typically in the insurance context the insured client is a one-time client of the lawyer; meanwhile, the insurance company is the source of a steady stream of new engagements. Moreover, the insurance company has the power to refuse to pay for the services the lawyer recommends, either forcing the lawyer to undertake the work pro bono or requiring the insured to go out of pocket to fund litigation for which she thought she was insured.

The lawyer must be courageous, despite these pressures, refuse to accept any direction from the third party, and only act on recommendations that are consistent with the independent professional judgment of the lawyer. And indeed, the defense lawyers have sought, through ethics committee

33. Id. 5.4.
opinions and the institution of proceedings in Montana to establish the impropriety of such insurance company intermeddling. Whether these efforts are successful and whether, in the guerrilla war between defense counsel and insurance companies, both clients and professional independence will come through intact, there is no doubt that one measure of professional independence is the extent to which lawyers are able to resist this third-party interference.

Does this discussion give real content to professional independence? For sure. Is this kind of interference likely to occur in an MDP in which lawyers are hired by the likes of American Express, Jacovini’s Funeral Home, or Travelers to provide legal services to third-party customers of these enterprises? Of course. If legal services become a profit center for the employers this is not only likely; it is inevitable. The more the lawyers cut corners, the higher the profits and the higher their bonuses. In addition, because the services will be provided by an MDP which maintains an entire Turkish Bazaar of products and other services to be cross-sold to these “clients” as part of the MDP’s business plan (one-stop shopping providing, by the way, convenience for the customer but, far more importantly, business extensions for the entrepreneurs), all of the incentives will be diverted away from the legal problem at hand and toward capitalizing on the capture of one more customer to be “sold” all the MDP has to offer. As poor Mrs. Hutzclutz sits there explaining how she wants to set up a trust for her grandchildren, the lawyer will be recalling how in sales training he was instructed to cross-sell limited partnerships, insurance products, financial advice, and burial plots, and how his ability to do so will be amply rewarded.

Nor is this far-fetched. H&R Block, one of the most oft-mentioned candidates to form an MDP with lawyers, became a “trusted tax preparer” for millions of Americans. But that “carefully constructed” image did not stop the firm from promoting tax refund loans to its customers at “roughly what mafia loan sharks in New York charge their best customers” (“more than 500 percent on an annualized basis”) instructing their return preparers to sell “two day refunds,” not to call these advances loans, and covering up entirely the kickback H&R Block was receiving on this business from the statutorily mandated “independent” lender who was gen-

---

37. Federal law prohibits tax preparers from making loans to clients. “a rule intended to prevent collusion between taxpayers and tax preparers.” Id.
erously sharing with H&R Block the abundant cash flow generated by this program. 38

Closer to home, I was recently consulted about a young lawyer who had just resigned from her first permanent position as a lawyer. The law firm she had joined marketed itself as expert in living trusts. An initial interview was held with the prospective clients and the data elicited thereby was plugged into a living trust form which was then presented to the client by an insurance salesman who worked with the firm, who used this opportunity to sell annuities to the clients, and who rebated a portion of his commissions to the law firm, a fact that went undisclosed to the "client."

The newly minted lawyer’s assignment was to plug the information into the living trust forms. Her concern was that, in many cases, the information elicited from the client indicated that the living trust form was then not appropriate because of various factors like the client’s marital status, age, or financial position. When the young lawyer raised this issue with the owner of the firm, she was told in no uncertain terms that her job was not to question why but to proceed in the most efficient way possible since the goal of the enterprise was to sell annuities. The provisions of Rules 1.1 and 1.3, 39 governing competence and diligence, and Rule 1.8(a), 40 governing doing business with clients, were all systematically ignored to sell products to the customer of this stealth MDP. When MDPs are fully authorized, such horror stories will come out of the underworld and become common-place events.

LEAVE YOUR CLIENTS AT THE DOOR

The American Law Institute (ALI), a collection of carefully nominated and selected judges, professors, and members of the practicing bar, has produced “Restatements” since 1932. These books of “black letter” law, explanatory comments, and supporting Reporters’ Notes are developed through a lengthy (some would say interminable) drafting process featuring meetings of advisers and consultative groups, numbering in the hundreds, and then finally brought before the full membership, most often in the historic ballroom of Washington, D.C.’s Mayflower Hotel where the texts are finally approved, after discussion and debate, before the hundreds who gather at the Spring meeting of the ALI.

Restatements are said to be attempts to “restate” the law; though lawyers all recognize “the law,” particularly in some areas, presents not just one choice. Examples abound, but think of whether contributory negligence can bar any recovery for injuries caused by a negligent defendant, whether there should be strict liability as to a manufacturer for the non-

38. See id.
40. Id. 1.8(a).
negligent production of a product with a latent defect, whether a derivative
complaint may be dismissed by the action of a board of directors that
includes many of the named defendants, or whether lawyers are free to
disclose confidential information to prevent or rectify a client fraud in
which the lawyer's services were innocently employed. To put together a
Restatement requires making choices, often controversial choices, choices
about which the client community sometimes cares deeply. And once a
choice is made for a Restatement it can, but only by dint of the prestige
of the participants and the integrity of the decision making process, have
a profound effect on the course of our law.

As a result, the ALI operates on a principle that its members are to
leave their clients at the door. These members, in reaching their individual
decisions on how to vote on these matters, are not to debate or vote in the
ALI deliberations as client representatives, but rather as independent in-
dividuals bringing their years of experience and best judgment to the
deliberative process.41

The principle has not always worked as hoped by its most ardent
adherents. The ALI Corporate Governance project found the deliberations badly infected by lawyers paid by a corporate coalition who sought
to hobble the continuing viability of derivative suits,42 and the ALI's Re-
statement of the Law of Product Liability was assaulted by lawyers whose
clients lobbied members on attempts to limit manufacturer liability.43
Similarly, in the Restatement of the Law Governing Lawyers, the insur-
ance industry sought to eliminate the professional independence require-
ment for lawyers hired by these enterprises to represent their insureds.44
Fortunately, these efforts were largely unsuccessful, even generating
their own backlash, prompted in part by the heavy handedness of the
interference.

But despite the fact that not all ALI members have been as true to the
principle as one would hope, the fact is that this principle—leaving your
clients at the door—represents another important example of lawyer in-
dependence. One of the obligations of all lawyers as members of the
profession is to work to improve the law. If lawyers are not committed to
the system's improvement, who will be? And the ALI example is but one

41. One ethics committee has written an opinion addressing this topic. The Committee
on Prof'l and Judicial Ethics, Association of the Bar of the City of N.Y., Formal Op. 1997-3:
Lawyer's Right to Engage or Express a Personal Viewpoint Which is Not in Accordance with a Client's
Interest, 52 REC. 874 (1997).
42. See Roswell B. Perkins, Call to Order by the President, 68 A.L.I. PROC. 10 (1991); Kenneth
43. James A. Henderson, Jr. & Aaron D. Twerski, The Politics of the Products Liability Restate-
44. Compare William T. Barker, Lobbying and the American Law Institute: The Example of Insurance
Defense, 26 HOFSTRA L. REV. 573 (1998), with Lawrence J. Fox, Leave Your Clients at the Door,
manifestation of what goes on in similar organizations, like Sections of the ABA, and in state and local bar associations all the time. The development of rules of professional responsibility, evidence codes, procedural rules amendments, and standards for representation of the indigent are but a few of numerous examples of issues lawyers should and do tackle informed by this principle.

Would this change with the development of MDPs? It would certainly get far worse. As lawyers succumb to pressure not only from their clients, but from their employers as well, can we imagine a full-time lawyer for H&R Block leaving her employer at the door and urging expansion of consumer rights, or a full-time lawyer for American Express urging an expansion of the class action remedy, or a full-time lawyer for Nationwide taking an independent view of tort damages for pain and suffering? No. The only sense in which these lawyers might leave their clients at the door is if they do so to represent the interests of their full-time employers. At MDPs, the search for truly independent lawyers may become a futile one.

THE MITH OF SELF-REGULATION: THE REALITY OF COURT REGULATION

Lawyers regularly invoke the mantra that one aspect of lawyer independence is the fact that we, as a profession, are self-regulated. It is true that we are self-regulating in the sense that most of our conduct is not reviewed by regulators and we rely on lawyers' natural inclination to conform their conduct to our professional rules on a voluntary basis to assure compliance. As many commentators have noted, however, that mantra of self-regulation recites what is largely a myth. Lawyers only really self-regulate to the extent that state supreme courts and other members of the judiciary choose to delegate that authority to the profession. The real power to regulate lawyers is inherent in the judicial function.

But lawyers have generally gotten the first crack at recommending rules for professional conduct, first at the ABA level where the basic Model Code and then Model Rules that form the greater part of the rules actually adopted by every jurisdiction (except California) have received their first promulgation, and then in each state where bar committees have taken the ABA "Models" and amended them to be recommended to their respective state Supreme Courts. Lawyers, too, fulfill essential tasks in the disciplinary systems of the various jurisdictions, acting as hearing officers to adjudicate


46. RESTATEMENT OF THE LAW; THE LAW GOVERNING LAWYERS §1, comment c (Proposed Final Draft No. 2 (April 6, 1998)) (hereinafter RESTATEMENT).
alleged violations of the rules of professional conduct. Thus, we do not have self-regulation in the sense that lawyers have the power to set the rules and determine violations, but an image of self-regulation in that at the sufferance of the real authorities—the highest appellate court in each jurisdiction—the profession enjoys a significant but circumscribed role.

But while the foregoing may dash the idealized version of lawyers as members of a profession that determines its own fate, it does include a point that may be even more important to our professional role—it is the court’s, not the state legislature’s, role to regulate the profession. Admittedly the extent of that power varies from state to state, and has been criticized as overstated, but the effect of court regulation on the independence of the profession is profound. Lawyers are being regulated by lawyers (now judges) who recognize the role lawyers play as officers of the court, essential to the vindication of their clients’ rights and just as critical to helping their clients conform their conduct to what the law requires.

Could the growth of MDPs cause a loss of this professional regulation for lawyers? Once again the answer is a certain affirmative. When lawyers become just another set of service providers in a department store of

47. The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the rules of Professional Conduct. A lawyer should also aid in securing their observance of the rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest it serves.

MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1999).

48. RESTATEMENT, supra note 46, at §1, comment c.

49. Compare Mississippi Bar v. McGuire, 647 So. 2d 706 (Miss. 1994) (striking down statute that excluded disbarment based on IRS violations as in conflict with lawyer code with no similar exception) with Heslin v. Connecticut Law Clinic, 461 A.2d 938 (Conn. 1983) (finding that Connecticut Unfair Trade Practices Act can be applied to the conduct of lawyers).

50. RESTATEMENT, supra note 46, at § 1, Reporter’s Note c.

51. The Preamble to the ABA Model Rules captures the point in another way:

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts. To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession’s independence from government domination. An independent legal profession is an important force in preserving government under law. For abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1999).
financial and other services, when MDPs offer multiple profit centers—the sale of annuities, investment-advisory services, insurance, burial plots, checking accounts, and loans—and all those other services and products are regulated by executive branch agencies established by the legislature, what will be the argument why court-centered lawyer regulation should be preserved?

In this context my obligation of candor forces me to admit that the failure to accommodate the MDP movement carries its own risks that court-centered regulation will be abolished. Many have argued that if we do not bend to the will of the Big 5, these economic and political behemoths will run to the legislatures for relief, just as they demonstrated their awesome political power in securing an accountant-lawyer privilege over the vigorous objection of the ABA. This risk is real—despite the fact that in many states such statutes would likely be declared unconstitutional—but nonetheless I conclude it is better to lose on the principle of defending professional independence than to endure a professional death by a thousand cuts as we let professional independence be taken away from us through ill-advised compromise.

**UNPOPULAR CAUSES AND PRO BONO REPRESENTATION**

Back in the early 1950s when McCarthyism was so rampant in the land and “Communists” were being uncovered in every area of human endeavor, Henry W. Sawyer, the late, great partner of my firm, Drinker Biddle & Reath, undertook to represent teachers in Philadelphia who had been accused of being “fellow travelers” or worse and whose jobs were in jeopardy. Sawyer was young, fearless, and articulate, and prepared to do battle on behalf of these beleaguered educators, a fact that gained wide publicity because of the paranoia of the times.

Out of the notorious nature of this representation came a protest directed to Henry Drinker, the Chairman of our firm, from a significant long-standing client. The client was outraged that his law firm was defending these “pinko commie sympathizers,” and he wanted Drinker to do something about it. To call Drinker conservative would have been an understatement, and his anti-Communist sentiments were probably as strong as those of his troubled client. But Sawyer’s defense of the teachers
reflected a more important principle than where one's ideas fell on some political spectrum. So Drinker rejected the client's imprecations and, when the client protested further and threatened to take his business elsewhere, Drinker made it quite clear that threat would not change his mind.

Will that ferocious professional independence to rush to the defense of the unpopular be affected by MDPs? Again, we need not speculate about what a future they may bring. As Chair of the ABA Death Penalty Representation Project, I already know what that answer will be. A number of times lawyers in corporate America have told me they would love to help but their company's shareholders would be "up in arms" if it came to light that they were representing the despicable denizens of Death Row. This tells me all too well that an early casualty of the MDP movement will be the loss of this precious aspect of professional independence.

Dean Fischel, in his eloquent piece, tried to argue that this is okay because who is to say that a greater contribution to society would not be maximizing profits, paying more in taxes, and supporting the Art Museum by serving on its board.\textsuperscript{54} My response is this: anyone can try to increase his or her income; anyone can attend fancy, high cost parties, charity balls, glitzy benefits, supporting the orchestra or the opera: only the Henry W. Sawyers and lesser lights who seek to emulate his commitment (even if we cannot come close to his eloquence) can represent those under sentence of the ultimate sanction, or the Ku Klux Klan as it seeks to march through Skokie, Illinois, or the young student who does not want to be forced to listen to the prayers of another religion while attending a high school graduation. Just as lawyers are not merely another set of service providers, so too are they not just another set of charitable donors. Only through their dedication of time, knowledge, experience, and role as officers of the court can the poor, the downtrodden, and the despicable receive the representation they require.

\textit{A NOTE ON LAWYER INDEPENDENCE V. ACCOUNTANT INDEPENDENCE}

No discussion of this topic can conclude without a short discussion of how badly the proponents of MDPs misunderstand completely any similarity between our professional independence and that of the accountants. Despite the accountants' most fervent wishes, we are not twins separated at birth, still united by our common ethical birthright. Their "independence" is independence from the client. As my discussion regarding my service as a director indicates, when we read that PricewaterhouseCoopers has opined on the financial statements of some company, we want to know that PricewaterhouseCoopers was free of influence from its client, able to bring healthy skepticism to its work to protect the public from relying upon

\textsuperscript{54} Fischel. \textit{supra} note 24, at 957.
financial statements that have not been prepared in accordance with generally accepted accounting principles after an audit conducted in accordance with generally accepted auditing standards. Like the SEC, we want no advocates here, but rather professional distance and objectivity.

For lawyers, professional independence is a completely different concept (as I hope this article demonstrates). Yes, it means we give our clients our best advice, even if it is not what the client wants to hear and in that sense, and in that sense alone, we adopt the accountant's version of independence. But it also means that we are as free as possible from outside influences—especially the government, other clients, third party payers, and our own self-interest—to permit us to exercise unbridled loyalty and zealous advocacy on behalf of our clients. Samuel DiPiazza, of Price-waterhouseCoopers, betrays his (and I suspect his accounting colleagues') misunderstanding when he asserts:

To suggest that the threat to independent judgment is unacceptably higher when a non-lawyer has an economic interest in a law firm than when a lawyer is under pressure from a long-standing client to take a particular position or is encouraged by a senior partner in his own firm to accommodate a client's interests, strikes me as a doubtful proposition.55

It may be doubtful to him, but it is anything but that to us. Being "under pressure" from a long time client is exactly where the pressure should be. Being "encouraged" by a senior partner is exactly who should be doing the encouraging. We are quite properly beholden to our clients (so long as the suggested conduct is lawful and ethical) and we are supervised by other lawyers (whose guidance we follow unless the ethical or legal violation is clear). The former is our client to whom we are ethically committed and the latter is a lawyer, similarly conversant with our values, subject to our rules, and liable to the same disciplinary sanctions as we. It is pressure from others that we must be ever vigilant to guard against and it is precisely those influences that will compromise our professional independence. The irony that Mr. DiPiazza's quoted statement proves this point. I trust, is not lost on those who worry about MDPs.

LAWYERS HAVE LAPSED

Have lawyers acted as committed professionals to the principle of lawyer independence? The report card is decidedly mixed. Lawyers have served as directors of their clients. Lawyers have invested in their clients and some, if recent stories are correct, have gone much further and made that

a condition for providing the services. Lawyers have started ancillary businesses and, though for awhile it seemed that the trendy opening of law firm subsidiaries was just a passing fancy, it now seems to have re-accelerated, perhaps in light of the fact that MDPs, like sneeze-inducing pollen in the spring, are in the air. Lawyers also have succumbed to the pressure from insurance companies. Large numbers have even gone to work as salaried employees providing legal services to insureds who, because these lawyers have stationery that to all the world represents that they work for a partnership using a fictitious firm name, remain blissfully ignorant of the relationship between their lawyers and the insurance company that employs them on salary. Undoubtedly, lawyers compromise their independence every day in myriad other ways like failing to "just say no," cutting corners, overbilling, charging unreasonable fees, and otherwise failing to observe our ethical precepts.

But that is no reason to abandon the principle of professional independence or conclude there is no principle there at all. To the contrary, the courageous, quiet conduct of a great super-majority of the bar, dedicated to these principles, is a testimonial to how much we can achieve as independent professionals. Their example should provide great encouragement that we can lasso in our lapsed brethren and sisters. When one considers a profession whose ranks approach one million, we can almost be giddy with how professional independence abounds, how much it contributes to the common weal and how rewarding it could be to use the savage attack on our professional values by the Big 5 and their supporters as a way of galvanizing the rest of us into a rededication to these values and concerted action to protect them.

CONFIDENTIALITY AND PRIVILEGE: ETERNAL PROTECTIONS

News Item: WALL STREET JOURNAL, OCTOBER 4, 2002
GENERAL ENTERPRISE ANNOUNCES BOLD INITIATIVE

(New York) Wendy Fineman, General Counsel of the General Enterprise Company, announced at a press conference yesterday in front of the New York Stock Exchange that henceforth all outside counsel for General Enterprise would be encouraged to share otherwise privileged or confidential information with the financial community. Each month General Enterprise plans to publish a list of the company’s outside counsel and a de-

56. The Venture Law Group "insists on having an opportunity to buy in ... at the idea stage ..." Richard B. Schmitt, *Little Law Firm Scores Big by Taking Stakes in Clients*, WALL ST. J., Mar. 22, 2000, at B1. Though investing in clients by lawyers does raise two concerns, objectivity and potential liability (See ABA Comm. On Ethics and Professional Responsibility, Formal Opinion 00-418 (July 7, 2000)), such investments can be accomplished consistent with lawyers’ ethical obligations, a fact that is not true of those accountants who seek to invest in firms for which they act as auditors where pristine objectivity is the *sine qua non* of the engagement.

scription of the matters they are handling, to facilitate the desired disclosures. Ms. Fineman’s in-house counsel staff will also be available for the purpose of disclosing similar information to the press, shareholders, or the public.

When asked whether General Enterprise did not consider it dangerous to share such sensitive information outside the company, Ms. Fineman explained that she had recently read an article by Dean Daniel Fischel, of the University of Chicago Law School, that argued companies “with nothing to hide” were received better by the marketplace. “If privilege is invoked [by a company] and this is disclosed [to the public], investors will rationally conclude that negative information is being withheld because the firm has something to hide, why else withhold the information?” Since Fischel believes, like Jeremy Bentham, that the attorney-client privilege “protects the guilty,” General Enterprise wanted to escape any negative implications the company’s invoking the privilege or having its lawyers maintain confidentiality might convey.

General Enterprise hopes that in taking this leadership role in jettisoning antiquated notions of confidentiality, other public companies will similarly make full disclosure to the investing public, a move that will give these companies, in the view of Dean Fischel, “a comparative advantage in attracting capital.”

The role of confidentiality in the practice of law is vastly overstated. Ms. Fineman observed, again relying on Dean Fischel. “The concern about information sharing is probably exaggerated. Information about business plans and strategies, for example, often depreciates rapidly and is frequently available from other sources” observes Fischel. It is in that spirit that General Enterprise has made this leadership decision.

* * * *

The quotes of Dean Fischel, though not the news conference, are accurate, believe it or not.58 The critics of MDPs asserted that, because the auditors’ attest function is inconsistent with the lawyers’ obligation of confidentiality, accountant-controlled MDPs threaten our clients. Dean Fischel responds not only that the advantages of the privilege are vastly overstated, but he goes further to assert that in fact, at least in the case of public company clients, the elimination of these protections would prove beneficial. Don’t bemoan the auditing firm’s threat to your secrets, Dean Fischel argues, you will be better off when the investment community knows you aren’t hiding behind such outmoded protections.

I know Mr. Fischel put this argument in his paper just to test the limits of his approach, but it demonstrates to me how much he has lost his way. The fact that we have emphasized the importance of both the privilege and confidentiality to the health of the lawyer-client relationship for more than a century diminishes not one wit how critical it remains. Some truths are not only self-evident, but endure across time. We may be living in a world of e-commerce, e-mail, and even e-law, but to argue that as a result our fundamental values should change is as flawed as the suggestion that my rabbi should change the content of his sermons now that they are being posted on our synagogue website.

58. Fischel, supra note 24. at 964, 967.
Every day major public companies consult their lawyers regarding a broad range of matters, some involving litigation, others transactions, still others tax, human resources, or other areas of corporate concern. The only way these representations can be effective is if the clients are free and indeed encouraged, to share their innermost concerns with the lawyer free from the threat that the lawyer or the client can be compelled to disclose the content of those discussions. Similarly the lawyer has to be free to explore alternatives, offer tentative advice, and candidly discuss the matter with the client. There is nothing wrong with that process nor should anyone be defensive about invoking the privilege to maintain the sanctity of the lawyer-client relationship. There is plenty of capital to be raised by companies who are wise enough to purchase Class A legal services delivered with confidentiality and the attorney-client and attorney work product privileges intact.

Nor should anyone doubt that confidentiality would be compromised in multidisciplinary practice settings. The Big 5 provide a particular problem in that regard because of the total inconsistency between the auditor’s attest function duty of disclosure and the lawyer’s obligation to maintain client secrecy. But other professionals, like social workers and investment bankers, have no duty of confidentiality and also, by other law, may have legal requirements of disclosure, for example to report child abuse, from which lawyers are exempt.

A recent example demonstrates the low regard other professionals might place on maintaining confidences (and loyalty). KPMG was the personal accounting firm for Garth Drabinsky, the founder and CEO of Livent, the live theatre production company. When Drabinsky sold the company to Michael Ovitz, KPMG conducted the due diligence of Ovitz. KPMG having given Livent a clean bill of health, Ovitz proceeded with the purchase and appointed a KPMG partner to the Board. When that partner heard of alleged financial irregularities at Livent, he retained a Toronto law firm which in turn hired KPMG to look into allegations. When Drabinsky complained that KPMG was not only investigating Livent, but also Drabinsky, its own client, KPMG ignored his plea and litigation ensued. On an interim ruling the Canadian court concluded that KPMG had duties not to disclose, as well as of loyalty and not to act against the interests of its on-going client. Then on the eve of trial, KPMG was forced to accept a consent order that declared KPMG had “breached its fiduciary duty to the Plaintiff [Drabinsky] in allowing” the investigation and restrained KPMG from disclosing any confidential information of Drabinsky.

59. Congress has also mandated auditor disclosure totally inconsistent with the attorney-client privilege and the lawyer codes’ injunctions against lawyer breaches of confidentiality.
THE DEATH OF LOYALTY

Not content to disparage the role of confidentiality and the critical importance of the attorney-client privilege, Dean Fischel cynically proceeds to dispatch loyalty to a similar dust heap of antiquated notions. "[Imputed disqualification,"61 Dean Fischel writes, "is obsolete and should be discarded," because the rule is "much costlier" in a world of very large firms (he means they have to turn down a lot of new business) and a "barrier to mobility" for lawyers.62 The Dean therefore concludes "the rule should be discarded altogether," so that "MDPs . . . could then grow to their efficient size."63

Wow! The questions raised by this salvo, gentle reader, are multiple. First, is Dean Fischel correct that imputation is designed simply to protect confidential information? Is he correct in arguing that the rule’s effect is "draconian" when it is applied to a situation in which a "junior partner" in a firm’s L.A. office is hired to do a small matter” for a “minor subsidiary of a major corporation,”64 thereby precluding a different client from hiring presumably a “senior” partner in the firm’s Washington office on a major matter against the parent of the junior partner’s client? Putting aside for a second, as undoubtedl, a momentary lapse on his part, any suggestion that the loyalty we owe clients turns on how important in the firm their lawyer is (where, Dean Fischel, is it written that the clients of junior partners really deserve less fealty) or how large the client is (beware small clients who venture within these hallowed walls, because the loyalty you shall receive is marginal), how large the matter is (bring us your mega merger and we’ll be real loyal), or whether you go to the firm’s headquarters or an outlying branch, Mr. Fischel really misses the point of the rules.

While it is true imputation is designed to protect confidential information, equally important is the fact that imputation reflects the higher standard of loyalty we promise our clients. The legal profession tells our clients...
that we not only will protect the information they share with us by assuring that no one in the firm will have an opportunity to use it, but we also assure them that, without their informed consent, we will not take positions adverse to them even if the matter is totally unrelated. Then, if a conflict situation arises, and we wish to take on the new engagement, we promise we will call the client, seek a waiver, and abide by the client's decision whether the waiver will be granted. It is this loyalty component that the Dean ignores entirely, even to the point of never mentioning the word anywhere in his essay.

Perhaps Dean Fischel's suggestion that richer, bigger clients with more significant matters and clients of more important partners would receive a better level of loyalty stems from his unstated recognition of the real world effects of abandoning imputation. If lawyers are free to take positions directly adverse to their current clients on unrelated matters, then the only questions the law firm will ask itself (since it never, under this regime, has to tell or ask the client anything) is "How upset will the client be when it learns what we have done?" "Will we be fired?" And most important, "Do we care?" In other words, the law firm will be asking itself the totally unseemly questions that determine whether it is prepared to incur the wrath of a current client to take on a new one, questions whose answers will not turn on values like loyalty and confidentiality, but rather on the size of the respective engagements, the power within the firm of the lawyers with the competing engagements, and the future prospects for cross-selling firm services to the competing clients.

Another construct the Dean relies upon to justify abandoning imputation is his willingness to have law firms erect firewalls or screens. Mr. Fischel suggests that clients really should not be upset when we tell them, on a take it or leave it basis, that we are taking on matters directly adverse to them because, like the accounting firms, we will erect screens to protect their confidential information. The problem with this assurance is how will the client ever know? All the padlocks and legended files in the world will not prevent A from talking to B—perhaps inadvertently, perhaps intentionally—sharing information the client is entitled to have protected, and whose sharing will never be disclosed.

The accountants use the term firewalls for their attempts to protect client information as if to lend gravity and solidity to their efforts in this regard. But their metaphor is not nearly as in touch with reality as the use of the term screens, which of course refers to those contrivances we install in windows and doors in the spring that keep out the bugs, but otherwise permit the entry of light, air, and sound! Suffice it to say that telling a client not to be concerned under these circumstances ("don't worry, the law firm to which your opposing lawyer just moved is screening your former counsel") is anything but reassuring.

Of course in a world where the hidden hand of Adam Smith prevails, perhaps quaint values like client fealty have no place. There it is acceptable
to place a client in a position where it either fires its disloyal lawyer or proceeds with the representation, gnashing its teeth and wondering how vigorous its representation will now be. But in my view what would be "draconian" in our profession would be if we permitted lawyers, without client waiver, to take on matters adverse to their own clients. Just as bad would be a rule that only let big firms take on such representations simply because the adverse matter was being handled by a different office (or lawyers on a different floor). Any surface appeal that limiting imputation within a geographical practice setting may suggest is completely undermined by the way these mega-firms hold themselves out to the prospective client world. As one great national firm puts it:

ACCESSIBLE EXPERTISE
Communicate with any lawyer in any Morgan Lewis office and you will have access to the firm’s worldwide depth and diversity of experience. The firm’s more than 1,000 lawyers are organized into sections and practice groups that cut across our 12 offices and connect lawyers with related fields of practice....

For decades, the firm has prized its culture of teamwork. Lawyers at every level place top priority on responding to calls for support from colleagues anywhere in the firm. Every client receives that level of institutional support....

Such teamwork and service have been greatly enhanced by leading-edge communications technology. Through telephone and computer linkages, lawyers function with fully integrated efficiency. Draft documents are exchanged instantly among practice groups and offices, allowing interactions among lawyers whose skills create the best client team.65

Moreover, these firms’ partners gleefully share the fees generated by these far-flung offices.

Another question raised by Dean Fischel’s dispatching of imputation to the ancient archives of our profession is whether we think there is some advantage to have law firms—either stand alone or as part of MDPs—in the Dean’s phrase, "grow to their efficient size."66 We have learned the painful lesson of the “benefits” of a no imputation rule from the growth of accounting firms. Their race to roll-up local accounting firms has left the world (literally) with a mere five choices. Competition is virtually eliminated and working together they are able to order their affairs so that, absent the intervention of the SEC, clients are given all the “protection” they are ever going to receive on a take it or leave it basis.

66. Fischel, supra note 24, at 966.
Nor is there anything efficient about the size of the largest accounting firms.\(^6\) Rather they are simply an example of the oligopoly that will always result if antitrust laws are not enforced: they stand as living proof that markets left unchecked yield results that are anything but models of free enterprise competition. A world with five law firms would be bad enough; a world in which these law firms were part of MDPs is too depressing to contemplate.

**NO RULES FOR THE RICH AND HIGH FALUTIN**

**THE RICH DON'T NEED PROTECTION**

One of the problems with Dean Fischel's approach is his working assumption that clients of MDPs will be rich and sophisticated (like the enterprises who hire him (and me)) and that therefore the protections some of us value are paternalistic and unnecessary. As he writes, "[t]he need for customer protection in this market is non-existent."\(^6\) Let the free enterprise system flourish, knock down all "barriers to entry" and only the best and the brightest will succeed because the clients are so discerning and well informed. In the Dean's view, we are to assume the University of Chicago would still produce brilliant lawyers. Illinois would still administer a bar examination and review character and fitness. mandatory CLE would be required for those duly admitted, but anyone, even those who learned law from an extension school that recruits students on matchbook covers, or who didn't learn law at all, could hold themselves out as providing legal services with the great unseen hand of Adam-Smith sorting the market out.

There are multiple problems with this construct and, thus, its potential adoption presents important public policy issues for the profession and society to confront. First, we must wonder how far Dean Fischel is prepared to go. Today we license lots of occupations because we make judgments that, without specific qualifications (education, examinations, licensure, continuing education), we don't want just anyone performing open heart surgery, doing root canal, opining on financial statements, designing jet airplanes, or installing garbage disposals. Does the practice of law present any challenges in its execution and potential harm in its misdelivery that suggest we ought to have what he calls "barriers to entry," and I characterize as minimum qualifications, to undertake these difficult assignments? I would hope, despite the Dean's rhetoric, that the leader of what is one of this country's greatest law schools, one that offers a $100,000 education to the best and brightest, would lend some support to the radical notion that asking those who practice law to receive a specialized education would be viewed not as just a way to differentiate in a

---

68. Fischel, supra note 24, at 961.
crowded marketplace those who are better qualified, but as a necessary prerequisite to participating in the marketplace at all.

**CAN THE PROFESSION AFFORD TWO DIFFERENT SETS OF RULES?**

**Consenting Adults**

The truth is, Mr. Fischel's hyperbole notwithstanding, that consumer protection will be required for many clients of MDPs. This means that the Dean, though he does not say so, would have us develop different rules for different clients, depending on their sophistication. This idea is deeply troubling on many levels, not the least that to go down this road represents a break from a long tradition. Our profession has had one set of rules since codes of ethics first were established. But this concept has more than history on its side; it springs from several principles. First, our rules trump what can take place between consenting adults, i.e., some protections simply cannot be waived, even by the most well informed client, or even when the client is a lawyer or separately represented by a lawyer.

A few examples can demonstrate this point. A client cannot waive a non-waiveable conflict.69 We as a profession have concluded that some conflicts are so disabling and so likely to affect the integrity of the system of justice itself that we will prohibit the lawyer from even broaching the subject. Nor can a client be asked to sign an open-ended prospective waiver.70 Who knows where the representation will evolve over time, who knows what confidential information will be shared, and who can anticipate what the future adverse representation will be? Lawyers also may neither seek nor accede to a scope limitation of their services that is unreasonably narrow in time or subject matter.71

69. “[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 5 (1999).

70. ABA Formal Opinion 93-372, observed:

> Given the importance that the Model Rules place on the ability of the client to appreciate the significance of the waiver that is being sought, it would be unlikely that a prospective waiver which did not identify either the potential opposing party or at least a class of potentially conflicting clients would survive scrutiny. Even that information might not be enough if the nature of the likely matter and its potential effect on the client were not also appreciated by the client at the time the prospective waiver was sought.


71. An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [the rule governing competence], or to surrender the right to terminate the lawyer’s services or the right to settle litigation that the lawyer might wish to continue.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 5 (1999).
So too a lawyer may not seek waiver from the client for the lawyer's unlimited liability for malpractice. As a public policy, lawyers stand behind their work as a safeguard for the public. Similarly the client cannot be asked to waive the protections of Rule 4.2. Even the worldly wise represented client who initiates the communication with the other side's lawyer will be saved from the consequences of her conduct unless and until her lawyer grants permission for the unguarded contact.

The lawyer who charges an unreasonable fee will also find the defense that the client was sophisticated unavailing if the fee in fact was unreasonable. This is because all lawyers may only charge all clients reasonable fees, even those who should be smart enough to know better. Preserving these values, we have decided, is far more important than providing lawyers and sophisticated clients the opportunity to create exceptions. and I would argue they ought to be preserved. What makes us a profession is the fact there are some standards that we do not compromise. no matter how successful we are in persuading the well-heeled client to do so.

*How Informed Are the Rich?*

The second reason we don't adopt a consenting adults approach is because, for good reason, even if the client is sophisticated, we do not trust how informed and voluntary that consent may turn out to be. I, for example, have personally been privy to the tales of too many in-house counsel who were asked for waivers they did not want to provide and who felt helpless not to accede to the wishes of an outside lawyer in a position of power. One example will suffice and how you, learned reader, respond to this tale will tell everything about your willingness to travel down Dean Fischel's "survival of the fittest super highway" or Larry Fox's "paternalistic pathway."

In this case, my client, despite my disappointment, wished to hire a prominent New York law firm to address some threats to current management's corporate control. That law firm was happy, even flattered, to get the assignment, but not so delighted that the firm did not present in-house general counsel with one of those classic blanket prospective waivers

---

72. "A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement..." *Id.* 1.8(h).

73. The rule itself provides that a lawyer may not communicate with a person known to be represented in the matter "unless the lawyer has the consent of the other lawyer..." *Id.* 4.2.

74. The rule's admonition is unequivocal: "A lawyer's fee shall be reasonable." *Id.* 1.5(a).

Although a lawyer and client may have executed a written fee agreement, courts are always free to make their own inquiries about the reasonableness of legal fees as part of their inherent authority to regulate the practice of law. *See* *Pfeifer v. Sentry Ins.,* 745 F. Supp. 1434 (E.D. Wis. 1990) (court has inherent power to review reasonableness of fees and to refuse to enforce any contract calling for excessive or unreasonable fees).
of future conflicts of interest that I view as hopelessly unenforceable. But if I were wrong, that would permit this law firm, in the future, to take positions adverse to its new client on almost any matter, including litigation, up to and including a different battle for corporate control.

Ethics allegedly being my field, the client asked me what I thought of this from a professional responsibility point of view. I told the client to reject the waiver out of hand. “But the firm may not agree to represent us” the conversation proceeded. “Fine.” I responded, thinking how good ethics and my self interest would come together and the client would hire my firm directly. “But we want this firm to represent us” came the reply. “We’ll see what happens.” I advised, hiding my disappointment that the New York firm’s disloyalty did not immediately result in the hiring of my “loyal” firm for this engagement. A day later I was informed the prospective waiver was there on a take it or leave it basis, and our client, to my regret, took it.

Now the questions were twofold. Should the law firm have been free to demand what in my view (a view formed long before these events unfolded) and the view of the ABA Standing Committee on Ethics and Professional Responsibility was an unethical request? And if so, was the client’s reluctant acceptance of the waiver, through its general counsel, knowing and voluntary? I have no doubt that, as simple as this question is, it defines the two different worlds inhabited by Dan Fischel and me. In my view, lawyers should not ask; if they do ask, no client in its right mind would or should agree; and if they do agree, the agreement should be unenforceable.

Of course, we could be like the unhinged entrepreneurial juggernauts of the marketplace—hawking goods and services—at whatever the market will bear with no core values. Or we, as lawyers, could offer something different, protections of client loyalty that last beyond the individuals involved and the engagement undertaken. It is a fundamental question. Two answers, of course, are possible. But only one reflects the best our profession has to offer.

**How Do We Decide Who Is Rich?**

Third, line drawing between sophisticated and unsophisticated is a very dangerous enterprise. Does every client with in-house counsel automatically qualify as sophisticated? The presence of in-house counsel says nothing of the relative bargaining power or knowledge of the two sides. Moreover, doesn’t a double set of rules simply invite unseemly and destructive post hoc litigation between former client and lawyer over this issue? Is that really where we want our ethics rules to land? Do we really want the dialogue to center on whether the client was sufficiently sophisticated that it was free to waive what would otherwise be a non-waiveable conflict, to accept what would otherwise be an unreasonable fee, to allow a commu-

75. See, ABA Formal Opinion 93-372, supra note 70.
communication from the other side's lawyer that would otherwise be impermissible? I think not. I hope not. and I implore Dean Fischel not to lead us down that road.

ALL SERVICE PROVIDERS ARE HIGH FALUTIN'

In Dan's world all of the service providers are high falutin’. We have Ernst & Young, Salomon Smith Barney, and American Express hiring lawyers to provide legal services to the customers of the MDP. But we cannot write rules that just apply to tassel-toed service providers either. If KPMG gets to have an MDP, so does Tony's Ambulance Service and Montesanto's Funeral Parlor. While I know from our unfortunate experience with lawyers going to work for the Big 5, that even the most pretentious of MDPs has the capacity to destroy our professional values, there is no reason to expect that those with less lofty airs will not act at least as badly, and perhaps even worse.

CONCLUSION

Dan Fischel and I, I hope, have joined issue. We really do describe two very different worlds. Dan Fischel's is swashbuckling, populated by behemoth multi-national enterprises and service providers of equal scale and scope. The market will reward the good and punish the bad. and officious intermeddling by regulators has no place. Mine insists on black letter rules and effective enforcement, would reject that which the marketplace offers us as, perhaps, in the best interests of the service providers, but certainly not in the best interest of the clients. It also celebrates the lawyers as something special, not because we are brighter or have an unwarranted sense of entitlement, but because we have special responsibilities and special roles to play in our society.

It is my wish, kind reader, that after you have read this far you will endorse the latter approach. But if you do so, your hard work is not at an end. Because this is not just a question of choosing one value system or another. The forces of the economic model are real. They have many adherents and those adherents are determined to tear down all that we have built. Some, like Dan Fischel, are in the academy. Others include our lapsed brethren and sisters at the Big 5 accounting firms. Still others are those who would profit from a breakdown in our system of justice, a withering away of the organized bar, a disappearance of our commitment to pro bono, an end to professional independence.

So a vote for our core values is not enough. We need to raise money, launch a campaign, enforce our rules, explain our position, take nothing for granted, and commit ourselves to the preservation of that which we treasure. Otherwise, just as the Grinch tried to steal Christmas, Dean Fischel and his colleagues will steal our profession. And we will have no one to blame but ourselves.