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The Bar Strikes Back: The ABA's Misguided Quash of the MDP Rebellion

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The Bar Strikes Back: The ABA's Misguided Quash of the MDP Rebellion
COMMENTS

THE BAR STRIKES BACK: THE ABA’S MISGUIDED QUASH OF THE MDP REBELLION

STUART S. PRINCE∗

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INTRODUCTION

On July 11, 2000, at the American Bar Association ("ABA") annual meeting in New York City, the ABA House of Delegates dealt a powerful blow to the proponents of multidisciplinary practice by overwhelmingly voting for the prohibition of such practices.1

One year earlier, in June of 1999, the ABA Commission on Multidisciplinary Practice2 (“the Commission”) presented a report to the ABA House of Delegates recommending changes to the ABA Model Rules of Professional Conduct3 (“Model Rules”) that would

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2. See Dianne Molvig, Multidisciplinary Practices: Service Package of the Future?, Wis. Law., Apr. 1999, at 10, 11 (describing Multidisciplinary Practices as “[p]artnership[s] owned by lawyers and professionals from other disciplines who work together to solve client problems”). The Commission on Multidisciplinary Practice proposed the following definition to add to the “Terminology” section of the Model Rules of Professional Conduct:

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

3. See ABA Comm. on Multidisciplinary Practice, Report to the House of Delegates, at http://www.abanet.org/cpr/mdpfinalreport.html (last visited Mar. 9, 2000) [hereinafter Report to the House of Delegates] (stating that the report was submitted to the House of Delegates). The ABA Commission on Multidisciplinary Practice, which was created in August 1998, submitted a report to the ABA House of Delegates in June 1999. See id. The ‘Report to the House of Delegates’ contained the following sections: (1) Recommendation; (2) Report; (3) Appendix A—Recommendations of possible amendments to the Model Rules of Professional Conduct; (4) Appendix B—Witnesses at ABA Commission on Multidisciplinary Practice Hearings and others submitting written comments to the Commission; (5) Appendix C—Reporter’s Notes; and (6) General Information Form. See id.
4. See Model Rules of Prof’l Conduct (1983) (amended 1999) (noting that rules were enacted in 1983). The Model Rules replaced the Model Code of Professional Responsibility, which was promulgated in 1969. The Model Code embodied a wholesale revision of the previous ethical guidelines produced by the ABA, the canons of Professional Ethics. See id. Before 1969, the Canons of Professional Ethics guided the ABA for sixty-one years. See id. Approximately forty-one states have adopted a version of the Model Rules. See ABA Comm. on Multidisciplinary Practice, Background Paper on Multidisciplinary Practice: Issues and Developments, at http://www.abanet.org/cpr/multicomreport0199.html (last visited...
allow lawyers to offer legal services and practice law outside the traditional law firm structure.\textsuperscript{5} The proposed changes would allow lawyers to join other professionals to create so-called “multidisciplinary practice” firms (“MDPs”), entities that provide legal and other professional services.\textsuperscript{6} Currently, Model Rule 5.4, which aims to protect lawyers’ independence, prohibits lawyers from sharing legal fees with non-lawyers or from forming a partnership that is engaged in the practice of law with a non-lawyer.\textsuperscript{7} Although

\begin{quote}
Jan. 9, 2000) (citing ABA/BNA Law. Man. Prof. Conduct 91:401) [hereinafter Background Paper] (describing the development of the MDP and the important issues surrounding it that the legal profession must address). Furthermore, all fifty states, except the District of Columbia, observe prohibitions nearly identical to the fee sharing bans included in Model Rule 5.4. See \textit{id}. Except for the Washington, D.C. jurisdiction, all fifty states prohibit fee sharing with non-lawyers. \textit{See id.} at n.41. For the District of Columbia rule, see Part II.B, \textit{infra} (elaborating on unique fee sharing rules, such as that of the District of Columbia), and see also the \textit{ABA Comm. on MDP, App. A, supra} note 2, which proposes a new rule, Model Rule 5.8 governing multidisciplinary practices, to the Model Rules of Professional Conduct. For the text of proposed rule 5.8, see \textit{infra} note 155.
\end{quote}

\textsuperscript{5} \textit{See Background Paper, supra} note 4 (stating that Model Rule 5.4 prohibits lawyers and non-lawyers from forming partnerships where the business of the partnership is to practice law). Model Rule 5.4, titled Professional Independence of Lawyer, states that:

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

\begin{enumerate}
\item 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.
\item 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.
\item A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
\begin{enumerate}
\item a non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
\item a non-lawyer is a corporate director or officer thereof; or
\item a non-lawyer has the right to direct or control the professional judgment of a lawyer.
\end{enumerate}
\end{enumerate}


\begin{quote}
\textsuperscript{6} \textit{See ABA Comm. on Multidisciplinary Practice, Report to the House of Delegates, Recommendation, at http://www.abanet.org/cpr/mdprecommendation.html} (last visited Mar. 9, 2000) (allowing lawyers to share legal fees with nonlawyers). The Commission’s recommendations must be adopted in each state before lawyers in that state are able to form MDPs. Molvig, \textit{supra} note 2, at 45.
\end{quote}

\begin{quote}
\textsuperscript{7} \textit{See supra} note 5 to view Rule 5.4 in its entirety.
\end{quote}
such firms already operate in Europe and Canada, the ethical rules governing the practice of law in America prohibit MDPs. At the ABA annual meeting in August 1999 in Atlanta, the ABA postponed action on a recommendation to end the self-imposed ban on fee sharing with non-attorneys. The ABA wanted to wait for the states to conduct further investigation of the MDP issue before making a decision on whether or not to permit such practices. At the 2000 annual meeting, even though many state committees that were formed to study MDPs had not finished their reports on the desirability of MDPs, the House of Delegates voted against relaxing the Model Rules, a measure the Commission had advocated in its recommendation to the House a year earlier.

The growth of MDPs abroad created a movement among members of the American legal community to loosen the current restrictions on fee sharing. Because many lawyers are already effectively practicing law in non-legal settings, particularly among the so-called

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8. See discussion infra Part II.A-B.
9. See ABA Delays Action on MDPs, ABA Press Release (Aug. 10, 1999), at http://www.abanet.org/medi/... (last visited Jan. 9, 2000) (noting that the ABA House of Delegates postponed action on MDPs until further study revealed such changes could be made to the Model Rules without compromising lawyer independence and loyalty to clients).
10. See Siobhan Roth, Bar Going Nowhere Fast on MDPs, LEGAL TIMES, Feb. 21, 2000, at 1-16 (stating that the state bars were forced into confronting the issue because the Commission on MDP created alarm among the members of the bar). At the ABA’s mid-year meeting in Dallas, no action was taken on MDP. The ABA is not going to take any action until the state MDP commissions discuss their own findings. The state MDP commissions will also read the ABA Commission’s upcoming April report. See id. When the House of Delegates made its decision that upheld the current rules on fee sharing, twenty-three states had not finished their studies on MDPs, and ten states that had finished studies had not taken any action. Gibeaut, supra note 1, at 93. At the July 2000 meeting, a number of state bars, including those from Ohio, Florida, Illinois, New York, and New Jersey, sponsored the resolution supporting the current rules that prohibit MDPs. See id. The House of Delegates supported the resolution by a margin of 314-106. See id.
11. See Gibeaut, supra note 1, at 93 (stating that many state and local bars had not had enough time to fully consider the idea fee sharing between lawyers and non-lawyers).
12. See Siobhan Roth, ABA REPORT: What Now?, LEGAL TIMES, June 14, 1999, at 12 (attributing the creation of the MDP Commission in part to the rapid growth of MDPs in Europe); David Rubenstein, How the Big Six Firms are Practicing Law in Europe, CORP. LEGAL TIMES, Nov. 1997, at 32 (noting that economic globalization is pushing accounting firms into legal practice); cf. Charles Hogan, Accountability: Law Society’s Protection Ban Under Pressure, SUNDAY BUS. POST, Feb. 21, 1999, (describing a new Irish firm closely associated with PriceWaterhouseCoopers, which has rekindled the debate over MDPs in the United States); A. J. Noble, The Metamorphosis: 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 (noting that Ernst & Young established a captive law firm in Toronto known as Donahue & Partners).
13. See Nathan Koppel, MDP Rift Splits Bar: Some Lawyers Feel There’s a Target on Their Back, TEX. LAW., Feb. 21, 2000, at 1 (“[L]awyers do practice law at accounting firms—they simply do it on the sly, free from confidentiality and conflict-of-interest
Big 5 accounting firms, the ABA reacted out of necessity in addressing the MDP issue. At the ABA mid-year meeting, held in February 2000 in Dallas, Texas, proponents of MDPs pleaded with the ABA to act on the MDP issue. A speaker at the meeting stated, “[i]t falls upon me to bring a sense of urgency into the discussion. MDPs are taking over our practice, and you are next.” It seems clear that while the ABA decides to oppose MDPs, the market for legal services is approaching its destination—integrated firms that provide a myriad of client services at one firm.

Those who oppose the recommended changes to the Model Rules cite many potential pitfalls of practicing law in the MDP setting. In particular, critics of MDPs believe that conflicts of interest between lawyers and their non-lawyer partners will often arise; that confidentiality duties of lawyers will conflict with those of non-lawyers; that lawyers will not be able to use independent judgment because of financial pressures; and that the attorney-client privilege will be eroded because of potential confidentiality breaches.

In addition, some members of the ABA fear that the financial pressures within MDPs will diminish lawyers’ commitment to pro bono work. Finally, opponents fear that MDPs will have an adverse impact on the fiscal health of existing law practices, although many lawyers dispute this assertion.

14. The Big 5 Accounting Firms consists of PriceWaterhouseCoopers LLP, Ernst & Young, Arthur Andersen, Deloitte Touche Tohmatsu, and KPMG Peat Marwick. For example, only 20% of Arthur Andersen’s 1997 revenue of $5.2 billion came from auditing. John E. Morris, King Arthur’s March on Europe—Arthur Andersen is on a Mission to Conquer the Continent’s High-End Legal Markets. Can the Accountants Beat the Lawyers at Their Own Game?, AM. LAW., June 1998, at 49.

15. See Richard Pena, Where Do We Go From Here?, 62 TEX. B.J. 328, 328 (1999) (warning that the bar must change if it is to survive).

16. See Koppel, supra note 13, at 1 (explaining the urgency in fashioning MDP regulations).

17. See infra Part I.B (discussing the counter-arguments to the creation of MDPs); ABA Comm. on Multidisciplinary Practice, Report to the House of Delegates, Report, at http://www.abanet.org/cpr/mdpreport.html (last visited Jan. 9, 2000) [hereinafter Report] (listing the core values of the legal profession that could be adversely affected by multidisciplinary practices).

18. See Lawrence J. Fox, Dan’s World: A Free Enterprise Dream; An Ethics Nightmare, 55 BUS. LAW. 1533, 1552 (arguing that pro bono work will be sacrificed if MDPs are allowed). Mr. Fox goes on to explain, “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.” Id.

19. See Ward Bower, ABA Report Endorses MDPs: What Should Your Firm Do?, LAW FIRM P’SHIP & BEN. REP., July 1999, at 3 (recognizing that MDPs can encroach upon traditional law firm practice in areas, such as labor, environmental, tax, regulatory, business practice and “big ticket” litigation); see also ABA Comm. on Multidisciplinary Practice, House of Delegates Debate, Annual Meeting 1999, at http://www.abanet.org/
Supporters of eliminating the ABA’s ban on fee sharing maintain that MDPs are an inevitable and necessary outgrowth of the growing complexity of conducting business and personal affairs in the information age. Advocates of “one-stop shopping” believe that clients should be able to satisfy their commercial and personal needs with the help of only one firm. These supporters urge that clients, whether they are large, small, international, or local, need comprehensive services from a team of professionals skilled in tax, engineering, insurance, technology, law, and financing. Likewise, on an individual level, “[a]n hourly worker factory worker hurt on the job . . . will need to see a psychologist for his emotional trauma, an insurance specialist to help him file for disability benefits, a social worker, who can counsel his family, and perhaps a lawyer if a suit is appropriate.”

In addition to providing clients with a wider array of services, MDPs promote greater freedom of association for lawyers, allowing them to form law practices with non-lawyers. Just as MDPs benefit corporate and individual clients, they can provide an unlimited possibility of professional partnerships for lawyers working in large and small

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20. When the Model Rules replaced the Model Code of Professional Responsibility in 1983, there was a proposal to end the prohibition against fee sharing with non-lawyers. See ABA Comm. on Multidisciplinary Practice, Report to the House of Delegates, Gen. Info. Form, at http://www.abanet.org/cpr/mdpgeninfo.html (last visited Jan. 9, 2000). The recommendation, which was defeated, permitted passive investment in law firms. The Commission’s recommendation does not propose allowing passive investment in law firms. See id.

21. See Direction of Legal Profession is Debated at Multidisciplinary Practice Panel Hearings, 15 Laws. Man. on Prof. Conduct (ABA/BNA) No. 2, at 45 (Feb. 17, 1999) (citing one participant, who said that the complexity of today’s environment requires different professionals with different expertise).

22. See id. at 44 (quoting a participant who felt that consumers should not have to use multiple firms when they could get the same services at a single entity).

23. See id. at 45 (mentioning a participant’s thoughts, which were that clients need comprehensive solutions from a team of professionals—lawyers, accountants, and other professionals).

24. Koppel, supra note 14, at 1; see John S. Dzienkowski & Robert J. Peroni, Shaping the Future of Law: ABA’s Multidisciplinary Practice Proposals Will Stymie the Growth of MDPs, Golden Age is Over, LEGAL TIMES, Aug. 2, 1999, at 27 (noting that consumer groups have stated that low and middle income individuals would benefit if MDPs were created); Tug of War, INT’L ACCOUNTING BULL., Mar. 25, 1998, at 5 n.225 (citing a person’s desire to merge his Elderly Law Practice with an accountant and money manager).

25. See Koppel, supra note 14, at 1 (providing an example of a firm that hires both lawyers and non-lawyers).
firms.26 Under a scheme free of burdensome regulations, lawyers could form partnerships with other professionals to provide a vast array of services.27 Thus, a lawyer could form a practice with a financial planner and social worker “to provide legal and non-legal services in connection with counseling older clients about estate planning, nursing home care, and living wills.”28 Low barriers to entry would allow lawyers and other professionals to set up an MDP with little capital, while a highly regulated scheme would favor large MDPs such as the Big 5. In a highly regulated scheme, large MDPs would be better positioned to sustain a heavy regulatory burden with their greater economies of scale.29

This Comment argues that the ABA should amend the Model Rules to permit MDPs. The ABA’s Commission on Multidisciplinary Practice proposed changes to the ABA House of Delegates to accomplish this goal. A Fully Integrated Model30 for an MDP, such as the model proposed by the ABA and the model endorsed in this Comment, will provide the fewest barriers to entry in setting up an MDP. A simple model with few regulations will ensure that lawyers who operate in both large and small firms will more effectively satisfy their clients’ needs.31

Part I of this Comment outlines the history of the MDP debate including some background on the ABA Commission on Multidisciplinary Practice and arguments for and against allowing MDPs. Part II describes the various models under which some form of MDPs would be permitted. Part II also examines MDP arrangements in Canada and Europe. Part III explains why MDPs can and should exist, focusing on how ethical rules can be observed in MDPs just as in any other law practice. Part IV describes the Commission’s proposed rule that permits MDPs. Next, this Comment endorses the Commission’s recommendation, with two proposed changes. This Comment proposes: (1) a change in the imputed disqualification/conflict of interest rules; and (2) a change

26. See Roth, supra note 12, at 12 (noting that support from MDPs is coming from consumer advocates, solo practitioners, accounting firms, and even big law firms).
27. See Dzienkowski & Peroni, supra note 24, at 27 (noting that the audit requirement in the recommendation would impose a barrier to entry that would inhibit the growth of non-lawyer-controlled MDPs in the United States).
29. For example of a rigid system that might suit only larger firms, see the discussion of the Contract Model, supra note 99 and accompanying text. As more regulations and formalities will create more overhead, firms with higher revenues may be better positioned to cover the expenses.
30. See infra notes 100 & 105 and accompanying text.
31. See supra Part V (recommending an MDP model with few barriers).
in the regulatory scheme for non-lawyer-controlled MDPs. This Comment concludes by urging the ABA to amend the Model Rules to allow for MDPs at the earliest possible date. Timely action is necessary to allow large firms to better service their multinational clients, and to allow small firms to better service small businesses and individuals.  

I. THE MDP DEBATE: HISTORY, PROS, AND CONS

In August 1998, the ABA first confronted the MDP issue by forming the twelve-person Commission on Multidisciplinary Practice. Subsequently, the Commission presented a number of questions regarding the MDP issue for public comment. After reviewing the

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32. See Roth, supra note 10, at 1 (noting that as the marketplace moves, lawyers may forfeit the chance to write their own rules).
33. See Background Paper, supra note 4 (noting that the new Commission consisted of practitioners, judges, and academicians).
34. See id. The Commission submitted the following questions to the public for comment:
1. How would clients be harmed or benefited by amending the ABA Model Rules of Professional Conduct (Model Rules) to permit a lawyer to enter into a partnership with a nonlawyer or enter into other arrangements that permit fee sharing with a nonlawyer? Can any specific instances of harm to a client by such a change be identified in either the United States or a foreign jurisdiction? If the benefits to clients would outweigh the harm, what restrictions, if any, should the Commission recommend? Should restrictions follow or differ from those adopted in Rule 5.4 of the Washington, D.C. Rules of Professional Conduct?
2. How, at all, would a lawyer’s independent professional judgment be impaired by changing the Model Rules to permit a lawyer to enter into a partnership with a nonlawyer or enter into other arrangements that permit fee sharing with a nonlawyer?
3. How, if at all, are the professional standards that govern the conduct of accounting firms different from those that govern the conduct of lawyers and law firms? How do any differences in professional standards impact on the protections offered to clients and the public?
4. If the Model Rules were amended to permit a lawyer to deliver legal services to the clients of a non-law firm entity at which the lawyer is employed or of which the lawyer is a partner (i.e., accounting firm, gerontological consulting firm, engineering firm, etc.)
(a) what changes, if any, should be made (1) to protect client confidentiality, i.e., information relating to the representation (Rule 1.6); and (2) to assure the lawyer’s avoidance of conflicts of interest (Rules 1.7-1.9)?
(b) what changes, if any, should be made to the general rule on imputed disqualification (Rule 1.10)? Should all clients of the non-law firm entity be treated as if they were clients of the lawyer?
(c) What changes, if any, should be made to 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 (Rule 5.7); and on advertising and solicitation (Rules 7.1-7.5)?
(d) Should the Model Rules be amended to permit the discipline of law
comments and holding hearings, the Commission submitted a report to the ABA House of Delegates in June of 1999. The Commission recommended that the ABA add a new rule—Model Rule 5.8—to the Model Rules of Professional Conduct. Although this proposed rule would permit MDPs, the proposed rule would subject them to a number of regulations, especially in instances where non-lawyers control the MDP. After much debate at the ABA annual meeting in Atlanta, Georgia, the ABA House of Delegates delayed action on the Commission’s proposal until more information on MDPs could be obtained.

Unlike the contentious meeting in 1999, the House of Delegates at the 2000 meeting did not even debate the Commission’s proposal. Instead the delegates voted by a 3-to-1 margin for a resolution that preserves the ABA’s ban on fee sharing, effectively ending any chances of changing the Model Rules to permit MDPs. In fact, the House of Delegates did not even vote on the MDP Commission’s proposal that was submitted in Atlanta and instead voted to disband the two-year old Commission.

A. Support for MDPs

Those who support MDPs maintain that clients want MDPs because they provide both legal and non-legal services within a single firm. At a Commission hearing in 1999, one participant explained, “[p]rohibiting lawyers from practicing law in firms that specialize in a variety of other business services means that the consumer has to use multiple firms to provide services that could be more efficiently provided by a single entity . . . .” With the internationalization of firms and/or MDPs?

(c) What changes, if any, should be made to the Rules?

Id.

35. See Report to the House of Delegates, supra note 3.

36. See ABA Comm. on MDP, App. A, supra note 2 (detailing the proposed changes to the Model Rules as part of the Commission’s recommendation).

37. See id. (stating that a lawyer may practice in a non-lawyer-controlled MDP if the MDP submits to annual audit by the highest court in each jurisdiction); see also infra note 155 (discussing the proposed rule).

38. See ABA Comm. on MDP, App. A, supra note 2 (explaining that the House of Delegates would not change the Model Rules until additional study showed that it was in the public interest).

39. See Gibeaut, supra note 1, at 92.

40. See id.

41. See id.

42. See Eleanor W. Myers, Multidisciplinary Practice Debate Continues: It’s Time to Redefine What We as Lawyers Really Do, LEGAL INTELLIGENCER, Oct. 12, 1999, at 11, 11 (stating that some see the MDP debate as “simple client preference for efficient, seamless, and cost effective service”).

43. Direction of Legal Profession is Debated at Multidisciplinary Practice Panel Hearings,
commerce, corporations have a growing need for integrated services. Moreover, consumer groups have also expressed a need for multidisciplinary services that cater to middle and low-income individuals, senior citizens, and families. Community resource centers, family resource centers, gerontological counseling centers, and real estate planning firms are examples of multidisciplinary arrangements that could benefit non-corporate clients.

Proponents of MDPs assert that the American legal profession may be left behind if the ABA and state bar associations do not permit the legal profession to engage in some form of multidisciplinary practice. As two commentators suggest, “If the ABA chooses to slow down or stop the development of [MDPs], we predict that Europe will become the 21st century hub of legal commerce as multinational companies, including U.S. corporations, turn to law firms and international professional service firms with offices in London, supra note 21, at 44 (quoting Mark K. Phigler, of Americans for Competitive Communications, who took a pro-MDP stance at the hearings).

44. See Dzienkowski & Peroni, supra note 24, at 27 (noting that even though opponents of MDPs believe that the Big 5 accounting firms have manufactured demand for integrated services, the fundamental changes occurring in commerce, such as internationalization, has created a need for MDPs).

45. See id. at 27 (stating that consumer groups have advocated multidisciplinary practices as a way to benefit their constituents and that traditional lawyers and law offices were often intimidating to consumers).

46. See id. (noting that consumers need counseling centers, family mediation clinics, and community resource centers). See generally Gary A. Munneke, Dances with Nonlawyers: A New Perspective on Law Firm Diversification, 61 FORDHAM L. REV. 559, 564-65 (1992) (noting that law firms traditionally retained other professionals to provide specific non-legal services).

47. See Dzienkowski & Peroni, supra note 24, at 27 (predicting that Europe will become the 21st century hub of legal services for corporations if the ABA halts the development of MDPs). In their article, Dzienkowski & Peroni not only advocate MDPs, but they criticize the restrictions imposed on non-lawyer-controlled MDPs, such as the proposed audit and filings requirements. See id.; see also Lewis E. Elicker, III, Room to Get Along. Pa. Law (July/Aug. 1999), at 16, 16 (suggesting that in the short run, lawyers may regulate themselves, but in the long run, the public must decide the kinds of law services it wants); Ritchenya A. Shepard, Law and Finance Under One Roof, NAT'L L.J., Nov. 15, 1999, at A21 (discussing the Legg Mason/Bingham Dana strategic alliance that was created in spite of the ABA’s reluctance to permit multidisciplinary practice). The Legg Mason/Bingham Dana alliance is an example of a law firm and investment firm creatively working within the current ethical rules to provide clients with multidisciplinary services. See id.

At one of the Commission hearings that was held prior to issuing the Recommendation, Ernst & Young’s General Counsel, Katherine Oberly, stated:

Absent a change in the rules, I suggest that U.S. lawyers will find themselves at a competitive disadvantage, because they will lack the “bench strength” and depth of resources to service client needs. This may explain the rush to mergers among large law firms in the United States, and the vigorous merger discussions between U.S. and European law firms.

MDP supporters also argue that the ABA must act soon because de facto MDPs, such as the Big 5 accounting firms and the quasi-legal services they offer, already exist. Accordingly, MDP supporters argue that the ABA should permit MDPs to allow large American firms to compete with their European counterparts, but that the ABA should frame the rules on its own terms so that it remains in control of the MDP issue.

B. Support for the Current Ban on Fee Sharing

The House of Delegates decision to uphold the current rules which prohibit fee sharing, and thus MDPs stemmed from the belief that such arrangements are inconsistent with the core values of the legal profession. In addition to barring MDP arrangements, the ABA at its July 2000 meeting also passed a resolution directing individual states to prosecute entities they believe are unlawfully delivering legal services.

1. The unauthorized practice of law

Many in the U.S. legal community have expressed strong beliefs
that lawyers at the Big 5 are engaging in “civil disobedience” whenever they provide legal services because of the current ban on practicing law in a multidisciplinary setting. Critics label such practice “civil disobedience” because they believe that lawyers, acting under the guise of consultants, violate unauthorized practice of law (“UPL”) statutes, which are included in the statutory scheme of every state. Attorneys at the Big 5 deny that they are practicing law, but instead insist that they merely provide consulting services in areas such as tax, real estate transactions, regulatory compliance, and pre-trial preparation. Although the work of these “consultants” mirrors legal services, the consultants provide their clients with a disclaimer stating that their work does not constitute a valid legal opinion.

Opponents of MDP view enforcement of UPL statutes as a way of policing companies such as the Big 5 for UPL violations to the point that the ABA passed the resolution urging states to actively prosecute

54. See House of Delegates Debate, supra note 19 (statement of Lawrence J. Fox) (claiming that the actions of certain lawyers at Big 5 companies constitutes “civil disobedience”).

55. For example, the District of Columbia’s Unauthorized Practice of Law provision falls under the D.C. Rules of Court. Rule 49, titled “Unauthorized Practice of Law,” states:

(a) General Rule. No person shall engage in the practice of law in the District of Columbia or in any manner hold out as authorized or competent to practice law in the District of Columbia unless enrolled as an active member of the District of Columbia Bar, except as otherwise provided by these Rules.

D.C. R. Ct. 49(a). On the other hand, Maryland has adopted the Model Rules provision, also titled “Unauthorized Practice of Law,” which states that:

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.


One of the main points of the MDP discussion taken by opponents is that UPL needs to be more clearly defined if it is to be enforced. Gary Blankenship, UPL Investment, Overhaul Net Results for Consumers, Fla. B. News, Nov. 1, 1999, at 6 (citing one commentator who feels that the only way to permit certain aspects of multidisciplinary practices is to change the rules regarding the unauthorized practice of law).

56. See id. (statement of Sherwin P. Simmons, Chairman of the ABA Commission on MDP) (identifying what lawyers at various companies deem consulting services, when in reality the services appear to be legal services).

57. See Jonathan Groner & Siobhan Roth, Envisioning a Big 5 Law Firm: Ernst and Young Positioning to Offer Full Legal Services, Legal Times, Oct. 25, 1999, at 1 (noting that CPA firms already employ lawyers who maintain that, when assisting clients, they are not practicing law).
entities engaging in such unlawful conduct. At the 1999 meeting, there was a sense that states were not enforcing UPL statutes against the five thousand lawyers with bar memberships who are currently offering legal services at the Big 5 consulting firms.

2. Preserving the core values of the legal profession

Critics of MDPs also argue that lawyers will compromise the core values of the legal profession if they are allowed to practice law at non-lawyer-controlled MDPs. These core values include lawyer independence, confidentiality, the attorney-client privilege, avoidance of conflicts of interest, and pro-bono work.

The rule of legal ethics that demands lawyer independence dictates that lawyers base their decisions on the rule of law rather than on client demands, external pressures, or profit motives. The ban on fee sharing is rooted in the belief that non-lawyers should not exercise influence over lawyers in providing legal advice. Independence extends beyond a lawyer’s professional judgment but also includes professional freedom, such as the ability to leave a client, settle cases, or select methods of defending a client.

Opponents of MDPs argue that control of a law firm by non-lawyers necessarily strips individual lawyers of their independence because

58. See Gibeaut, supra note 53, at 23 (discussing the ABA resolution calling for increased prosecution of UPL violators as an ineffective manner of combating the lawyers who provide quasi-legal services at Big 5 accounting firms).

59. See House of Delegates Debate, supra note 19 (statement of Sherwin P. Simmons, Chairman of the Commission on MDP) (mentioning that the MDP Commission declined to take UPL action against lawyers who practice at personal service firms).

60. See Lawrence J. Fox, Defend Our Clients, Defend Our Profession, PA. LAW (July/Aug. 1999), at 20, 20 (predicting the disappearance of lawyer independence should multidisciplinary practice become a reality).

61. See Report, supra note 17 (listing and explaining the core values that could be threatened by MDPs).

62. See James C. Moore, Lawyer Independence: Being Able to Tell the Client “You are a Damned Fool!”, N.Y. ST. B.J., Jan. 1999, at 5 (stating that lawyers have always been independent of all commitments except the rule of law); see also Model Rules of Prof’l.Conduct R. 5.4 cmt. (1983) (amended 1990) (stating that the independence provisions reflect traditional limitations on fee sharing and are enacted to protect the lawyer’s independence of judgment).

63. Fee sharing is taken directly from the text of Model Rule 5.4. Model Rules of Prof’l.Conduct R. 5.4(a).

64. “The prohibition against MDPs is rooted in the perception that it prevents a layperson from exercising undue influence over the independence of a lawyer in the representation of a client in attempt to subordinate the protection of clients to the pursuit of profit.” Background Paper, supra note 4.

65. See ABA Comm. on Multidisciplinary Practice, Remarks on the report and recommendations of the ABA Commission on MDPs, Remarks of Ramon Mullerat, at http://abanet.org/cpr/mullerat2.html (last visited Jan. 9, 2000) [hereinafter Remarks of Ramon Mullerat] (stating that independence consists of both independence of judgment and professional freedom).
they must now consider other client needs such as business strategy, medical problems, or family issues instead of only legal considerations. Some observers argue that law firms, at a minimum, must meet two minimal standards of independence: (1) all partners in a law firm must be lawyers, and (2) law firms should allow their lawyers to exercise independent judgment. Model Rule 5.4, which prohibits lawyers from sharing fees with non-lawyers, was created to insulate lawyers from external actors, particularly those seeking to use financial pressures to influence a lawyer’s opinion.

Additionally, opponents of the creation of MDPs point to possible encroachments on the attorney-client privilege as another possible drawback of eliminating the ban on fee sharing. The attorney-client privilege forbids lawyers from revealing client communications made in confidence to the lawyer or an agent of the lawyer unless the client

66. See id. (noting that absolute independence is necessary and that a lawyer must be free of external pressures).
67. See L. Harold Levinson, Independent Law Firms that Practice Law Only: Society’s Need, the Legal Profession’s Responsibility, 51 Ohio St. L.J. 229, 229-30 (1990) (stating the two attributes are the minimal standards of independence that law firms should meet).
68. See ABA Comm. on MDP, Remarks of Ramon Mullerat, supra note 65 (explaining that lawyers must not compromise their professional standards to please the client, the court, or the third parties).

When considering the importance of preserving the core values of the legal profession, the fate of the medical industry is a constant reminder to opponents and supporters of MDPs. See Pena, supra note 15, at 328 (warning that lawyers should look to the lessons of the medical profession in 1990s as an incentive to make changes in legal practice so that lawyers can control the destiny of the profession).

Both factions of the MDP debate recognize the need to address the issue. “It would not read the writing on the wall in time to come up with its own proposal for reforming the health-care system. The AMA lost its membership—its leaders had lost perspective.” Id. The American Medical Association in the 1990s was not pro-active in addressing the changing nature of medicine. As a result, doctors forfeited much of their power to healthcare buyers. See id. (claiming the doctors lost power to health-care buyers because they waited to address the problem).

The result was the unionization of doctors, which was permitted by the American Medical Association two years ago. See House of Delegates Debate, supra note 19 (statement of Lawrence J. Fox) (fearing that if MDPs are approved, lawyers, like doctors, will be forced to form a union in the future because the values of the profession will no longer be enforced).

Furthermore, the medical profession used to have a prohibition against fee sharing. See id. (noting that the medical profession used to have a rule like Model Rule 5.4, the rule governing independence). After its abandonment ten years ago, physicians could sell their practices. See id. (mentioning that doctors were able to sell their practices for $1 million or more). Commentators suggest that physicians compromised their authority in the medical field when they allowed HMOs to take control of the medical profession. See Mark Schauerte, Law Firms Eye New Ventures as Big Five Encroach on Legal Turf, Ctn. Law., Nov. 1999, at 6 (citing others’ concerns that lawyers might lose independence under MDPs like doctors did with Health Maintenance Organizations (HMOs)).

69. See Report, supra note 17 (outlining the concerns about the attorney-client privilege being compromised if MDPs are allowed).
expressly or implicitly waives the privilege. Significantly, the privilege protects communications between a lawyer and his co-counsel if made for the purpose of securing legal advice. Once a client’s statements are disclosed to anyone for any purpose other than seeking legal advice, the communications are no longer protected by the privilege. Accordingly, some commentators suggest that the courts will not recognize the attorney-client privilege in cases in which client communications to the lawyer are disclosed to other employees of the MDP who do not provide legal services.

Opponents of MDPs also argue that such firms present too many opportunities for conflicts of interest to arise. Conflict of interest rules exist to provide clients a reasonable expectation of loyalty by

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70. In his hornbook, Charles Wolfram defines the attorney-client privilege: (1) a person (client) who seeks legal advice or assistance (2) from a lawyer acting in behalf of the client, (3) for an indefinite time may invoke, and the lawyer must invoke in the client’s behalf, an unqualified privilege not to testify (4) concerning the contents of a client communication (5) that was made by the client or by the client’s communicative agent (6) in confidence (7) to the lawyer or the lawyer’s confidential agent, (8) unless the client expressly or by implication waives the privilege.

Charles W. Wolfram, Modern Legal Ethics § 6.3.1, at 250-51 (1986). The privilege is summed in Model Rule 1.6 (Confidentiality of Information), which states that: “A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosure that are impliedly authorized in order to carry out representation ….” Model Rules of Prof’l Conduct R. 1.6 (1983).

The attorney-client privilege is threatened in an MDP when a non-lawyer supervisor is presented with conflicting professional considerations. See Richard E. Mikels & Mark I. Davies, Multidisciplinary Practices: Ethical Concerns or Economic Concerns?, AM. BANKR. INST. J., July-Aug. 1999, at 21 (noting that large MDPs could be conflicted out of many cases and demonstrating that a lawyer may be jeopardizing the attorney-client privilege when informing a non-lawyer supervisor of the progress of a case when the supervisor is an accountant, who might have an ethical duty of disclosure in certain situations).

71. See Paul R. Rice, Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished, 47 DUK. L.J. 853, 856 (1998) (stating that a party may invoke the attorney-client privilege if it can show a document has some legal significance).

72. See Paul R. Rice, Our Late Great Secrets?, LEGAL TIMES, June 14, 1999, at 18 (observing the possibility that creation of MDPs “could undermine important presumptions and significantly affect the way in which these law firms should treat attorney-client communications in order to preserve the privilege”).

73. See id. (stating that presumptions of confidentiality may no longer be justified after the mergers of law and non-law practices). In practice, however, confidentiality is often ignored. See id. For example, courts have ignored the loss of confidentiality component of client communication when documents have been stolen or inadvertently disclosed. See id. One possible remedy to the problems of the attorney-client privilege in an MDP setting is to abolish the requirement of confidentiality as a condition precedent to the attorney-client privilege. See id.

74. See Report, supra note 17 (listing concerns about conflicts of interest if MDPs are allowed). But see Rice, supra note 72, at 18 (stating that the attorney-client privilege would probably not be destroyed in multidisciplinary firms, even if controlled by non-lawyers).

75. See infra note 157 (supplying a complete listing of the rule).
the attorney and of confidentiality with regard to a present or former attorney. 76 Trouble could arise in an MDP when a lawyer is obligated to maintain confidentiality regarding a client’s affairs, while an accountant in the same MDP is forced to disclose certain materials because the interest of others must be considered. 77 Unlike lawyers, who are often bound by confidentiality, accountants have many disclosure requirements. 78 Situations could arise where the duty of an accountant to disclose and the duty of an attorney to keep information confidential are in conflict. 79 Accordingly, opponents of MDPs argue that combining law practice with other professional services will significantly increase the number of conflicts of interest in the practice of law. 80 Similarly, many also believe that conflicts of interest inevitably increase as law firms increase in size. 81

Imputation rules also present MDPs with possible hurdles. 82 Imputation rules prevent all lawyers in a firm from representing a

76. See Model Rules of Prof’l Conduct R. 1.7, cmt. 4 (1983) (amended 1987) (stating that loyalty to the client is impaired when a lawyer cannot carry out his duties because of other responsibilities).
77. See Hogan, supra note 12 (explaining that the duties of a lawyer to maintain confidentiality could conflict with the duties of an auditor).
78. See id.
79. See id. (identifying the potential problem that conflicts of interest could arise between providers of professional services within an MDP).
80. See Mikels & Davies, supra note 70, at 20, 21 (noting that large MDPs could be conflicted out of many cases).
81. For example, it would be difficult for a debtor’s potential MDP attorney to discover if a non-lawyer colleague from another international office is negotiating an audit engagement with one of the debtor’s creditors. See id.
82. See Model Rules of Prof’l Conduct R. 1.10 (1983) (amended 1989) (stating that when lawyers are associated in a firm, no lawyers shall knowingly represent a client if there will be a conflict of interest or a violation of intermediary rule would result). Rule 1.10, entitled “Imputed Disqualification,” states that:
(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when anyone of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9, or 2.2.
(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
(c) A disqualification prescribed by this rule may be waived by the affected client under conditions stated in Rule 1.7.
Id.; see A Guide to the ABA Debate Over Multidisciplinary Firms Facing the Future of the Practice—Now, Legal Times, Aug. 2, 1999, at 18 [hereinafter Guide to ABA Debate] (criticizing the MDP Commission’s Recommendation because it failed to address the imputation rule, which could potentially be global firms’ biggest problem); ABA Comm. on MDP, App. A, supra note 2 (listing the proposed comment to Model Rule 1.10). See infra Part IV.
client that any one of them practicing alone would be prohibited from representing because of a conflict of interest.\(^{83}\) Thus, a minor conflict of interest involving an associate in the United States can be imputed to a partner in Europe and prevent the partner from accepting a case.\(^ {84}\) Large U.S. law firms that operate internationally are already constrained by imputation rules.\(^ {85}\) Many international law firms that currently compete with the Big 5, who are not bound by the conflict of interest limitation, want to change the imputation rules because they place American firms at a competitive disadvantage.\(^ {86}\)

Finally, many opponents to MDPs argue that the legal profession’s commitment to pro bono work will suffer if MDPs begin operating in the United States.\(^ {87}\) The source of this fear comes from the notion that non-lawyer-controlled MDPs will be concerned solely with generating profits, weakening the legal profession’s commitment to public service.\(^ {88}\)

### II. Multidisciplinary Practices Models

The Commission based its recommendation to the House of Delegates on its observations of various practice models that combine legal and non-legal services.\(^ {89}\) When crafting the new MDP rule, the Commission looked to models that currently exist in the United

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83. See Model Rules of Prof’l Conduct R. 1.10 cmt. 6 (1983) (amended 1989) (noting that imputed disqualification come from the premise that a firm of lawyers is considered one lawyer for the purposes of client loyalty). The definition of a “firm” can become a point of contention. See id. at cmt. 1.
84. See Guide to ABA Debate, supra note 82, at 18 (describing how the imputation rule could block a partner’s efforts in one country because of a relatively minor conflict of interest involving an associate in another country).
85. See id. (stating that a minor conflict of interest involving an associate in the United States could prevent a partner in another country from representing a client).
86. See id.
87. See Direction of Legal Profession is Debated at Multidisciplinary Practice Panel Hearings, supra note 21, at 45 (noting that one of the speakers at the Commission on MDP Hearing in Los Angeles felt that MDPs might not encourage pro bono obligations). But see ABA Multidisciplinary Panel Hears Final Witnesses on Regulation of MDP, 13 Laws. Man. on Prof. Conduct (ABA/BNA) No. 4, at 95 (Mar. 17, 1999) (reporting statements of Big 5 representatives, who maintained that accounting firms are already committed to public service work and that MDP will have greater resources in which to offer pro bono work than in traditional law firms).
88. See Fox, supra note 18, at 1551-52 (arguing that lawyers have a duty to represent the downtrodden and the poor, and that pro bono work will be sacrificed if lawyers do not have the professional independence to provide such services).
Although MDPs are not allowed under the Model Rules, the rules permit some practice arrangements that provide legal and non-legal services. On the other hand, MDPs of one form or another exist in Canada, Australia, Russia, and much of Western Europe. Lawyers at the Big 5 accounting firms account for a large number of the attorneys practicing in MDP settings abroad. At the end of 1998, the Big 5 employed over 5,500 non-tax lawyers in at least thirty-nine countries around the world.

Because the ABA has decided to disallow MDPs, lawyers in the United States who wish to provide multidisciplinary services to their client must devise practice models that are presently allowed under the Model Rules. This section identifies different forms of practice that combine legal and non-legal services. In addition, it examines different forms of MDPs that exist internationally.

A. Different Models of Combining Legal and Non-legal Services

In its Report to the House of Delegates, the Commission on Multidisciplinary Practice identified five practice models. These models are (1) the Cooperative Model, (2) the Command and Control Model, (3) the Law-Related Services/Ancillary Business Model, (4) the Contract Model, and (5) the Fully Integrated Model.

90. See id.
91. See id.
92. See Noble, supra note 12 (listing examples of MDP arrangements in Canada); Rubenstein, supra note 12 (listing examples of MDP in arrangements Europe); see also Richard Tyler, War of the Words: French Plans to Regulate MDPs have Sparked a Debate Between Lawyers and Accountancy Firms Which Could Lead to All-Out War, LAWYER 1517 (Aug. 4, 1998) (discussing how the Big 5 dominate the legal scene in France).
93. See Background Paper, supra note 4 (detailing the members of the Big 5 and how many lawyers they employ in countries around the world).
94. See id. (citing the Big 5’s desire to become major players in the legal services market around the world).
95. See ABA Comm. on MDP, App. C, supra note 89.
96. See id. (noting that even though the Cooperative Model is not an MDP, the Cooperative Model describes the current status of law firms in the United States). In this model, lawyers in a firm may hire non-lawyer professionals such as paralegals to assist in providing legal services to clients. See id. In addition, the lawyer may retain other professional firms, such as an accounting or consulting firms to work closely with the firm on behalf of clients. See id.
97. See id. (stating that the Command and Control Model is not an MDP under the Commission’s recommendation because the firm’s sole purpose would be providing legal services to clients even though the model allows lawyers and non-lawyers to share legal fees). Under both of the above models of practice, non-lawyers working at the firm must abide by a lawyer’s professional standards of conduct. See id.
98. See id. (stating the Law-Related Services/Ancillary Business Model is not an MDP because non-lawyer partners do not actually share legal fees and are not partners in the firm). In this model, law firms own and operate ancillary businesses
Model.100

Under the current scheme, the ABA permits the Cooperative Model, the Command and Control Model, and the Law-Related Services/Ancillary Business Model101 as these models do not technically constitute MDPs because legal fees are not shared.102 Law firms in the United States currently operate in the Cooperative Model, where lawyers in a firm may hire non-lawyer professionals such as paralegals and retain other professionals such as accountants or consultants to perform specific work for the firm on behalf of clients.103 Likewise, the Command and Control Model allows non-lawyer partners, but the firm’s sole purpose is to provide legal services.104 Moreover, the Law-Related Services/Ancillary Business Model permits law firms to own other businesses, such as consulting
firms, to assist clients.\textsuperscript{105} The ancillary business may include lawyer and non-lawyer partners, but may not provide legal services.\textsuperscript{106}

On the other hand, the Contract Model and Fully Integrated Model are MDPs because there is a sharing of legal fees either directly or indirectly.\textsuperscript{107} Under the Contract Model, the law firm remains a separate entity controlled by lawyers, sharing the profits with a professional service firm that provides a particular non-legal service to the client.\textsuperscript{108} For example, the law firm might rent space from the professional services firm, the two entities might share letterhead, or identify their affiliation in advertising.\textsuperscript{109} Under the Fully Integrated approach, one firm, controlled by lawyers or non-lawyers, can provide both legal and other professional services.\textsuperscript{110}

\textbf{B. Observing the Practice Models Inside and Outside the United States}

Unlike other jurisdictions in the United States, the District of Columbia permits a variation of fee sharing between lawyers and non-lawyers.\textsuperscript{111} The D.C. rule permits fee sharing and partnerships with non-lawyers in firms exclusively delivering legal services and controlled by lawyers.\textsuperscript{112} Although fairly restrictive, the rule does allow accountants to be partners in a tax practice, psychologists to be partners in a family law practice, or economists to work in an antitrust practice.\textsuperscript{113}

Practically speaking, the D.C. rule has had little effect for two primary reasons.\textsuperscript{114} First, firms have had little interest because the rule requires that firms engage solely in legal practice.\textsuperscript{115} Second, the

\begin{itemize}
  \item \textsuperscript{105} See \textit{id.} (describing the Law-Related Services Model, where a law firm may own another business with non-lawyers so long as clients are aware that the business is distinct from the law firm and that the business does not provide legal services).
  \item \textsuperscript{106} See \textit{id.} (distinguishing the ancillary business from the law firm).
  \item \textsuperscript{107} See \textit{id.} (stating the Contract Model and the Fully Integrated Model constitute MDPs).
  \item \textsuperscript{108} See ABA Comm. on MDP, App. C, supra note 95.
  \item \textsuperscript{109} See \textit{id.} (providing an example of identifying an affiliation, such as “A & B, P.C., a member of XYZ Professional Services, LLP”).
  \item \textsuperscript{110} See \textit{id.} (mentioning that the Fully Integrated Model includes a single firm providing an array of services rather than a freestanding law firm).
  \item \textsuperscript{111} See Janet L. Conley, \textit{Ernst and Young Set to Hire Tax Lawyers}, \textit{Legal Intelligencer}, Oct. 7, 1999, at 4 (noting the comments of Susan D. Gilbert, Ethics Counsel, District of Columbia Bar, who stated that the District of Columbia is the only jurisdiction in the United States that allows lawyers to share fees with non-lawyers).
  \item \textsuperscript{112} See \textit{id.} (noting that non-lawyer/lawyer partnerships are limited to firms that provide only legal services).
  \item \textsuperscript{113} See \textit{id.} (citing examples of partnerships that are permitted under the rules for the District of Columbia).
  \item \textsuperscript{114} See ABA Comm. on MDP, App. C, supra note 95 (reviewing the testimony of Susan Gilbert, who stated that few firms appear to have non-lawyer partners).
  \item \textsuperscript{115} See \textit{id.} (stating that the “sole purpose” of providing a legal service
ABA imposed limitations on the D.C. rule that does not allow a law firm with offices in more than one state or jurisdiction to have a non-lawyer partner in the D.C. office.\textsuperscript{116} Therefore, the rule only applies to Washington, D.C. firms that only have an office in the District of Columbia.\textsuperscript{117}

At the end of 1999, a number of lawyers from the Atlanta and Washington, D.C. offices of King & Spalding left the firm to form an alliance with Ernst & Young.\textsuperscript{118} The firm, named Mckee Nelson Ernst & Young is only comprised of lawyers, so it is not an MDP.\textsuperscript{119} Being in D.C. allows the firm to hire non-lawyer partners, but under the current rules, the firm can only be engaged in the practice of law.\textsuperscript{120} The formation of the Ernst & Young firm in D.C. can be interpreted as a maneuver by the audit firm to position itself in the MDP market had the ABA permitted such practices. Since the ABA’s decision to reject MDPs, the fate of the firm remains to be seen.\textsuperscript{121}

\textsuperscript{116}See id. (citing the provision of ABA Formal Opinion 91-360, which disallows non-lawyers partners if a firm has an office outside the District of Columbia).

\textsuperscript{117}See id. (applying the effect of the District of Columbia rule when coupled with the ABA limitation).

\textsuperscript{118}See Jonathan Groner & Siobhan Roth, Envisioning a Big 5 Law Firm: Ernst and Young Positioning to Offer Full Legal Services, LEGAL TIMES, Oct. 25, 1999, at 1 (discussing the proposed formation of a law firm by Ernst & Young and lawyers from King & Spalding); see also Koppel, supra note 13, at 1 (noting that King & Spalding lawyers created an alliance with Ernst & Young when forming Mckee Nelson Ernst & Young).

\textsuperscript{119}See Roth, supra note 10, at 20 (noting that the firm is comprised of 17 attorneys). See generally Daniel R. Fischel, Multidisciplinary Practice, 55 BUS. LAW. 951, 952-53 (stating that Ernst & Young’s new law firm is not violating Model Rule 5.4 because Ernst & Young is merely a lender to new firm and will be repaid with interest).

\textsuperscript{120}District of Columbia Rule of Professional Conduct provides:

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

(1) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b).

(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to client;

(2) All persons having such a managerial authority or holding a financial interest undertake to abide by these rules of professional conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;

(4) The foregoing conditions are set forth in writing.


\textsuperscript{121}One of the founders of Mckee Nelson Ernst & Young recently left the firm to join the tax practice at KPMG. See Bryan Rund, On the Move, LEGAL TIMES, Oct. 16,
A different model for MDPs has developed in Canada.\textsuperscript{122} This model is a form of the Contract Model discussed in the Commission’s report.\textsuperscript{123} Two years ago, in response to similar actions by its competitors, Ernst & Young’s Canadian unit established what is known as a “captive law firm.”\textsuperscript{124} The firm, Donahue & Company, offers many legal services including mergers and acquisitions, commercial real estate, labor and employment, and capital markets.\textsuperscript{125} It is not an MDP in a strict sense because its lawyers do not share fees with other Ernst & Young professional firms.\textsuperscript{126} In addition, the law firm partnership is composed strictly of lawyers.\textsuperscript{127} The firm is, however, a member of Ernst & Young International, Ltd., which is the umbrella organization for all Ernst & Young firms.\textsuperscript{128} The law firm pays Ernst & Young a management fee, as well as all its administrative expenses such as rent, technical support, secretarial services, and supplies.\textsuperscript{129} Also, each partner in the law firm is a partner of Ernst & Young Management Consultants, the Canadian partnership for Ernst & Young’s non-accounting professionals.\textsuperscript{130} Thus far, the Law Society of Upper Canada, the governing body of lawyers in Ontario, has raised no objections to Donahue & Company.\textsuperscript{131} Recently, the Law Society passed a rule that would allow MDPs to offer non-legal services only where the services supplemented specific legal services.\textsuperscript{132} Significantly, this rule would prevent the creation of Fully

\footnotesize 2000, at 31.
\textsuperscript{122} See Noble, \textit{supra} note 12, at 51 (outlining Ernst & Young’s establishment of a Canadian law firm, Donahue & Partners). Ernst & Young worked within the parameters of the Canadian Regulatory scheme and did not try to change any bar rules. \textit{See id.}
\textsuperscript{123} \textit{See supra} notes 99, 107-09 and accompanying text (discussing the Contract Model, under which law firms share profits with non-legal service providers while remaining a separate entity).
\textsuperscript{124} \textit{See supra} note 12, at 51 (stating that the Ernst & Young group looked to Arthur Andersen’s affiliation with Garrett & Co. in the United Kingdom as an example of a “captive law firm”). For a description of the “captive law firm” set up in Canada, see \textit{infra} notes 125-30 and accompanying text.
\textsuperscript{125} \textit{See id.} (discussing the breadth of the service approach employed by Donahue & Company).
\textsuperscript{126} \textit{See id.} (explaining the management structure of Donahue & Company).
\textsuperscript{127} \textit{See id.}
\textsuperscript{128} \textit{See id.} (discussing the intricacies of Donahue & Company relationship with Ernst & Young).
\textsuperscript{129} \textit{See id.} (elaborating on the fiduciary relationship between Donahue & Company and Ernst & Young).
\textsuperscript{130} \textit{See Noble, supra} note 12, at 51 (discussing the management structure of Donahue & Company and Ernst & Young).
\textsuperscript{131} \textit{See id.} at 52 (explaining the process by which Ernst & Young determined its Canadian practice was legal, which entailed consulting the governing body of the legal profession, the Law Society of Upper Canada, Ontario).
\textsuperscript{132} \textit{See id.} (prohibiting MDPs from doing work primarily of a non-legal nature).
Integrated MDPs. The Québec Bar, on the other hand, has been more willing than the Ontario Bar to accept MDPs. The Québec Bar has actually endorsed MDPs, and because the Canadian Bar Association has no regulatory jurisdiction, it is powerless to prevent Québec from allowing MDPs. In any event, the captive law firm arrangement in Canada will provide an experimental model which may succeed, fail, or be shut down. Through its new arrangements in Canada and in the District of Columbia, Ernst & Young has demonstrated its eagerness to establish a legitimate stake in the North American market for legal services.

In Switzerland, the rules allow for the Fully Integrated model of MDPs. ATAG Ernst & Young is currently the largest law practice in Switzerland. Swiss rules, which allow in-house legal practices, make the ATAG Ernst & Young arrangement possible. In addition to Switzerland, varying forms of MDPs are currently operating in France, England, Spain, Ireland, and South Africa.

III. HOW MULTIDISCIPLINARY PRACTICES CAN EXIST

Opponents of MDPs argue that profit considerations will override independent legal judgment. In reality, law firms have always had to weigh the ethical duties to clients with the financial interests of the firm. Law firms would become insolvent if they continuously

133. See id. (examining the effects of the new the Law Society of Upper Canada rule permitting only a very limited form of MDPs on Donahue & Company).
134. See id.
135. See id. supra note 12, at 32.
136. See id. supra note 12.
137. See id.
138. See id. supra note 12 (stating that the Swiss rules allow for joint law and accounting firms).
139. See Tyler supra note 92, at 1517 (explaining that over 4,000 lawyers, or 10% of the profession, are employed by some type of multidisciplinary practice in France).
140. See John E. Morris, King Arthur’s March on Europe: Arthur Andersen is on a Mission to Conquer the Continent’s High-End Legal Market. Can the Accountant’s Beat the Lawyer’s at Their Own Game?, Am. Law., June 1998, at 49 (stating that Garretts, Arthur Andersen’s UK firm, employed 170 lawyers in 1997).
141. See id. supra note 12 (describing the Andersen-Garrigues merger in Spain as the first in a series of dramatic moves for Andersen on the European scene).
142. See Hogan supra note 12 (describing a new Irish law firm, which will be closely associated with PriceWaterhouseCoopers).
143. See Roth supra note 10, at 20 (discussing an investment bank’s recent acquisition of seventeen litigators from a law firm in Johannesburg, South Africa).
144. See Background Paper supra note 4 (noting that the prohibition against MDPs is to protect a lawyer’s independent judgment from influence by a layperson in pursuit of profit).
145. See Mikels & Davies supra note 70, at 20 (noting that the struggle to balance ethical obligations with the economies of a law firm while providing adequate legal
pursued client interests above the firm’s financial interests. Thus, it is neither tenable to say that a lawyer in an MDP is unable to use independent judgment in addressing legal issues, nor to suggest that lawyers in firms or in solo practice serve their clients free of any financial concerns.

Beyond independence, other core values of the legal profession can be protected if lawyers in MDPs abide by the existing standards included in the Model Rules. Thus, lawyers in MDPs may not provide legal services to a client if there will be ethical violations. As MDPs get larger and expand globally, the tasks of managing ethical issues and potential conflicts will become more difficult. MDPs, like large law firms in the current scheme, will have to establish viable internal procedures to avoid conflicts of interest, such as firewalls. Practically speaking, large MDPs might be conflicted out of many cases.

Although ethical considerations and potential conflicts will be a hurdle for MDPs, lawyers in an MDP must confront these issues just as lawyers do in traditional law firms. Significantly, certain developments in the law could make it easier for MDPs to function. These potential developments are the abolishment of confidentiality as condition precedent for the attorney-client privilege, and a revision of the rules governing the conflicts of interest. The services is not unique to MDPs).

146. See id. (suggesting that a firm erring on the side of its ethical duties to a client will experience financial difficulties). In their article, Mikels & Davies state that as law firms increase in size, the partners have less and less contact with the firm’s clients. See id. Thus, the partner may be unwilling to sacrifice economic interests for that of a client with which he or she has no contact. See id. at 20-21. Accordingly, law partners, like accounting partners, are motivated by a return on investment in a firm. See id. at 21.

147. See Myers, supra note 42, at 11 (noting that stresses on lawyer independence exist today and that suggesting that law firms operate free from the influence is unrealistic given the proliferation of writing on how professional values are being sacrificed because of greed).

148. See Mikels & Davies, supra note 70, at 21 (stating that potential conflicts between lawyers and accountants representing clients at MDPs may substantially diminish the benefits of law or accounting firms forming MDPs).

149. See infra Part V.B (discussing the application of the Model Rules to lawyers in MDPs).

150. See Mikels & Davies, supra note 70, at 21 (suggesting that even with adequate procedures for checking conflicts, large MDPs might be conflicted out of many cases). For a discussion of conflicts of interest and how imputed conflicts disqualify firms from representing clients, see supra notes 82-86 and accompanying text.

151. See Rice, supra note 71, at 868 (finding that courts over the past century have honored confidentiality more in theory than in practice and that confidentiality should therefore be abolished as a requirement of preserving the privilege).

152. See Mikels & Davies, supra note 70, at 21 (stating the belief that the conflict of interest rules will be altered in the age of multidisciplinary practice); Speakers Single out Ethics Rules That Need Change if MDPs are Allowed, 15 LAWS. MAN. ON PROF.
elimination of confidentiality would lower the costs of asserting the attorney-client privilege and would still afford the protections of the attorney-client privilege to MDPs and law firms. Relaxing the imputation of conflicts rule would also benefit both MDPs and law firms because conflicts of interest will be imputed to all the lawyers in a firm less frequently.

IV. THE COMMISSION’S PROPOSED RULE GOVERNING MULTIDISCIPLINARY PRACTICES

In its recommendation to allow MDPs, the Commission proposed adding a new rule and accompanying comments to the ABA’s Model Rules of Professional Conduct. The proposed rule—Model Rule 5.8—is titled “Responsibilities of a Lawyer in a Multidisciplinary Practice Firm.” There are three important aspects of Rule 5.8.

CONDUCT (ABA/BNA) No. 2, at 46 (Feb. 17, 1999) (discussing how many participants at the MDP Commission meeting felt that Rule 1.10 governing imputation of conflicts of interests is outdated and should be relaxed).

153. See Rice, supra note 73, at 18 (noting that if confidentiality remains a condition for the attorney-client privilege, MDPs will be at a greater disadvantage than law firms). Professor Rice states:

Under existing case law, the ABA commission’s multidisciplinary proposal would increase the costs of asserting the [attorney-client] privilege. In order to minimize the extensive proof of confidentiality that will be required for each and every document, the new law-plus firms will have to use the same burdensome confidentiality policies—that is, much stricter control of the creation, labeling, and distribution of such communications—that they now promulgate for their corporate clients.

Id.

154. See infra Part V.B (arguing that the rules governing conflicts of interest should be relaxed to allow MDPs and law firms to represent a broader range of clients).

155. See ABA Comm. on MDP, App. A, supra note 2 (listing proposed Model Rule 5.8). Model Rules that begin with the number five apply to “Law Firms and Associations.” MODEL RULES OF PROFESSIONAL CONDUCT vi (1998). Model Rule 5.7, titled “Responsibilities Regarding Law-Related Services,” currently permits firms to own other types of businesses, such as consulting firms. Note that Rule 5.4, titled “Professional Independence of a Lawyer,” also applies to the conduct of law firms and associations. The Commission’s proposed Model Rule 5.8 states that:

(a) A lawyer shall not share legal fees with a nonlawyer or form a partnership or other entity with a nonlawyer if any of the activities of the partnership or other entity consist of the practice of law except that a lawyer in an MDP controlled by lawyers may do so, subject to the present provisions limiting the holding of equity investments in any entity or organization providing legal services. A lawyer in an MDP not controlled by lawyers may do so, subject to the conditions set forth in paragraphs (c)(1)-(5), and subject to the present provisions limiting the holding of equity investments in any entity or organization providing legal services.

(b) A lawyer in an MDP remains subject to all the Model Rules of Professional Conduct, unless this Rule provides otherwise.

(c) A lawyer may practice in an MDP in which lawyers do not own a controlling interest only if the MDP provides the highest court with the authority to regulate the legal profession in each jurisdiction in which the
First, the rule allows for the creation of Fully Integrated MDPs. Second, the rule states that all lawyers in MDPs must comply with all of the Model Rules of Professional Conduct. Third, the rule distinguishes lawyer-controlled MDPs from non-lawyer-controlled MDPs and imposes a separate regulatory system for non-lawyer-controlled MDPs. To be clear, Rule 5.8 does not allow non-lawyers

MDP is engaged in the delivery of legal services written undertakings signed by the chief executive officer (or similar official) and the board of directors (or similar body) that:

1. It will not directly or indirectly interfere with a lawyer’s exercise of independent professional judgment on behalf of a client;
2. It will establish, maintain and enforce procedures designed to protect a lawyer’s exercise of independent professional judgment on behalf of a client from interference by the MDP, any member of the MDP, or any person or entity associated with the MDP;
3. It will establish maintain and enforce procedures to protect a lawyer’s professional obligation to segregate client funds;
4. Its members will abide by the rules of professional conduct when they are engaged in the delivery of legal services to a client of the MDP;
5. It will respect the unique role of the lawyer in society as an officer of the legal system, a representative of clients and a public citizen having special responsibility for the administration of justice. This statement should acknowledge that lawyers in an MDP have the same special obligation to render voluntary pro bono publico legal service as lawyers practicing solo or in law firms;
6. It will annually review the procedures established in subsection (2) and amend them as needed to ensure their effectiveness; and annually certify its compliance with subsections (1)-(6) and provide a copy of the certification to each lawyer in the MDP;
7. It will annually file a signed and verified copy of the certificate described in subsection (6) with the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in the delivery of legal services, along with information identifying each lawyer who has been a member of the MDP during the reporting period, the jurisdiction in which the principal office of each such lawyer is located, and the jurisdiction(s) in which those lawyers are licensed to practice law;
8. It will permit the highest court with the authority to regulate the professional conduct of lawyers in each jurisdiction in which the MDP is engaged in the delivery of legal services to review and conduct an administrative audit of the MDP, as each such authority deems appropriate, to determine and assure compliance with subsections (1)-(7); and
9. It will bear the cost of the administrative audit of MDPs described in subparagraph (8) through the payment of a reasonable annual certification fee.

(d) An MDP that fails to comply with its written undertaking shall be subject to withdrawal of its permission to deliver legal services or to other appropriate remedial measures ordered by the court.

Id. 156. See id. (stating that lawyers in an MDP may share legal fees with non-lawyers subject to the present provisions restricting equity holdings in entities providing legal services).

157. See id. (“A lawyer in an MDP remains subject to all the Model Rules of Professional Conduct . . . .”).

158. See id. (providing that non-lawyer-controlled MDPs sign written undertakings that attest that, inter alia, the independence and unique role of the lawyer will be
in an MDP or any other setting to deliver legal services.\(^{159}\)

**A. Fully Integrated Practice**

Rule 5.8 allows for the creation of Fully Integrated MDPs because it allows lawyers to directly share legal fees with non-lawyers, and it does not require any artificial boundaries between the legal practice and other divisions of the firm.\(^{160}\) For example, in some forms of the Contract Model of MDPs, the legal practice shares letterhead and advertising, and refers clients on an exclusive basis with the professional services firm.\(^{161}\) Fee sharing also occurs, but the legal practice remains a separate entity controlled by lawyers.\(^{162}\)

Rule 5.8 does not require the legal services group to be a separate entity controlled by lawyers.\(^{163}\) In fact, 5.8(a) specifically allows non-lawyer-controlled MDPs.\(^{164}\) Thus, the MDP may provide a fully integrated line of services even when the firm is not controlled by lawyers.\(^{165}\) The rule, however, suggests that firewalls be implemented in certain scenarios between different groups in the MDP to preserve the attorney-client privilege.\(^{166}\) The comments to Rule 5.8 effectively require firewalls to retain the confidentiality of information within the MDP, such as restricting access to files and separating the lawyers and non-lawyer assistants from other service units within the MDP.\(^{167}\)

**B. All Model Rules Apply to Lawyers in an MDP**

Proposed Rule 5.8 succinctly states that “[a] lawyer in an MDP remains subject to all Model Rules of Professional Conduct, unless...”

\(^{159}\) See Report, supra note 17 (stressing that the MDP Commission was not advocating that non-lawyers should be allowed to practice law).

\(^{160}\) See ABA Comm. on MDP, App. A, supra note 2 (allowing lawyers to share fees with non-lawyers in an MDP).

\(^{161}\) See supra notes 99, 107-09 and accompanying text (describing the Contract Model of an MDP).

\(^{162}\) See id.

\(^{163}\) See supra note 155 and accompanying text (describing Rule 5.8 and how it permits Fully Integrated MDPs).

\(^{164}\) See ABA Comm. on MDP, App. A, supra note 2 (permitting lawyers to practice in MDPs where non-lawyers own a controlling interest).

\(^{165}\) See id.

\(^{166}\) See id. (“[I]t may be necessary for an MDP to implement special procedures to protect confidential information . . . .”). The suggestion of firewalls appears in comment 3 to Rule 5.8. See id.

\(^{167}\) See id. (stating that it may be necessary for an MDP to build firewalls to protect the flow of information between different professional practice areas within the MDP); infra notes 222-23 and accompanying text (describing a commentator’s suggestion that firewalls may be adequate to ensure that confidentiality is maintained).
this Rule provides otherwise.\textsuperscript{168} Moreover, Rule 5.8 specifically allows lawyers in an MDP to share legal fees with non-lawyers, an arrangement that Rule 5.4 forbids.\textsuperscript{169} Furthermore, the Commission reiterates that passive investment in law firms or MDPs is prohibited.\textsuperscript{170} Thus, ownership of the MDP is limited to members performing professional services.\textsuperscript{171}

C. A Different Regulatory Scheme for Non-Lawyer-Controlled MDPs

A non-lawyer-controlled MDP exists when lawyers do not own a controlling interest in the firm.\textsuperscript{172} In an attempt to assure compliance by non-lawyer-controlled MDPs with the Model Rules, Rule 5.8(c) creates a special regulatory mechanism.\textsuperscript{173} Under the regulatory provision, non-lawyer-controlled MDPs must submit a written document signed by the chief executive officer and the board of directors agreeing to a variety of conditions outlined in Rule 5.8(c)(1)-(9) to the “highest court” in the state.\textsuperscript{174} The “highest court” under the meaning of the rule is the highest court in the jurisdiction with the authority to regulate the legal profession.\textsuperscript{175} Subsections (1)-(9) require that the written document contain a variety of certifications.\textsuperscript{176} First, MDP must state that it will not interfere with a lawyer’s exercise of professional judgment on behalf of a client, and will establish and enforce procedures that protect a lawyer’s independent professional judgment.\textsuperscript{177} Second, the MDP must enforce procedures to protect a lawyer’s obligation to segregate client funds.\textsuperscript{178} Third, all members of the MDP must abide by the

\textsuperscript{168} ABA Comm. on MDP, App. A, supra note 2.


\textsuperscript{170} See ABA Comm. on MDP, App. A, supra note 2 (reiterating that present provisions “limiting the holding of equity investments in any entity or organization providing legal services” still apply); see also Report, supra note 17 (reiterating that ownership would be limited to members of the MDP who actually perform professional services at the firm). Thus, passive investment in the firm is not allowed.

\textsuperscript{171} See id.

\textsuperscript{172} See ABA Comm. on MDP, App. A, supra note 2 (noting that a non-lawyer-controlled MDP occurs when non-lawyers own a controlling interest in the firm).

\textsuperscript{173} See id.

\textsuperscript{174} See id. (requiring the CEO and the board of directors to sign a “written undertaking” to be filed with the highest court in each state that regulates the legal profession).

\textsuperscript{175} See id.

\textsuperscript{176} See id.

\textsuperscript{177} See id. (recognizing that the “independence of professional judgment is a cornerstone of the client-lawyer relationship”).

\textsuperscript{178} See id.
Model Rules when engaging in the delivery of legal services.\textsuperscript{179} Finally, a firm must respect a lawyer’s obligation to provide pro bono legal services.\textsuperscript{180}

In addition to the above requirements, MDPs must annually (1) review their procedures protecting lawyer independence; (2) certify their compliance; and (3) provide each lawyer in the MDP and the highest court with a copy of the certification.\textsuperscript{181} The MDP must also provide the highest court with a list of the lawyers who were members of the MDP during the period; the jurisdiction of the principal office of each lawyer; and the jurisdiction in which each lawyer is licensed to practice law.\textsuperscript{182}

Furthermore, the MDP must permit the highest court to conduct an administrative audit as necessary to assure compliance with the guidelines for non-lawyer-controlled MDPs.\textsuperscript{183} The non-lawyer-controlled MDP will bear the cost of the audit through a reasonable annual fee.\textsuperscript{184} Finally, Rule 5.8(d) states that if a non-lawyer-controlled MDP fails to comply with the filing requirements, the firm’s license to provide legal services will be revoked.\textsuperscript{185} None of the above provisions in 5.8(c) or (d) apply to lawyer-controlled MDPs.\textsuperscript{186}

V. RECOMMENDATIONS

The ABA’s rejection of the Commission’s proposed changes to the Model Rules does not prohibit states from creating MDP schemes of their own because the Model Rules are not binding on an individual state unless the state adopts them.\textsuperscript{187} Instead of assuming a leadership role and designing an MDP rule for states to follow, the ABA declined

\textsuperscript{179} See id. (recognizing that a lawyer must still maintain confidentiality of information relating to representation and other professional obligations of the lawyer).

\textsuperscript{180} See id. (acknowledging that lawyers in an MDP share the same obligations of lawyers in law firms to provide voluntary legal services).

\textsuperscript{181} See id. (emphasizing that such action reminds the MDP of the importance of the specified procedures).

\textsuperscript{182} See id. (emphasizing that it is a lawyer’s obligation to insure complete compliance with the rule by the MDP).

\textsuperscript{183} See id. (noting that MDPs not controlled by lawyers must be monitored closely to pressure the lawyer’s independent professional conduct).

\textsuperscript{184} See id. (reiterating that the responsibility placed on the MDP to comply with the Rule and all of its subsections).

\textsuperscript{185} See id. (affirming that the failure to comply with the Rule is subject to withdrawal of permission to deliver legal services).

\textsuperscript{186} See id. (delineating the difference between lawyer and non-lawyer-controlled MDPs).

\textsuperscript{187} See ABA Multidisciplinary Practice Commission Recommends Amending Model Rules to Allow MDPs, 15 Laws. Man. on Prof. Conduct (ABA/BNA) No. 10, at 250 (June 9, 1999) (explaining that the Model Rules are only illustrative and not directly binding on the states).
to vote on the Commission proposed changes. In its recommendation, the ABA Commission on MDP proposed a new rule, Model Rule 5.8, to address multidisciplinary practices. The MDP Commission’s proposed changes to the Model Rules reflect months of hearings, deliberations, and research. The ABA should adopt the Commission’s proposal with two exceptions. First, the House of Delegates should create the same regulatory scheme for non-lawyer-controlled MDPs as it does for lawyer-controlled MDPs. Thus, it should omit the audit requirement covered by proposed Rule 5.8(c) and 5.8(d) for non-lawyer-controlled MDPs. Second, the ABA should alter Rule 1.7 governing conflicts of interest to allow MDPs to more effectively operate. Altering Rule 1.7 will decrease the effect of the imputed disqualification rule on lawyers practicing in MDPs and in law firms.

One of the key forces behind the MDP debate is the need for lawyers to shape their own fate and take leadership on the issue. The proposed amendment succeeds because it allows lawyers to remain in control of the practice of law. Just as the MDP Commission’s recommendations require MDPs to nurture independence, they also preserve other core values of the profession such as confidentiality, preventing conflicts of interest, and the attorney-client privilege. Lawyers will benefit under the Commission’s scheme because it allows a lawyer to practice in any of

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188. See Gibeaut, supra note 1, at 92.
189. See ABA Comm. on MDP, App. A, supra note 2 (listing the language of the proposed Rule 5.8, titled Responsibilities of a Lawyer in a Multidisciplinary Firm).
190. See id. (listing many proposed amendments to the Model Rules of Professional Conduct). In the “Terminology” section of the Model Rules, the Commission defined the “Practice of Law,” so that UPL statutes could finally be enforced. See id. Moreover, the Commission defined “Legal Services” and “Multidisciplinary Practice,” as well as other terms. See id. The Commission also added sections to the Comment for Rule 1.6—Confidentiality of Information, and added a section to Rule 1.10—Comments of the Imputed Disqualification. See id. Finally, the Commission inserted MDP language in Rule 5.1—Responsibilities of a Partner or Supervisory Lawyer; Rule 5.2—Responsibilities of a Subordinate Lawyer; and Rule 5.3—Responsibilities Regarding Nonlawyer Assistants. See id.
191. See Dzienkowski & Peroni, supra note 24, at 27 (questioning why non-lawyer-controlled MDPs would be subject to an audit).
192. See Speakers Single Out Ethics Rules that Need Change if MDPs are Allowed, supra note 152, at 46 (noting Dzienkowski’s comments that Model Rule 1.7 and Model Rule 1.10 should be altered).
193. See discussion infra notes 207-24 and accompanying text (discussing conflicts of interest and imputed disqualification rules); Rice, supra note 65, at 18.
194. See Pena, supra note 15, at 390 (emphasizing that lawyers must seize the opportunity to reinvent themselves).
195. See ABA Comm. on MDP, App. A, supra note 2 (mandating that a lawyer in an MDP remains subject to all Model Rules of Professional Conduct, and that non-lawyers of the MDP abide by the Model Rules when assisting in the delivery of legal services).
the five models previously discussed. In particular, the Fully Integrated scheme recommended by the Commission will be much easier for small firms and solo practitioners to implement. In other words, the Fully Integrated model gets rid of the requisite formalities under the Contract model, which allows the sharing of support services but requires that the law firm remain a separate entity.

A. Equal Regulation for MDPs and Law Firms

The regulatory scheme for non-lawyer-controlled MDPs included in proposed Rule 5.8(c)(7)-(9) and (d) should be eliminated. Lawyers in non-lawyer-controlled MDPs should be treated the same as lawyers practicing in lawyer-controlled MDPs. The proposed rule’s yearly filing requirement and the requirement that non-lawyer-controlled MDPs submit to periodic audits by the highest state court at their own expense are problematic for two reasons. First, the rules create a barrier to entry for smaller MDPs. In particular, the financial and administrative costs of the annual filings give larger MDPs and law firms an advantage over smaller MDPs. Second, the additional regulatory burden on non-lawyer-controlled MDP imposes a stigma on lawyers practicing in non-lawyer-controlled MDPs. The regulatory scheme is inherently distrustful. Ethical violations occur in all legal settings, and violations can be just as easily spotted in non-lawyer-controlled MDPs as they can in other practice settings.

196. See supra notes 96-100 (describing the five models: (1) the Cooperative Model; (2) the Command and Control Model; (3) The Law-Related Services/Ancillary Business Model; (4) The Contract Model; and (5) the Fully Integrated Model). As the Commission states, there are only two forms of the model that were previously prohibited under the Model Rules: the Contract Model and the Fully Integrated Model. See ABA Comm. on MDP, App. C, supra note 89 (noting that the Cooperative, Command and Control, and Ancillary Business Models are all allowed under the present Model Rules scheme).

197. See id. (discussing the five models). Under the Contract Model of MDP, companies must share space and use the same letterhead, but the law firm remains an independent entity. See id. For a one or two-person firm, keeping the functions separate could prove to be a nuisance.

198. See id. (stating that the law firm remains an independent entity controlled by lawyers).

199. See Roth, supra note 12, at 12 (discussing some critics’ opposition to regulating only non-lawyer-controlled MDPs). Some critics feel that if the bar is so worried about its core values, then it should audit all lawyers. See id. (citing the comments of Laura Wertheimer).

200. See id. (stating critics’ belief that it is wrong to regulate only MDPs). “It is the individual lawyer who is obligated to satisfy the core values of the profession. It seems reasonable to me that changes to the model rules must focus on the individual lawyer, rather than the organization in which the lawyer practices.” Statement of Kathryn Oberly, supra note 47.

201. See Dzienkowski & Peroni, supra note 24, at 27 (stressing that law-related activity is not limited to lawyers).
The Commission erred when it created different regulatory schemes for non-lawyer-controlled and lawyer-controlled MDPs. The Commission should not impose a burden on attorneys practicing in an MDP setting when it fails to impose the same burden on lawyers in all other settings. The filing requirement assumes that lawyers in non-lawyer-controlled MDPs need extra supervision compared to their colleagues in lawyer-controlled MDPs, law firms, or solo law practices. Under the present system, in-house counsel are technically under the control of non-lawyers, and they are still bound by professional ethics in the advice they give their companies. Yet these attorneys and their companies are not subjected to audits or yearly court filings. MDPs, lawyer or non-lawyer-controlled, should not be subjected to any regulatory scheme to which law firms or solo practices are not. Thus, sections (c)(7)-(9) and (d) of proposed Model Rule 5.8 should be eliminated. In place of the omitted material, the ABA should impose a rule that regulates both lawyer-controlled and non-lawyer-controlled MDPs in the same fashion as law firms and solo law practices.

B. The Imputed Disqualification Rule and Conflicts of Interest Rule Need to be Altered

To enable MDPs to operate more effectively in the global marketplace, changes to Rule 1.7 (Conflicts of Interest) and Rule

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202. See Roth, supra note 12, at 12 (discussing critics’ beliefs that it is wrong only to regulate non-lawyer-controlled MDPs).
203. See Carol M. Langford & Richard Zitrin, Has the MDP Train Left the Station?, N.J. L.J., Nov. 29, 1999, at 20 (noting that lawyers have longed worked in situations where they are controlled by non-lawyers, but their independence is not questioned).
204. See Dzienkowski & Peroni, supra note 24, at 27 (“We question why this [audit] obligation would apply only to non-lawyer-controlled MDPs.”).
205. See ABA Comm. on MDP, Statement of Prof. John Dzienkowski, Univ. of Tex. L. Sch., to the ABA Comm. on Multidisciplinary Practice, at http://abanet.org/cpr/dzienkowski2.html (last visited Jan. 9, 2000) [hereinafter Statement of Professor Dzienkowski] (stating that lawyers practicing in a single entity MDP should be regulated by the local bar).
206. This Comment advocates replacing sections (c)(7)-(c)(9) of proposed Model Rule 5.8 with a new 5.8(c)(6). The amended (c)(7) would read: “it will be subjected to regulatory filings certifying the adequate MDP’s procedures to protect a lawyer’s exercise of independent professional judgment and audits of those procedures in the same manner as a law firm.” Section 5.8(d) should also be eliminated. ABA Comm. on MDP, App. A, supra note 2.
207. Rule 1.7, “Conflict of Interest: General Rule” states that:
(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after consultation.
(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or
(Imputed Disqualification) are needed. The Commission made virtually no alterations in either of these two areas as its recommendation only included a brief addition to the comment section of Rule 1.10. Under the Commission’s recommendation, imputed disqualification applies to a lawyer and a client in an MDP if there is a conflict with any client of the MDP, not just a legal client. 

As one authority on MDPs has suggested, two changes should be made to Rule 1.7 governing conflicts of interest. The first change applies to conflicts where clients have interests directly adverse to one another. In these situations, clients seeking representation by the same firm should be able to waive direct conflicts in all cases provided there is full disclosure by the MDP or law firm. Under the current rules, there are certain conflicts that cannot be waived by clients, and all conflicts are imputed to the entire firm.

208. To view Model Rule 1.10, see supra note 82 and accompanying text.
209. See Statement of Professor Dzienkowski, supra note 205 (stating that changes to Imputed conflicts rule and the conflict of interest rules need to be made); Speakers Single Out Ethics Rules That Need Change if MDPs are Allowed, supra note 152, at 46 (describing some commentators suggestions regarding the imputation rule and how it should be altered).
210. See ABA Comm. on MDP, App. A, supra note 2 (listing the proposed addition to the comment section of Rule 1.10). It states that:

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.

211. See id. (stating that conflicts are imputed to all lawyers in a firm when there is a conflict between any client of the firm, not just a conflict between clients of a legal services division of the MDP).
212. See Statement of Professor Dzienkowski, supra note 205 (noting that changes to Rule 1.10 and 1.7 should be made).
213. See Model Rules of Prof’l Conduct R. 1.10, App. A (1983) (amended 1989) (stating that a lawyer shall not represent a client if the representation will be directly adverse to another client). For examples of a conflict that is “directly adverse,” see Statement of Professor Dzienkowski, supra note 205. Assume client A seeks the services of a lawyer at the firm for a lawsuit against client B. The firm could not represent client B in the matter. This is an example of the imputation rule in effect. Id.
214. See id. (proposing that the rules need to be revised to permit clients to waive direct conflicts as long as there is full disclosure).
215. [As indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude...
The second change applies to conflicts that are generally adverse.\textsuperscript{216} Under the current rules for conflicts that are generally adverse, law firms may not represent two clients without consultation and consent from both clients.\textsuperscript{217} For large law firms and subsequently, large MDPs, the majority of conflicts are not directly adverse conflicts, but rather conflicts that are generally adverse.\textsuperscript{218} In situations where two clients seek assistance from the firm in unrelated matters and the two clients are adverse in matters where the firm only represents one of the clients, the rules should only require that full disclosure be given to both clients rather than a waiver from both clients.\textsuperscript{219} After disclosure, each client can decide whether or not to continue to retain the services of the firm.\textsuperscript{220}

If each client wishes to use the firm, appropriate ethical firewalls should be set up to assure each client that confidential information would not be used against them in other situations.\textsuperscript{221} Firewalls should be mandatory to protect confidential client information and

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\textsuperscript{216} See Statement of Professor Dzienkowski, supra note 205 (examining conflicts that are “generally adverse”). Professor Dzienkowski posits two different conflict paradigms. In the first example, there are two clients, Client A and Client B, who are business competitors in the marketplace. Client A wishes to retain the services of the firm for one matter, and Client B wishes to retain the services of the firm in an unrelated matter. This is Professor Dzienkowski’s example of a “generally adverse” conflict. See id. Under the current Model Rule 1.10, the firm needs a waiver from both clients. See id. Professor Dzienkowski’s second example of this type of conflict exists when Client A and Client B are adversaries in unrelated litigation in which the law firm does not represent either party. See id. In an unrelated matter, Client A wants to retain the firm for legal services, and Client B wants to retain the firm for other services. See id. (illustrating another situation where a firm needs a waiver by both Client A and Client B).

\textsuperscript{217} See Model Rule 1.10(c) (“A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.”).

\textsuperscript{218} See Statement of Professor Dzienkowski, supra note 205 (stating that only full disclosure and the implementation of firewalls, and not a waiver, should be required with a generally adverse conflict).

\textsuperscript{219} See id. (discussing generally adverse conflicts in relation to large law firms).

\textsuperscript{220} See id. (examining disclosure rules for returning services with a firm).

\textsuperscript{221} Id. Professor Dzienkowski posits that ethical firewalls would be necessary in a situation where the parties being represented have generally adverse interests. See id.
to ensure that each lawyer or team of lawyers within the firm will use independent judgment. Thus, Rule 1.7 and 1.10 should be altered so that both MDPs and regular law firms can represent a more broad range of clients. This is especially true for large MDPs who will undoubtedly represent clients in many different countries.

CONCLUSION

As other countries move toward multidisciplinary practices, the ABA should not sit idly by and let market forces dictate how American lawyers practice law. The ABA should have taken the lead and permitted multidisciplinary practices. Otherwise, lawyers may suffer the fate of professionals in other industries who refused to address changing trends in their respective businesses.

The ABA Commission on Multidisciplinary Practice proposed a sensible rule that allows the legal profession to maintain its core values. With the exception of the audit requirement, the ABA should have adopted the Commission’s proposed Model Rule 5.8. In addition, the ABA should amend Model Rule 1.7, which governs

222. See id. (stating that the rule should require full disclosure and implementation and ethical firewalls to prevent confidential information from being disseminated).

223. Rule 1.10 is the enforcement rule for imputing conflicts to all the lawyers in a firm. Therefore, Rule 1.10 will reflect any alterations of Rule 1.7. By including Professor Dzienkowski’s suggestions, sections of Rule 1.7 and its comments must be amended. First, comment 5 to Model Rule 1.7 must be eliminated. Comment 5 to Rule 1.7 lists situation when a conflict cannot be waived. See MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 5 (1983) (amended 1987). Second, Rule 1.7 needs to be altered to address “generally adverse” conflicts. A new section, 1.7(c) could be added to Model Rule 1.7. This comment proposes an additional section to 1.7, called 1.7(c):

(c) A lawyer shall not represent a client if the representation of that client will be generally adverse to another client, unless:

(1) full disclosure is provide to all clients involved in the conflict, and

(2) procedures to preserve client confidences are implemented to protect the parties in the conflict from having confidential information compromised as a result using different teams of lawyers at one firm.

Statement of Professor Dzienkowski, supra note 205.

In addition, the ABA needs to add a comment to Rule 1.7 explaining and defining “directly adverse” and “generally adverse” conflicts. See id.

224. See Siobhan Roth, A Guide to the ABA Debate over Multidisciplinary Firms Facing the Future of the Practice—Now, LEGAL TIMES, Aug. 2, 1999, at 18 (stating that the Big 5 could face stifling conflicts of interests under the present rules if MDPs are allowed).

225. See Pena, supra note 15, at 328 (stating that pain of staying the same will be greater than changing).

226. See id. (mentioning timber cutters, doctors, and automakers as professionals who failed to notice changing trends).

227. See ABA Comm. on MDP, App. A, supra note 2 (listing the proposed rules suggested by the Commission on MDP).

228. See supra Part V.A, supra notes 199-206 and accompanying text (arguing for the omission of this requirement).
conflicts of interest, so that firms will not be barred from representing clients in fewer cases. 229 These measures will allow both large and small MDPs to flourish while still adhering to the legal ethical canons central to the purpose of lawyers.

229. See supra Part V.B, supra notes 207-24 and accompanying text (advocating changes to the imputed disqualification rule and conflict of interest rules).