

2003

## New York Revises Ethics Rules to Permit Limited MDPs: A Critical Analysis of the New York Approach, the Future of the MDP Debate After Enron, and Recommendations for Other Jurisdictions

John P. Lucci

Follow this and additional works at: <https://ir.lawnet.fordham.edu/jcfl>



Part of the [Banking and Finance Law Commons](#), and the [Business Organizations Law Commons](#)

---

### Recommended Citation

John P. Lucci, *New York Revises Ethics Rules to Permit Limited MDPs: A Critical Analysis of the New York Approach, the Future of the MDP Debate After Enron, and Recommendations for Other Jurisdictions*, 8 Fordham J. Corp. & Fin. L. 151 (2003).

Available at: <https://ir.lawnet.fordham.edu/jcfl/vol8/iss1/6>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Journal of Corporate & Financial Law by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# NEW YORK REVISES ETHICS RULES TO PERMIT LIMITED MDPS: A CRITICAL ANALYSIS OF THE NEW YORK APPROACH, THE FUTURE OF THE MDP DEBATE AFTER ENRON, AND RECOMMENDATIONS FOR OTHER JURISDICTIONS

*John Paul Lucci\**

## INTRODUCTION

In July 1999, a large international firm announced its tax practice was “experiencing a phenomenal [twenty-five] percent growth rate this year, creating a real need for tax professionals at the firm.”<sup>1</sup> Compared with the previous year, the firm expected to hire double the number, up from 150 to 300, of law school graduates and experienced tax lawyers.<sup>2</sup> “With more than 650 professionals with law degrees currently in our U.S. tax practice,” the firm boasted, “we believe [that we present] law school graduates with unparalleled opportunities for growth in a practice that offers many high-end specialty services and breakthrough

---

\* For my wife Angela, parents Jean and Ben, and brother Michael. I am grateful to Raphael Omerza for his assistance during two summers and for introducing me to a cutting-edge topic and to Robert P. Lawry for steering me toward New York. Special thanks to Ian J. Kimbrell for his countless hours of editorial assistance and to George W. Dent, Jonathan L. Entin, Steve Fazio, Angela M. Lucci, and Aaron Harley Smith for their substantive comments on this Note. This piece would not have been possible without those additional colleagues, friends, and teachers who helped to improve my writing over the years: Jonathan Gordon, Vincent E. McHale, Thomas B. Schorgl, Fr. Streicher, S.J., Lynne E. Woodman, and Margaret J. Wyszomirski. Any errors or omissions remain mine alone.

1. Cliff Collins, *The ABCs of MDP: How Multidisciplinary Practice Could Reshape the Practice of Law*, OR. ST. B. BULL., Dec. 1999, at 17, 17.

2. *See id.*

strategies for leading clients worldwide.”<sup>3</sup>

While this testimonial sounds as if it could belong to any of the world’s largest law firms, it in fact belongs to K.P.M.G., one of the Big Five<sup>4</sup> accounting firms.<sup>5</sup> The Big Five accounting firms, Arthur Andersen,<sup>6</sup> Deloitte & Touche,<sup>7</sup> Ernst & Young,<sup>8</sup> K.P.M.G.,<sup>9</sup> and PricewaterhouseCoopers,<sup>10</sup> employed more than 5500 non-tax lawyers worldwide in 1999.<sup>11</sup> Only two law firms in the world employed more attorneys than PricewaterhouseCoopers, the largest accounting employer of attorneys.<sup>12</sup> The increased number

3. *Id.*

4. Since the writing of this article, Arthur Anderson is arguably no longer one of the “Big Five” and the “Big Five” are more accurately described as the “Big Four.” However, at the time when this article was written, available data and commentary analyzed the MDP debate and lawyers’ interactions with the “Big Five.” Therefore, for the sake of continuity with the source material, the term “Big Five” will be used throughout this piece.

5. See Michael Schroeder, *SEC, Accounting Firms Reach Pact on Conflicts*, WALL ST. J., June 8, 2000, at A2 (listing the Big Five accounting firms and their responses to SEC guidelines on conflicts of interest).

6. See Katherine L. Harrison, Comment, *Multidisciplinary Practices: Changing the Global View of the Legal Profession*, 21 U. PA. J. INT’L ECON. L. 879, 905 (2000) (noting that in 1998 Arthur Andersen had subsidiaries practicing law in England, France, Spain, and Australia, and more than 1500 lawyers working in twenty-seven different countries).

7. See *id.* at 906 (noting that in November 1998 Deloitte Touche Tohmatsu had 586 lawyers working in fourteen countries, including France, Austria, Belgium, the Netherlands, and Spain).

8. See *id.* (noting that in 1999 Ernst & Young had more than 850 lawyers working in thirty-two countries, with more than 600 of those lawyers employed in Europe).

9. See *id.* (noting that in 1999 K.P.M.G. employed more than 980 lawyers worldwide).

10. See *id.* at 907 (noting that in 1999 PricewaterhouseCoopers “led the pack” with more than 1600 lawyers practicing in thirty-nine countries).

11. See Collins, *supra* note 1.

12. See John E. Morris, *The Global 50*, AM. LAW., Nov. 1998, at 45, 45 (listing, in its first annual survey of global law firms, Baker & McKenzie as the largest with 2300 lawyers, followed by Clifford Chance with 1795, Eversheds with 1290, Jones Day Reavis & Pogue with 1191, and Skadden, Arps, Slate, Meagher & Flom with 1125. *Id.* at 46. The Big Five accounting firms were counted separately. *Id.* at 45. PricewaterhouseCoopers employed the most lawyers at 1663, followed by Arthur Andersen with 1500, K.P.M.G. with 988, Ernst &

of lawyers practicing at Big Five firms has come about not only through mergers with existing firms or practices, but also through recruitment of individual lawyers and law school graduates.<sup>13</sup> One report indicated that as many as twenty percent of graduates at some law schools are starting their careers at Big Five accounting firms.<sup>14</sup> Now worldwide competitors of law firms,<sup>15</sup> these accounting firms are aiding management<sup>16</sup> and expanding their influence in transactional matters.<sup>17</sup>

Although the lines between lawyers and accountants have long been blurred on legal issues involving taxes, the current situation is different. “[A]ccountants have stepped up their quest to be a full service provider, especially to multinational clients.”<sup>18</sup> Accountants argue they are not practicing law, but practicing “tax.”<sup>19</sup> However,

---

Young with 851, and Deloitte Touche Tohmatsu with 586. *Id.* at 45. These figures include all lawyers in affiliated law firms and business lawyers in other divisions, but not lawyers practicing tax law exclusively within the accounting or tax divisions of the firms. *Id.* at 47.

13. See Laurel S. Terry, *A Primer on MDPs: Should the “No” Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 880 n.45 (1999) (discussing the departure of six partners to Big Five firms and lawyers leaving firms for the attraction of international practices); see also Donald S. Gray, *Multidisciplinary Practice of Law*, ORANGE COUNTY LAW., Apr. 1999, at 4 (discussing the resignation of a managing partner at a major San Francisco law firm to accept a position with Ernst & Young as national director of state and local tax consulting services).

14. See Terry, *supra* note 13, at 880 n.46.

15. See Bernhard Grossfeld, *Lawyers and Accountants: A Semiotic Competition*, 36 WAKE FOREST L. REV. 167, 170 (2001).

16. See *id.* The traditional role of the lawyer was to serve as loyal insider to senior management and to maintain their confidences. See *id.* The corporate entity, and the voice and loyalty of the shareholders, were often regarded as “not being their business.” *Id.*

17. See A.J. Noble, *Eyes on the Prize: While the Profession Debates Where to Draw the Line Between Accountants and Lawyers, the Big Five Firms Are Already Cozying Up to Corporate Clients*, AM. LAW., June 1999, at 51, 52 (noting that while members of the bar debate their ethics rules, accountants are taking action by creating new products and services).

18. Gray, *supra* note 13, at 4.

19. But see, e.g., Debra Baker, *Accounting Firm Calls for Changes in Lawyer Conduct Rules*, A.B.A. J., Apr. 1999, at 83 (quoting Lawrence J. Fox, who, in observing the Big Five accounting firms, stated that “[t]hey say they aren’t practicing law, but they aren’t practicing law the same way President Clinton was not participating in sex. It’s all semantics.”).

many accountants admit that their goal is to provide the same range of services offered by full-service law firms.<sup>20</sup> Because these attorneys purport not to be practicing law, they are largely unregulated by the courts and administrative bodies charged with policing the legal profession.<sup>21</sup> Commentators argue that this unregulated activity in multidisciplinary practices (MDPs) undermines the integrity of professional services.<sup>22</sup> Not only are attorneys affected, but also clients and non-attorneys who are engaged in activities that traditionally have been considered the practice of law.<sup>23</sup> Companies and individuals are preferring "one-stop shopping"<sup>24</sup> to decrease costs through the elimination of dual management structures. Multidisciplinary practices have been touted as allowing one-stop shopping, better service (because of the broader expertise of the service providers and closer cooperation of an interdisciplinary team), and cost-effectiveness.<sup>25</sup> However, current ethics guidelines present many barriers to multidisciplinary practice.<sup>26</sup>

---

20. See Lowell J. Noteboom, *Professions in Convergence: Taking the Next Step*, 84 MINN. L. REV. 1359, 1362 (2000) (observing that accountants regularly provide employment law advice, prepare estate plans, consult on a range of regulatory issues, assemble claims of every description, serve as advocates in alternative dispute resolution settings, and provide litigation management services to clients by hiring and managing lawyers for a client's litigation matters).

21. See *id.* at 1362-63.

22. See, e.g., Aubrey Meachum Connatser, Comment, *Multidisciplinary Partnerships in the United States and the United Kingdom and Their Effect on International Business Litigation*, 36 TEX. INT'L L.J. 365, 374, 376 (2001).

23. See *id.*

24. See, e.g., Grace D. Moran, *New York's Amended Code of Professional Responsibility: A Guide to What's New*, 29 HOFSTRA L. REV. 239, 244-45 (2000) (observing that one-stop shopping firms on Long Island will be "different". "I foresee a real estate law firm joining up with a mortgage brokerage, a real estate agency, a title company, a general contractor, a landscaper, and an interior decorator.").

25. See Terry, *supra* note 13, at 891-92 (providing a brief summary of the arguments for and against MDPs).

26. For a succinct definition of multidisciplinary practice, see William G. Paul, *Remarks of the Outgoing President of the American Bar Association*, 31 N.M. L. REV. 55, 61 (2001) (defining multidisciplinary practice as "the practice of law through an entity that includes nonlawyer professionals as well as lawyers . . .

In the United States, partnerships and fee-sharing arrangements between lawyers and nonlawyers are generally banned. American Bar Association (“ABA”) Model Rule of Professional Conduct 5.4 prohibits a lawyer from forming a partnership with a nonlawyer if the partnership will engage in activities constituting the practice of law or will involve a lawyer sharing legal fees with a nonlawyer.<sup>27</sup> Judicial decisions<sup>28</sup> and ethics

---

[in] a firm that delivers both legal and non-legal services, but in which lawyers are members and in which lawyers are sharing fees.”); *see also* Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1469 (2000) (defining an MDP as a firm providing “legal and other professional services to the public, and . . . owned by any combination of lawyers and nonlawyers who participate in its operations.”); Robert A. Stein, *Multidisciplinary Practices: Prohibit or Regulate?*, 84 MINN. L. REV. 1529, 1529 (2000) (defining an MDP as “a lawyer or lawyers having nonlawyer partners in a firm or other professional entity that provides legal and nonlegal services”).

27. Specifically, Model Rule 5.4 reads:

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

(1) an agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

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

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

MODEL RULES OF PROFESSIONAL CONDUCT R. 5.4 (1999).

28. *See* Emmons, Williams, Mires & Leech v. State Bar of California, 86 Cal.

opinions<sup>29</sup> demonstrate acceptance of this general rule by courts

---

Rptr. 367 (Ct. App. 1970) (holding that a contract between an attorney and a legal aid referral service was not illegal under the California ethics canons). The court observed that the prohibited fee splitting between lawyer and layperson carries with it the danger of "competitive solicitation," raises the possibility of "control by the lay person" interested in his or her own profit, and facilitates the lay intermediary's "tendency to select the most generous, not the most competent, attorney." *Id.* at 372. The court also observed that "one objective of fee-splitting prohibitions is avoidance of arrangements which unnecessarily inflate the client's cost." *Id.* at 373; *see also* *Brandon v. Newman*, 532 S.E.2d 743 (Ga. Ct. App. 2000) (applying Georgia law and holding that a fee-splitting contract was void for public policy reasons, resulting in forfeiture of the claimed fee); *"We The People" Paralegal Servs., L.L.C. v. Watley*, 766 So. 2d 744 (La. Ct. App. 2000) (applying Louisiana law and holding that although a contract to split legal fees with a nonlawyer is illegal and unenforceable, the nonlawyer may sue for unjust enrichment); *Plume v. Paddock*, 832 S.W.2d 757 (Tex. App. 1992) (applying Texas law and holding that ambulance owner's contract, whereby attorneys would pay owner for personal injury case referrals, was illegal and void as against public policy); *Danzig v. Danzig*, 904 P.2d 312 (Wash. Ct. App. 1995) (applying Washington law and holding that fee-sharing contracts are void while holding it was reversible error not to permit the nonlawyer to raise the *in pari delicto* exception to the general rule precluding enforcement of contracts against public policy).

29. *See, e.g.*, State Bar of Mont. Ethics Comm., Op. 000111 (2000) (denying an attorney's request to maintain a legal practice while at the same time working as an employee of a professional services organization within the same office, in light of the ABA's rejection of MDPs), at <http://www.montanabar.org/ethics/ethicsopinions/000111.html> (last visited Aug. 26, 2002); Utah State Bar Ethics Adv. Op. Comm., Op. 00-03 (2000) (applying Utah law and stating that a lawyer who is also a real estate title officer may not enter into a partnership with or form a small business corporation with a nonlawyer for the purpose of assisting clients in challenging their real estate taxes unless the lawyer withdraws entirely from the practice of law); Ill. State Bar Ass'n Adv. Op. on Prof'l Conduct, Op. 99-02 (1999) (applying Illinois law and stating that, until the Illinois Supreme Court amends its Rules of Professional Conduct to allow MDPs, a lawyer may not pay a nonlawyer authorized to represent claimants in cases before the Social Security Administration ("SSA") a fee for his or her involvement in the lawyer's representation of such claimants before the SSA); S.C. Bar Ethics Adv. Comm., Adv. Op. 99-07 (1999) (applying South Carolina law, stating that a lawyer may not engage in the practice of law either in the capacity of an employee of or as an equity holder in a certified public accounting firm); Or. State Bar Ass'n Ethics Comm., Formal Op. 1991-101 (1991) (applying Oregon law, stating that if family mediation services involve the practicing of law, an attorney could not split fees with a nonlawyer psychologist),

and administrative bodies. The only exceptions to this rule are payment to a lawyer's estate after death,<sup>30</sup> purchase of a deceased, disabled, or disappeared lawyer's practice,<sup>31</sup> or the participation of nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing agreement.<sup>32</sup> These exceptions are designed only to benefit the lawyer rather than the client.

Until November 2001, the District of Columbia was the only United States jurisdiction to provide rules facilitating multidisciplinary practice.<sup>33</sup> One year after the ABA rejected its commission's proposal to allow lawyers and nonlawyer professionals to join forces in multidisciplinary practices, New York granted its lawyers the authority to form limited multidisciplinary alliances and other cooperative contractual relationships with nonlawyers in November 2001.<sup>34</sup> This Note will analyze the New York approach in light of arguments for and against MDPs. I contend that while MDPs may be an inevitable consequence of globalization, New York's approach may complicate the issue, allowing MDPs only in a limited context and ignoring the existing climate for change in the legal profession.

---

at <http://www.osbar.org/Ethics/Data/1991-101.pdf> (last visited Mar. 6, 2002); Alaska Bar Ass'n Ethics Comm., Op. 79-3 (1979) (applying Alaska law and stating that an accountant employed by a law firm may not be a partner and shall be compensated by salary to avoid any violation of the disciplinary rules), at <http://www.alaskabar.org/index.cfm?x=200> (last visited Mar. 6, 2002); Nassau County (N.Y.) Bar Ass'n Comm. on Prof'l Ethics, Op. 99-1 (1999) (stating, under New York's old disciplinary rule, that an ethics rule is violated whenever a nonlawyer's income depends on the lawyer's receipt of legal fees in a specific case or cases), at [http://www.nassaubar.org/ethic\\_opinions\\_details.cfm?OpinionID=8](http://www.nassaubar.org/ethic_opinions_details.cfm?OpinionID=8) (last visited Mar. 6, 2002).

30. MODEL RULES OF PROF'L CONDUCT R. 5.4 (1999).

31. *Id.* at 5.4(a)(2).

32. *Id.* at 5.4(a)(3).

33. The District of Columbia's version of the rule, effective since 1991, allows nonlawyer partners in firms under a limited set of circumstances. *See* D.C. RULES OF PROF'L CONDUCT R. 5.4 (1999).

34. *See* Lance J. Rogers, *Regulation of Bar: New York Modifies Rules to Authorize Multidisciplinary Business Affiliations*, 17 LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 464, 464 (Aug. 1, 2001).



This Note has two goals. The first is to provide a positive contribution to the MDP debate by conducting a critical analysis of New York's regulatory approach. New York's approach will be measured against the arguments for and against MDPs. Second, this Note will provide four recommendations for jurisdictions<sup>35</sup> that will follow New York's lead in permitting MDPs. To make these recommendations, this Note discusses the impact of Enron Corporation's bankruptcy and the role of Enron's auditor, Arthur Andersen. While some see Enron as proof that lawyers and accountants should not work together, Enron may provide the organized bar with both the opportunity and justification for altering existing guidelines to permit MDPs to improve the quality of audits and business transactions.

This Note is divided into three sections. Part I provides a brief overview of the ABA's historical approach to MDPs and analyzes the major arguments for and against MDPs. Part II studies the New York approach to regulating MDPs and compares and contrasts it with opposing views. Part III reviews alternatives for regulating MDPs and explores how the Enron Corporation bankruptcy influences the debate. The Note concludes with four recommendations to increase the effectiveness of future MDP rules.

## I. A HISTORY OF MDP REGULATION<sup>35</sup>

The original Canons of Professional Ethics adopted by the ABA in 1908 did not bar fee sharing or partnership with nonlawyers.<sup>36</sup> Such prohibitions did not become a formal part of the professional responsibility codes until the adoption of Canons 33 and 34 in 1928. Canon 33 outlawed partnerships between lawyers and nonlawyers where the partnership consisted of the

---

35. This Note provides no more than a cursory overview of the ABA's historical approach to fee sharing and lawyers partnering with nonlawyers. For a more detailed historical review, see Terry, *supra* note 13, at 874-78; see also Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 584 (1989) (discussing the content and history of rules prohibiting the combination of lawyers with nonlawyers).

36. See Terry, *supra* note 13, at 874.

practice of law, while Canon 34 permitted the division of legal fees, but only with other lawyers.<sup>37</sup> From 1928 to the present, regulatory authorities have successfully invoked these provisions and the subsequent Model Code and Model Rules to prevent the establishment of MDPs that offered legal services.<sup>38</sup>

In 1969, the Model Code of Professional Responsibility replaced the Canons of Professional Ethics.<sup>39</sup> Although the format of the rules changed dramatically, the prohibitions on lawyer/nonlawyer business associations remained.<sup>40</sup> In 1983, the ABA's ethics code underwent another major revision with the adoption of the Model Rules of Professional Conduct.<sup>41</sup> Once again, the prohibitions against multidisciplinary practice did not change.<sup>42</sup>

In 1998, the ABA established its Commission on Multidisciplinary Practice to examine MDPs and to deliver recommendations on their future within the organized bar.<sup>43</sup> The ABA formed this Commission in response to the growing number of unregulated lawyers working for accounting firms and an increase in the number of attorneys wishing to join MDPs.<sup>44</sup> The twelve-member Commission on Multidisciplinary Practice studied and reported on the manner and extent to which nonlawyer professional service firms sought to provide legal service.<sup>45</sup> The Commission gathered testimony from business clients, consumer groups, the Big Five accounting firms, and ABA entities representing small firms and solo practitioners.<sup>46</sup> In August 1999, the commission recommended that it would be "in the best interest

---

37. See *id.* at 874.

38. See *id.* at 874.

39. See Andrews, *supra* note 35, at 588.

40. See Terry, *supra* note 13, at 874-75.

41. See Andrews, *supra* note 35, at 588.

42. See *id.* at 588.

43. See John M. Matheson & Peper D. Favorite, *Multidisciplinary Practice and the Future of the Legal Profession: Considering a Role for Independent Directors*, 32 LOY. U. CHI. L.J. 577, 591-92 (2001).

44. See *Regulation of Bar: ABA Rejects Multidisciplinary Practice, Stands Firm Against Sharing Legal Fees*, 16 LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 367, 367 (July 19, 2001).

45. See *id.*

46. See *id.*

of the public" to relax ABA Model Rule of Professional Conduct 5.4 to permit lawyers to offer their clients the interrelated services of lawyers and nonlawyers in a single firm.<sup>47</sup> On July 11, 2000, the ABA House of Delegates voted 314 to 106 to reject the Commission's proposal and to adhere to the current formulation of Model Rule 5.4,<sup>48</sup> the ethical codification of the current prohibition against multidisciplinary practice.

Most states adopted Model Rule 5.4 virtually intact.<sup>49</sup> Prior to New York's action, the District of Columbia was the only jurisdiction that departed from the rule.<sup>50</sup> The District of Columbia's version of Rule 5.4 permits nonlawyers to become partners or shareholders of a law firm.<sup>51</sup> Furthermore, the rule permits a law firm to admit an accountant as a partner to assist the firm with its tax practice or an economist partner to assist with

47. *See id.*

48. *See, e.g.,* George V. Overston, *MDP: Will It Rise from the Dead?*, CHI. B. ASS'N REC., Sept. 2000, at 62.

49. Some states adopted variations of Model Rule 5.4. *See, e.g., Partnerships With Nonlawyers*, LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) No. 142 91:401-91:403 (May 18, 1994) (noting that North Carolina has no counterpart to Rule 5.4. Illinois, Oklahoma, and the state of Washington, in their versions of Rule 5.4(d)(2), permit nonlawyers to be corporate secretaries of professional corporations. Washington also permits nonlawyers to be treasurers. Florida and Kentucky have not adopted Rule 5.4(d)(2) and do not specifically prohibit nonlawyers from serving as directors or officers of a professional corporation or association. Utah permits a lawyer to practice in a not-for-profit public interest corporation provided that nonlawyer directors and officers do not interfere with a lawyer's independent professional judgment).

50. *See* Terry, *supra* note 13, at 875.

51. Specifically, Rule 5.4 reads:

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

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

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

(3) the lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer[s] . . . ;

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

D.C. RULES OF PROF'L CONDUCT R. 5.4(b) (1999).

antitrust litigation.<sup>52</sup> This unique rule, however, provides little practical guidance because MDPs are rare in that jurisdiction.<sup>53</sup>

District of Columbia Ethics Counsel Susan Gilbert has offered several explanations for the District's infrequent use of its Rule 5.4. First, the District of Columbia's requirement that a partnership have as its sole purpose the provision of legal services is different from what many MDP proposals advocate, including that of the ABA.<sup>54</sup> Second, ABA Ethics Committee Formal Opinion 91-360 narrowed the scope of the rule by concluding that a multi-jurisdictional law firm having a District of Columbia office cannot have a nonlawyer partner in that office.<sup>55</sup> Gilbert concluded that when the multi-jurisdictional firm is eliminated, the rule is available only to "D.C.-based boutique law firms that identify a specific need."<sup>56</sup> Therefore, there has been no effective test case for MDPs in the United States.

### A. The Rationales for MDPs

The arguments for and against MDPs are as varied as the article titles that commentators have selected to frame the debate. Commentators see the MDP issue as an epic struggle between good and evil,<sup>57</sup> while others have even compared MDPs to fast

---

52. See Stein, *supra* note 26, at 1538.

53. See Terry, *supra* note 13, at 875.

54. See *id.*

55. See *id.*

56. *Id.*

57. MDP commentators, eager to share their opinions, have described the MDP debate in colorful terms. See, e.g., Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV. 1097, 1104 (2000) (calling the legal profession a "priesthood" while discussing the obligations of the legal profession compared with those of accountants); J. Emory Barker, *Multidisciplinary Practice: Armageddon or Salvation?*, ARIZ. ATT'Y, May 2000, at 24, 24 (observing that a "fair number of countries have already decided the issue in favor of allowing fee sharing arrangements."); Wade Baxley, *Please Mr. Custer, I Don't Want to Go*, 61 ALA. LAW. 6, 7 (2000) (comparing MDPs and other important legal issues facing the bar to Custer's last stand); Jack F. Dunbar, *Multidisciplinary Practice Translated Means "Let's Kill All the Lawyers,"* 79 MICH. B.J. 64, 66 (2000) (stating the independence of the lawyer is critical to the

food providers and department stores.<sup>58</sup>

The most touted arguments for allowing MDPs center on client efficiency.<sup>59</sup> Proponents argue that clients would save both time and money if they could employ one firm that could provide both legal and other related services. MDPs have become a practical solution for obtaining cost-effective, comprehensive professional services in an increasingly deregulated market.<sup>60</sup> Competition from deregulation and increased costs of delivery through geographic expansion contribute to this cost surge.<sup>61</sup> In

---

independence of the judiciary because "we are special. We are in the Constitution."); Dave Foster, Comment, *Get Off My Turf! Attorneys Fight Accountants over Whether to Allow Multidisciplinary Practice*, 31 TEX. TECH L. REV. 1353, 1382 (2000) (arguing that de facto MDPs already exist necessitating the need for lawyers to enter the conversation to help shape modern ethics rules); John D. Messina, Comment, *Lawyer + Layman: A Recipe for Disaster! Why the Ban on MDP Should Remain*, 62 U. PITT. L. REV. 367, 384 (2000) (concluding that MDPs "should not now, or in the future, be permitted."); Stuart S. Prince, Comment, *The Bar Strikes Back: The ABA's Misguided Quash of the MDP Rebellion*, 50 AM. U. L. REV. 245, 251 (2000) (urging the ABA to amend the Model Rules to permit MDPs).

58. See Adam A. Shulenburg, Note, *Would You Like Fries with That? The Future of Multidisciplinary Practices*, 87 IOWA L. REV. 327, 329 (2001) (arguing that limited forms of MDPs will continue to exist despite the ABA's lack of support); see also Nancy J. Moore, *Lawyering for the Middle Class*, 70 FORDHAM L. REV. 623, 634 (2001) (observing that if MDPs are permitted, Sears may enter the market and begin offering legal services, providing expanded access to the middle class). *Contra* Lawrence J. Fox, *The Argument Against Change*, R.I. B.J., Apr. 2000, at 17, 49 (fearing that dysfunction might befall Sears if its lawyer employees are supporting the Legal Services Corporation, the funder of consumer complaints on behalf of the indigent).

59. See Edith Y. Wu, *Why Say No to Multidisciplinary Practice*, 32 LOY. U. CHI. L.J. 545, 552 (2001).

60. See Talha A. Zobair, *Multidisciplinary Practices—Firms of the Future*, 79 MICH. B.J. 64, 65 (2000) (observing that as the demand for highly specialized service providers increases, so does the cost of providing such services).

61. See *id.* The demand for highly specialized service providers has also increased as firms expand into unfamiliar markets. *Id.* These experts now need more formal training and experience to meet the demands of their business clients. *Id.* Thus, as the demand for highly skilled professionals is increasing, the cost of obtaining and retaining such individuals is growing. *Id.* Cost-conscious clients, in an effort to eliminate transaction costs associated with "employing multiple professional organizations to resolve overlapping business problems"

fact, some commentators argue that lawyers already integrate professional services in an informal context when they hire jury consultants, investigators, economic analysts, and other experts.<sup>62</sup> Increases in the number of international mergers, acquisitions, and other complex business transactions have led clients to seek out more efficient and cost-effective ways of obtaining professional services.<sup>63</sup> One commentator argues this is what accounting firms do now by seeking to combine legal counsel, audit and tax services, information consulting, financial planning, litigation support, and other professional services.<sup>64</sup> The overall impact, argue such proponents, is a reduction in client costs.<sup>65</sup>

A corollary to this argument is that as the world becomes more complex, client problems are becoming more complex. Proponents of MDPs argue that clients need to obtain professional services from a single provider, given an increase in the complexity of both law and business.<sup>66</sup> The problems of clients are not just legal anymore.<sup>67</sup> Recent developments in technology, the

---

are turning to MDPs to obtain "the optimal delivery of various services." *Id.*

62. See Wu, *supra* note 59.

63. See Randall S. Thomas et al., *Megafirms*, 80 N.C. L. REV. 115, 172 (2001) (noting that the demand for MDPs is driven by the client's sense that these arrangements would be a more efficient, less costly way to deal with complex matters that have legal, management, and accounting issues).

64. See Robert A. Prentice, *The SEC and MDP: Implications of the Self-Serving Bias for Independent Auditing*, 61 OHIO ST. L.J. 1597, 1599 (2000). Professor Prentice discusses behavioral studies showing that, overwhelmingly, people tend to behave inequitably if it benefits them and they think they can get away with it. *Id.* This behavior is known as the self-serving bias and Prentice examines this bias in the context of the MDP debate. *Id.*

65. Specifically:

Proponents of MDPs argue that MDPs benefit clients because the ability to retain an organization whose staff can handle all of the legal and extralegal issues involved in a client's representation increases efficiency. The proponents argue that MDPs cause clients to need only one firm and, thus, reduce clients' costs because there is only one company to instruct, communication between members of the same firm is better, there is a better liaison between advisors, and projects are streamlined.

Gianluca Morello, Note, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multidisciplinary Practices Should Be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190, 238 (1997).

66. See Matheson & Favorite, *supra* note 43, at 597.

67. See Jennifer R. Garcia, Comment, *Multidisciplinary Practices: What Is*

globalization of the economy, and governmental regulation of commercial and private activities have changed the ways in which clients request legal service.<sup>68</sup> Instead of taking the time to contact, visit, and contract with multiple professional firms, the modern client has an interest, in terms of both quality of service and efficiency, in obtaining legal, financial, and other professional services from a single entity.<sup>69</sup> This model allows for better service because of the expertise of service providers and the close cooperation of interdisciplinary teams.<sup>70</sup>

Steve Bennett, corporate counsel to one of the United States's ten largest banks, has observed that client problems are not just "legal" problems, but often require a multidisciplinary approach.<sup>71</sup> As a result, the practice of law has evolved to a point where lawyers are influential advisors to companies that are considering complex global issues that involve "tax, environment, labor, politics, economic infrastructure, and so on."<sup>72</sup> As one commentator has observed, the modern client has "a significant interest" in access to a single firm providing financial, legal, and other services.<sup>73</sup>

The overall goal of MDPs is the reduction of transaction costs. This decrease in transaction costs would come from a reduction of duplicated efforts, elimination of the need for professionals in each firm to consult one another in costly conferences and meetings, and a reduction in the need for two firms to bill a sufficient amount to ensure that the transaction is viable from business and liability perspectives.<sup>74</sup> By employing persons of different skill levels,

---

*Wrong with the Legal Profession's Ethics Rules?*, 44 ST. LOUIS U. L.J. 629, 647 (2000) (observing that today's clients are more sophisticated and the issues they bring before attorneys are more complex).

68. *See id.* at 647-84.

69. *See Matheson & Favorite, supra* note 43, at 597.

70. *See Terry, supra* note 13, at 891.

71. *See id.*

72. Tim Wells, *A Conversation with David Wilkins*, WASH. LAW., Dec. 2001, at 30 (observing that "it's obvious that MDPs are here to stay" and suggesting that it is in the interest of the bar to consider forms of MDP regulation).

73. Edward S. Adams, *Not "If" But "How": Reflecting on the ABA Commission's Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269, 1269 (2000).

74. *See John S. Dzienkowski & Robert J. Peroni, Multidisciplinary Practice*

MDPs could further lower transaction costs.<sup>75</sup> Some MDP opponents argue, however, that there may be a conflict between the desire to provide MDP service and protecting client interests.<sup>76</sup>

Another way to view the MDP debate is through law and economics analysis. This school of thought argues that the availability of legal services to consumers should be dictated by the market, unrestricted by barriers in the form of governing rules.<sup>77</sup> Under this view, legal ethics rules are viewed no differently than those of any other interest group or trade union pursuing economic protectionism.<sup>78</sup> Consequently, advocates of existing bans on

---

*and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 118-19 (2000) (noting that few service providers will want to undertake joint liability when the reward for representation is relatively small).

75. See *id.* at 119. Other reduced costs would include search, contracting, coordination, monitoring, and information costs. *Id.* MDPs are also more likely to employ persons of varying skills and billing rates. *Id.* With this approach, a person doing routine tasks, such as basic mathematical calculations, is billed at a lower rate than a more skilled professional who performs such calculations incidental to the performance of his or her work. *Id.* "Specifically, a consumer of professional services may realize the benefit of reduced consumption related costs" when dealing with an MDP that is in position to "offer a variety of services and specialists in one location." *Id.*

76. Symposium, *Multidisciplinary Practice*, 20 *N.Y.L. SCH. J. INT'L & COMP. L.* 153, 159-60 (2000). Mr. Shestack tells a story illustrating this point:

It reminds me of a story of the time that Sherlock Holmes and Dr. Watson went camping. They put up a very nice tent and went hiking, and then they prepared dinner by the campfire. Later, they retired on their sleeping mattresses. About midnight, Holmes awoke and turned to Watson and said, "Watson, look up at the sky and those beautiful stars and tell me what thought occurs to your." And Watson says, "Well Holmes, I think of the Majesty of the heavens and the glory of the Creator . . . what thought occurs to you?" And Holmes said, "I look up at the stars, and it occurs to me that someone stole out tent."

*Id.* The concern is that the MDP will benefit business partners more than the MDP will benefit clients and that what is happening is a "cloaking" of a business plan by the Big Five in the guise of client service and development. *Id.* at 160.

77. See Sydney M. Cone, III, *Views of Multidisciplinary Practice with Particular Reference to Law and Economics*, *New York, and North Carolina*, 36 *WAKE FOREST L. REV.* 1, 4-5 (2001).

78. See *id.* The law and economics school is selective in its choice of the economic consideration that is of primary significance in the marketplace for professional legal services. The "paramount economic consideration" is freedom of ownership and investment "uncomplicated by any consideration of how this



MDPs are said to be “defending their economic turf.”<sup>79</sup>

A comparative analysis of the legal and accounting professions in other countries shows that other parts of the world are willing to allow MDPs.<sup>80</sup> This may be the most compelling reason to permit MDPs in the United States. Many argue that the legal profession in the United States must adapt to “marketplace competition as it becomes globalized and remove those regulations that restrict its participation.”<sup>81</sup> For the ABA to insure its relevancy on this issue internationally, it may have to move in the direction of regulating MDPs.<sup>82</sup> While the issue is debated here in the United States, “the Big Five accounting titans are avidly acquiring law firms in dozens of cities in Europe, where restrictions on law practice are often less stringent.”<sup>83</sup>

While MDP acceptance is not universal in Europe, many European countries embrace MDPs.<sup>84</sup> European lawyers and

---

freedom” affects clients. *Id.* at 5. As far as the law and economics school is concerned, the possible variation in legal product in the different economic contexts “is of less importance than is ownership of the means of production of that product.” *Id.* The approach is “hardly consumer oriented.” *Id.*

79. *Id.* The law and economics school is not concerned with MDPs in the sense of the actual availability to consumers of efficiently coordinated services; rather, it focuses on ownership of the firm enterprise. *Id.* at 6.

80. See, e.g., *infra* text accompanying notes 88, 92, 96, 104.

81. Adams, *supra* note 73, at 1300.

82. Robert K. Christensen, *At the Helm of the Multidisciplinary Practice Issue after the ABA's Recommendation: States Finding Solutions by Taking Stock in European Harmonization to Preserve Their Sovereignty in Regulation of the Legal Profession*, 2001 BYU L. REV. 375, 377 (observing that “by withdrawing national support from the exploration of MDP alternatives, the ABA has surrendered an important role in developing a meaningful approach to the multidisciplinary practice issue.”).

83. Margaret A. Jacobs, *Hybrid Law Practices in the U.S. Debated*, WALL ST. J. EUR., May 31, 2000, at 6; see also G. Ellis Duncan, Comment, *The Rise of Multidisciplinary Practices in Europe and the Future of the Global Legal Profession Following Arthur Andersen v. Netherlands Bar Ass'n*, 9 TUL. J. INT'L & COMP. L. 537, 542 (2001) (noting that the Big Five have built extensive legal networks across Europe, currently providing legal services in Spain, France, Italy, Germany, the United Kingdom, Switzerland, Sweden, and Austria).

84. See *infra* text accompanying notes 88–96. Cf. Ramon Mullerat, *Multidisciplinary Practices and the Public Interest: Is There a Possible Solution?*, 15 TEMP. INT'L & COMP. L.J. 31, 38 (2001). The Dutch Bar Association ruled

accountants boast of the financial efficiencies achieved by hiring MDP firms. For example, Peter Friedli, a Swiss venture capitalist, stopped using a traditional Swiss law firm and hired K.P.M.G.'s MDP in Zurich.<sup>85</sup> As a result, he estimates that his company, New Venturetec AG, saved twenty percent, or sixty thousand dollars, in legal, tax, and audit fees when it went public on the Swiss Stock Exchange.<sup>86</sup> The savings came from swifter service, rather than from lower rates, says Mr. Friedli.<sup>87</sup>

German MDPs have existed for many years.<sup>88</sup> While much of

---

that association of its members with auditors breached legal ethics rules. *Id.* A Dutch court decided in favor of the Bar's position. *Id.* In August 1999, the Dutch Appeal Court referred the matter to the European Court of Justice in Luxembourg. See Paul Hofheinz, *Deals & Deal Markers: Accounting Firms Can't Bundle Legal and Auditing Services*, WALL ST. J., Feb. 20, 2002, at C16. Specifically:

Europe's highest court backed a Dutch ban on bundling auditing and legal services as accounting firms face criticism for straying from their traditional role of certifying the accuracy of corporate books.

The U.S. already restricts the bundling of legal advice and accounting services, but the ruling by the European Court of Justice could be a blow to accounting firms hoping the U.S. might someday relax those rules. For nearly a decade, U.S. accounting firms have lobbied the American Bar Association to drop the U.S. ban, arguing that clients would prefer so-called one-stop shopping, in which they could get legal advice and accounting services from the same firm. Five European Union countries have banned the practice as well, although it is legal in Germany and Italy.

Neither Europe nor the U.S. currently ban the linking of accounting and consulting services, which has been scrutinized by regulators and lawmakers since the bankruptcy of Enron Corp. in December. Arthur Andersen LLP, a U.S. affiliate of Anderson Worldwide, provided both auditing and financial-consulting services to Enron, and critics in the U.S. Congress have questioned whether Andersen might have had an incentive to ignore questionable Enron accounting for fear of losing lucrative consulting work.

The European Court of Justice said it may be "necessary for the proper practice of the legal profession" that lawyers not be allowed to team up with accountants to offer collaborative services. The ruling applies to restrictions placed on law firms, not accounting firms. But lawyers said it could set a European standard on exactly what services accountants can legally offer in the EU.

*Id.*

85. See Duncan, *supra* note 83.

86. See *id.*

87. See *id.*

88. See Martin Henssler & Laurel S. Terry, *Lawyers Without Frontiers—A*

the MDP debate has centered on the Big Five accounting firms, many MDPs in Germany are small or mid-sized firms with a handful of lawyers, accountants, and tax advisors serving the needs of local communities.<sup>89</sup> Some commentators, however, have observed that the motivations for forming MDPs in Germany and the United States might be different.<sup>90</sup> In Germany, the driving force may be the ability to offer seamless, one-stop service.<sup>91</sup> While confidentiality is a major concern of MDP opponents, there is less concern about this issue in Germany because “training, values, and obligations” of auditors, lawyers, and tax advisors are very similar.<sup>92</sup> Given that these professions are “highly respected” and “heavily regulated,” it has never been submitted that the standards could erode because lawyers are allowed to form partnerships with auditors or tax advisors.<sup>93</sup> It is important to note, however, that German law, unlike that in the United States, does not impose on the auditor the obligation to disclose to authorities certain matters found during the course of an audit.<sup>94</sup> Hence, the problem of conflicting disclosure requirements and confidentiality obligations of partners in the same firm is eased.<sup>95</sup>

In France, accounting firms rely on a law allowing drafters of legal documents called “conseil juridique” to offer drafting services to their clients.<sup>96</sup> Accounting firms hire these drafters as employees.<sup>97</sup> French law also allows accounting firms to affiliate with independent law firms or networks of firms.<sup>98</sup> Recently,

---

*View from Germany*, 19 DICK. L. REV. 269, 295 (2001).

89. *See id.* at 296.

90. *See id.*

91. *See id.* MDP proponents in the United States offer the same justification relied on by German regulators.

92. *See id.* at 297; *see also* Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV. 1547, 1551 (2000) (providing a brief history of the development of MDPs in Germany).

93. *See* Henssler & Terry, *supra* note 88, at 297.

94. *See id.*

95. *See id.* at 298. While these drafters technically are not lawyers as we would think of them in the United States, they nonetheless perform services comparable to the document drafting function of American lawyers.

96. *See* Dzienkowski & Peroni, *supra* note 74, at 115.

97. *See id.*

98. *See id.*

France merged the two legal professions (“advocats” and “conseil juridique”) to form one unified profession.<sup>99</sup> Since that time, it has become common for accounting firms to affiliate with or acquire the combined law firms.<sup>100</sup> The French rules have led to accounting firms’ use of the “captive” law firm arrangement.<sup>101</sup> A “captive” law firm remains separate in structure from the accounting firm, but the two firms share the same client base and often provide indistinguishable services in a unified manner.<sup>102</sup> The accounting firm often provides the law firm with accounting support, and the law firm provides the accounting firm with legal services. The partner in charge of the Paris office of Archibald Andersen Association d’Advocats, a French law firm associated with Arthur Andersen, observed that they provide all the typical services of a business law firm.<sup>103</sup>

MDPs are not confined to Europe.<sup>104</sup> The International Practice of Law Committee and the National MDPs Committee of the Canadian Bar Association have recommended that lawyers be permitted to share fees with nonlawyers and enter into partnerships with nonlawyers as long as the lawyers continue to respect traditional rules of professional conduct.<sup>105</sup> The Federation of Law Societies of Canada recommended a national approach to MDPs and even wrote a “Draft Model Rule for Multi-Disciplinary Practice.”<sup>106</sup> This rule would permit a fully integrated partnership

---

99. See *id.*

100. See *id.*

101. See *id.*

102. See *id.*

103. See Jeffery M. Jones, Comment, *Bend, but Don’t Break: MDP Proposal Bends in the Right Direction, but—Crack!!—Goes Too Far*, 54 SMU L. REV. 395, 398–99 (2001) (noting that similar associations, operating in the absence of regulation, exist in Ireland, Scotland, and South Africa).

104. See, e.g., Zobair, *supra* note 60 (stating that MDP activities are increasing in Africa, Asia, and Latin America).

105. See Mullerat, *supra* note 84, at 36 (discussing the state of MDPs in Spain, England and Wales, and Belgium). The Spanish General Council for Lawyers (Consejo General de la Abogacia Espanola) proposed a draft for a new General Statute for Lawyers (Estatuto General de la Abogacia) in 1997. The Statute permits MDPs as long as they group together professions compatible with the legal profession. *Id.*

106. See Terry, *supra* note 13, at 888–89.

of lawyers and nonlawyers.<sup>107</sup>

The Law Council of Australia, an organization similar to the ABA, adopted a policy in December 1998 endorsing MDPs and calling on Australian states and territories to remove existing restrictions on this business form.<sup>108</sup> Prior to the vote of the Council, the Legal Ombudsman of Victoria issued a report that endorsed a change in the regulations to permit MDPs.<sup>109</sup> As a result of these regulatory changes, several of the Big Five accounting firms either have opened or are contemplating opening new offices in Australia.<sup>110</sup>

The existence of MDPs in other countries<sup>111</sup> is one of the most powerful justifications offered for relaxing the current MDP ban in the United States.<sup>112</sup> Lawyers cannot hide behind the high ideals of the Model Rules of Professional Conduct and hope ethics will help them survive the competition.<sup>113</sup> Regulators in the United States have three options with regard to MDPs: (1) ignore their existence, (2) ban them altogether, or (3) regulate them.<sup>114</sup> If one chooses to ignore the current existence of MDPs, the result will be two

107. *See id.* at 889.

108. *See id.* at 886.

109. *See id.*

110. *See id.*

111. *See* Ronald A. Landen, Comment, *The Prospects of the Accountant-Lawyer Multidisciplinary Partnership in English-Speaking Countries*, 13 EMORY INT'L L. REV. 763, 820 (1999). Australia already has multidisciplinary partnerships and the United Kingdom will likely soon follow with a model similar to Australia's. *Id.* Additionally, the legal system in the United Kingdom allows for easier transition as a result of the separation of barristers and solicitors. *Id.* at 821. This makes multidisciplinary alliances possible. *Id.*; *see also* Zobair, *supra* note 60 (reporting that Big Five firms have already implemented MDPs through the acquisition of law firms, resulting in parallel firms and the institution of varying degrees of integrated practices in Europe, Canada, and Australia).

112. *See, e.g.,* Caryn Langbaum, *Will Attorneys Vote Themselves Out of the Competition*, NEV. LAW., July 2000, at 20, 22-23 (asserting that the existence in Europe of MDPs shows that there is demand for integrated professional services).

113. *See id.* at 23.

114. *See* Terry, *supra* note 13, at 920 (discussing the "pragmatic" approach to MDPs and observing that regulation is the best option in order to ensure that the bar remains relevant in the MDP debate).

distinct groups of lawyers: those regulated and those unregulated.<sup>115</sup> This will likely result in the dilution of the ability of the organized bar to have meaningful influence on the business lawyer.<sup>116</sup> Lawyers practicing in traditional law firms acknowledge that, while practicing law, they are bound by applicable ethics rules.<sup>117</sup> In contrast, if regulators choose to ignore MDPs and maintain the current ethics structure, lawyers practicing in MDPs must claim they are not practicing law; to do otherwise would subject them to discipline for a violation of Rule 5.4. Forcing lawyers to claim they are not practicing law would lead to a “dangerous world” in which some lawyers were regulated while others were not, leading to a “disrespect for the law and legal ethics rules” which might create “a race to the bottom.”<sup>118</sup> The only question is, therefore, whether the organized bar will play a constructive role in regulating MDPs or whether it will lose control over the delivery of legal services by U.S. lawyers both domestically and abroad.<sup>119</sup>

MDP proponents argue that a multidisciplinary structure would provide law firms with access to new capital, which is increasingly necessary as expensive technology plays a larger role in the delivery of legal services.<sup>120</sup> As it stands today, equity partners provide all the financing for law firms.<sup>121</sup> While law firms are typically characterized as non-capital intensive, increasing

---

115. See *id.* at 920.

116. See Adams, *supra* note 73, at 1298 (quoting a lawyer who observed, “[W]e are all paranoid about driving our clients into the arms of other professionals and that’s one of the reasons we are [pushing MDP reform].”).

117. See Terry, *supra* note 13, at 920.

118. *Id.*

119. See Dzienkowski & Peroni, *supra* note 74, at 90 (arguing that a narrowly tailored system of MDP regulation will accomplish the important goals of satisfying client demand for multidisciplinary services while protecting the legitimate interests of the legal profession in preserving its core values); see also Dunbar, *supra*, note 57, at 65 (discussing Michigan and observing that the state bar can “take the lead in addressing the need to regulate MDPs by leading the dialogue”). *Contra* Christopher J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law*, 34 VAND. J. TRANSNAT’L L. 931, 949 (2001) (arguing that a set of global professional ethical regulations that assert core values may not only be unnecessary, but counterproductive).

120. See Adams, *supra* note 73, at 1300–01.

121. See *id.*

technology needs are changing this dynamic.<sup>122</sup> Furthermore, the notion that law firms have insignificant capital requirements fails to recognize that many law firms are investing significant amounts of money in training and developing young associates. Allowing law firms access to equity markets through investment by nonlawyers could result in firms that are more optimally capitalized and therefore more efficient.<sup>123</sup>

### *B. The Arguments Against MDPs*

The underlying rationale for the traditional MDP prohibition is contained in the official comments to Rule 5.4.<sup>124</sup> One key concern is the preservation of a lawyer's independent professional judgment.<sup>125</sup> When a lawyer has intimate strategic and financial attachments to nonlegal professionals, opponents argue, there are bound to be "obstacles to independent judgment."<sup>126</sup> This argument, however, suffers from a fundamental flaw: law firms are in the business of providing sound legal services and judgment to clients every day. Failing to provide the highest quality counsel to clients will have an adverse impact on a firm's ability to compete for business. While conceding that MDPs might make the delivery of legal and nonlegal services more efficient, critics say that this efficiency would come at the sacrifice of independent professional judgment and confidentiality.<sup>127</sup>

---

122. *See id.*

123. *See id.*

124. *See infra text* accompanying note 125.

125. *See* Terry, *supra* note 13, at 874; *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-355 (1987) (stating that the MDP prohibition avoids the possibility of a nonlawyer's interference with exercise of a lawyer's independent professional judgment and ensures that the total fee paid by clients will not be unreasonably high); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 86-1519 (1986) (noting that the prohibition protects against possible control by nonlawyers of a lawyer's professional judgment and avoids encouraging nonlawyers to engage in unauthorized practice of law).

126. Adams, *supra* note 73, at 1302.

127. *See* Lawrence J. Fox, *Old Wine in Old Bottles: Preserving Professional Independence*, 72 TEMP. L. REV. 971, 984 (1999). Fox compares the MDP debate to law enforcement. He explains that repealing the Fourth, Fifth, and Sixth Amendments would make law enforcement more efficient and effective, while at

Another concern is the perceived risk of conflict between the ethical obligations of lawyers with respect to confidentiality and those of accountants. For example, opponents argue that there is a fundamental conflict between a lawyer's duty of confidentiality and an accountant's duty to go public.<sup>128</sup> U.S. securities laws require accountants to disclose audit irregularities to the Securities and Exchange Commission if a company does not quickly correct a problem.<sup>129</sup> By contrast, lawyers are bound by their ethics rules to protect confidential client information.<sup>130</sup> Under current ABA Model Rules of Professional Conduct, lawyers have discretion to reveal client confidences only under limited circumstances.<sup>131</sup>

However, the ABA Model Rules of Professional Conduct governs "a nonlawyer employed or retained by or associated with a lawyer."<sup>132</sup> Without making any changes to this existing rule, lawyers are responsible for those they employ, retain, or associate with in a professional capacity. Part C of the rule states that a lawyer shall be responsible for conduct of such a person if "the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved."<sup>133</sup> Therefore, in an MDP situation, a lawyer could be disciplined if the lawyer has knowledge of wrongful conduct engaged in by the other professional, including

---

the same time eroding civil liberties. *Id.* Analogizing to MDPs, Fox observes that repealing ABA Model Rule 5.4 would allow lawyers to work with "accountants, financial planners, insurance agents, tow truck operations, and morticians." *Id.* However, Fox asserts that by permitting these types of lawyer/nonlawyer partnerships, lawyers would sacrifice independent professional judgment, confidentiality, and loyalty, and concludes by noting that the safeguards lost would be just as great a loss to the American public as the repeal of our constitutional rights. *Id.*

128. See Terry, *supra* note 13, at 892.

129. See Matheson & Favorite, *supra* note 43, at 601.

130. See *id.*

131. MODEL RULES OF PROF'L CONDUCT R. 1.6 (1999). The rule states, in relevant part, that a lawyer "shall not reveal information relating to representations of a client." *Id.* A lawyer, may, however, reveal confidences to the extent necessary to "prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm" or to defend actions brought by the client against the lawyer. *Id.*

132. *Id.*

133. *Id.* at 1.6(c)(1).



that lawyer's partner(s).

Opponents further argue that MDPs will lead to a loss of zealous representation and advocacy,<sup>134</sup> with too much focus on the financial aspect of MDPs. The fear is that management by nonlawyers of lawyers' work will lead to a decrease in the efforts of attorneys to advocate vigorously for their clients as the focus for MDP firms shifts from high-quality representation to the bottom line.<sup>135</sup> However, this assumption rests on the false premise that "adversarial advocacy is the sole function of lawyers."<sup>136</sup> Traditional equity partner law firms are trusted to protect their clients' interests, and MDP opponents offer no explanation why this would be different in an MDP.<sup>137</sup> Otherwise, these professionals would quickly find their client base exhausted. Furthermore, it is "important to recognize that accountants, consultants, doctors, and other professionals have ethics too."<sup>138</sup>

Another concern raised by MDP opponents is that consumers' freedom to obtain the best services would be jeopardized because consumers would be pressured to choose their internal service providers rather than engaging the services of another firm.<sup>139</sup> The

---

134. See Peter C. Kostant, *Paradigm Regained: How Competition from Accounting Firms May Help Corporate Attorneys to Recapture the Ethical High Ground*, 20 PACE L. REV. 43, 66 (2000).

135. See, e.g., Dennis J. Tuchler, *Unavoidable Conflicts of Interest and the Duty of Loyalty*, 44 ST. LOUIS U. L.J. 1025, 1028 n.11 (2000). The author observes that one of the objections to MDPs is that decisions as to services offered or courses of actions to be pursued might be influenced by monetary concerns rather than independent professional judgment. *Id.* It is unclear, however, how this is any different from the motivations of a non-MDP law firm. Either firm has a market driven motivation to provide high quality services to satisfy client needs.

136. See Kostant, *supra* note 134.

137. See, e.g., Gerard J. Clark, *American Lawyers in the Year 2000: An Introduction*, 33 SUFFOLK U. L. REV. 293, 311 (2000) (describing some examples of full service MDPs such as a bankruptcy firm offering clients legal, accounting, factoring, and receivership services; or an environmental firm offering legal services as well as detection and engineering services, supervision of clean-up, and certification of results to the relevant governmental agency).

138. Wells, *supra* note 72, at 31 (noting that we are "so concerned about protecting them [clients] that we're suggesting that they . . . [lack] the ability to choose between an MDP and a law firm").

139. See Morello, *supra* note 65, at 242.

opponents argue this that is a problem because an MDP could offer the best services in one area while being deficient in others.<sup>140</sup> Opponents further assert that there will be pressure on lawyers to promote nonlawyer personnel when advising clients because of the financial commitment MDPs make to nonlawyer personnel.<sup>141</sup> This argument assumes that the client is unsophisticated<sup>142</sup> and will be unable to determine on its own which firms provide the best services. However, the debate has never been about how best to “help Mom and Dad plan their retirement.”<sup>143</sup> The debate is about “high-end lawyers” who want to merge with other high-end financial professionals to compete more effectively for the business of “the Masters of the Universe.”<sup>144</sup> Oftentimes, clients are in the best position to make the judgment on whether the MDP firm is best capable of representing their other interests. At the very least, it is difficult to accept the argument that the organized bar is most suited to determine the best interests of sophisticated clients.

Opponents of MDPs assert that the preservation of the current prohibition in Rule 5.4 is “essential to preserving the core values of the legal profession.”<sup>145</sup> They argue that lifting the restrictions

---

140. *See id.*

141. *See id.* (stating, for example, that a former Coopers partner explained that Coopers’s French audit unit would strongly urge clients to work with Coopers’s in-house tax and legal division in France. This was problematic because “Coopers in France was not always the best in a particular area.”).

142. *See supra* text accompanying note 67.

143. David Luban, *No Rules?; Considering Values Asking the Right Questions*, 72 TEMP. L. REV. 839, 840 (1999).

144. *Id.* at 840–41.

The Masters of the Universe did not acquire their riches by being dumb negotiators in their own self-interest, and they scarcely need the solicitude of the organized bar, which cannot claim to understand their interests better than they do. The rich really aren't like you and me, and they transact their business with lawyers and bankers out of sight of our speculations. We don't really know how they view their lawyers or what they say to them; why second-guess them, then? We find similar phenomena in nature. Two miles beneath the placid surface of the Pacific Ocean, far removed from the eyes of observers, the sperm whale and the giant squid grapple in silent combat. Moby Dick has no need of ABA commissions worrying that the squid may use an illegal hold. Moby Dick knows what to do.

*Id.*

145. *See* James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A “Radical” Proposal to Extend the Model Rules to Changing Forms of*

would significantly weaken the profession and would compromise the interests of clients, for whom the protections of the Model Rules were primarily designed.<sup>146</sup> MDP opponents further argue for maintaining the current rule to preserve the legal profession's tradition of quality and loyalty to its clients.<sup>147</sup> Opponents also express concerns that MDPs will steer law clients to nonlawyer professionals within the MDP firm for nonlegal problems, even if a more qualified nonlawyer professional could be found outside the MDP.<sup>148</sup> As a consequence, MDPs would erode attorney independence, client loyalty, and confidentiality, ultimately having a harmful impact on the public<sup>149</sup> and reflecting negatively on the profession. MDP proponents counter, however, by arguing that the American bar is motivated by a desire to maintain control and autonomy over access to legal services, "especially the billions of dollars of fees they produce annually."<sup>150</sup>

---

*Legal Practice*, 84 MINN. L. REV. 1159, 1185 (2000); see also Nancy L. Kaszak, *Practicing Law in the Global Economy*, 22 N. ILL. U. L. REV. 1, 14 (2001) (noting that opponents argue that MDPs would undermine the core values of independence and loyalty); John Freeman, *Uncaring "Professionals,"* S.C. LAW., May/June 2001, at 11, 13 (stating "accountants and lawyers are not on the same wavelength professionally when it comes to accountability to clients."); Bradley G. Johnson, Note, *Ready or Not, Here They Come: Why the ABA Should Amend the Model Rules to Accommodate Multidisciplinary Practices*, 57 WASH. & LEE L. REV. 951, 965 (2000) (observing that MDPs could adversely affect the legal profession by compromising a lawyer's professional independence of judgment).

146. See *supra* note 144.

147. See Garrett Glass & Kathleen Jackson, *The Unauthorized Practice of Law: The Internet, Alternative Dispute Resolution and Multidisciplinary Practices*, 14 GEO. J. LEGAL ETHICS 1195, 1201 (2001) (observing that proponents contend current times necessitate acceptance of MDPs to meet market demands, remain competitive, and service clients).

148. See Dzienkowski & Peroni, *supra* note 74, at 141.

149. See Victoria Kremeski, *Multidisciplinary Practices and the Main Street Lawyer*, 79 MICH. B.J. 1196, 1196 (2000) (observing that MDP opponents argue that a lawyer's professional judgment is subject to "erosion" in an MDP setting, as the competing interests of other partners may impede the lawyer's ability to give sound advice).

150. See Connatser, *supra* note 22, at 374 (observing that yielding to rules and regulations of other professions, while not attempting to draft rules of their own, would effectively "relinquish the cherished place in society that the American lawyer has occupied for centuries").

## II. A CRITICAL ANALYSIS OF NEW YORK'S MDP RULES

In April 2000, a New York State Bar Association special committee issued a detailed report recommending modifications to the state's ethics code to permit limited forms of MDPs. The mission of the special committee was to "consider the present law and its effectiveness" and to consider the costs and benefits of any potential changes to rules governing multidisciplinary practice.<sup>151</sup> Over a six-month period the committee identified and researched six areas deemed helpful in making recommendations on MDPs.<sup>152</sup> The report, "Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers," resulted in the promulgation of New York Code of Professional Responsibility DR 1-106 and 1-107.<sup>153</sup>

On November 1, 2001, when its new rules took effect following approval by the four Appellate Divisions of the New York Supreme Court, New York became the first state to permit MDPs.<sup>154</sup> A critical analysis of the rules shows their limited scope and less than enthusiastic endorsement of multidisciplinary practice. The New York rules still prohibit nonlawyers from holding any ownership or interest in law firms, sharing legal fees with lawyers, and directing the professional judgment of lawyers.<sup>155</sup> While these new New York rules are a move forward, the following discussion demonstrates how other jurisdictions can

---

151. Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers, Apr. 2000, at 1 (Report of the New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation), at [www.law.cornell.edu/ethics/mdp1.htm](http://www.law.cornell.edu/ethics/mdp1.htm) (last visited Sept. 6, 2002) [hereinafter Preserving Core Values].

152. *Id.* at 2. The committee examined the following subject areas in depth: post-World War II changes in the American legal profession, "articulation and enforcement of professional values"; lawyers working with other professionals; nonlawyers involvement in the practice of law; developments abroad relating to multidisciplinary practice; and "factors that look toward change in the existing law governing lawyers." *Id.*

153. See Steven C. Krane, *End Game*, N.Y. St. B.J., Sept. 2001, at 5, 5.

154. See Rogers, *supra* note 34.

155. See *id.* (noting that the New York approach permits MDPs without "giving away the store").

improve upon the important foundation constructed by New York.

New York's new Model Code of Professional Responsibility DR 1-106 governs the provision of nonlegal services by lawyers or law firms, either directly or through companies that they own or control.<sup>156</sup> For purposes of this rule, "nonlegal services" are "services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer."<sup>157</sup> For example, a lawyer with appropriate licenses

156. Specifically, DR 1-106 reads:

Responsibilities Regarding Nonlegal Services

(a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

(1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the provision of both legal and nonlegal services.

(2) A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship.

(3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Disciplinary Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship.

(4) For purposes of [this section] . . . it will be presumed that the person receiving nonlegal services believes the services to be the subject of an attorney-client relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

(b) [A] lawyer or law firm that is an owner, controlling party, agent, or is otherwise . . . affiliated with an entity that the lawyer or law firm knows is providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty . . . with respect to the confidences and secrets of a client receiving legal services.

(c) For purposes of [this section], "nonlegal services" shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.

N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-106 (2001).

157. See *id.* 1-106(c).

could provide investment or insurance advice; a nonlawyer with similar licenses could provide the same services. The goal of the rule is to require clarity with respect to services provided. The rule applies to both legal and nonlegal services when the nonlegal services are not distinct from the legal services.<sup>158</sup> The rule applies when a person who receives the nonlegal services could reasonably believe that they “are the subject of an attorney-client relationship.”<sup>159</sup> The rule applies to a lawyer or firm that is “an owner, controlling party or agent of, or that is otherwise affiliated with” an entity the lawyer knows is providing nonlegal services to a person if the client could reasonably believe that the nonlegal services are a subject of the attorney-client relationship.<sup>160</sup> The lawyer or law firm bears the burden of communicating to clients that the nonlegal services are not part of the attorney-client relationship; the rule presumes that the client receiving nonlegal services believes they are a part of the attorney-client relationship unless the lawyer advises the client in writing that the nonlegal services do not enjoy the protection of the attorney-client privilege.<sup>161</sup>

DR 1-106 reinforces the notion that a nonlawyer should not influence the professional judgment of a lawyer. A lawyer or law firm is not permitted to allow any nonlawyer providing nonlegal services “to direct or regulate the professional judgment of the lawyer or law firm.”<sup>162</sup> While maintaining the professional integrity of the legal profession is important, this part of the rule on professionalism ignores a fundamental reality of MDPs: lawyers and nonlawyers will be working together under any scheme.

Therefore, while DR 1-106 effectively requires that a lawyer’s professional judgment not be impeded, it should expand to focus on the professional judgment of the other professions, such as accounting. By working together with accountants, rather than in isolation, lawyers and other professionals can craft joint ethical guidelines that mutually state the goals of their collective efforts

---

158. *See id.* 1-106(a)(1).

159. *See id.* 1-106(a)(2).

160. *See id.* 1-106(a)(3).

161. *See id.* 1-106(a)(4).

162. *See id.* 1-106(b).

while protecting client interests. Instead of having two separate ethical codes, one universal set of guidelines should be drafted to apply to both lawyers and nonlawyers (such as accountants) working in an MDP environment. These guidelines should outline the joint responsibilities of MDP lawyers and nonlawyers, while providing guidance on issues such as attorney-client privilege and confidentiality/disclosure. If, when entering the relationship, the lawyer and the accountant know each other's responsibilities, and the client understands the overall obligations of the MDP firm, the client will receive a higher quality of defined services.

It is somewhat surprising that New York did not attempt to distinguish between lawyers providing transactional services and those providing advocacy services, in light of the Committee's recognition of the distinctions between various kinds of lawyers. For example, New York's Special Committee made note of increased specialization in the legal profession.<sup>163</sup> The Special Committee observed that lawyers in larger law firms who predominantly served business clients developed competence in particular areas of the law to better serve corporate clientele.<sup>164</sup> It is striking that the Special Committee observed that, at one time, the profession's ethical rules forbade lawyers to hold themselves out as specialists except in patent, trademark, or admiralty law. Under the current formulation, the ABA Standing Committee on Specialization has promulgated standards for some twenty-four specialties.<sup>165</sup> It would seem logical, therefore, given that the Special Committee recognized the value of segmenting lawyers by specialization, that it would consider rules distinguishing between transactional and litigation services.<sup>166</sup> However, no such effort was

---

163. Preserving Core Values, *supra* note 151, at 15 (noting that, over time, an "increase[ed] premium was put on specialization to maintain competence and to keep abreast of subject matter.").

164. *Id.* at 16.

165. *Id.*

166. This Note does not address the broader issue of whether different ethical standards should apply to litigators and transactional attorneys. While such a framework with two separate ethical standards may be desirable and eliminate many seemingly contradictory statements in the ethical rules, this Note simply advocates that having different standards would facilitate the development of MDPs.

made in these revised New York rules. This is a potential weakness in the New York approach.

This section of the rule dealing with permissible lawyer-nonlawyer partnerships should be commended, however, for placing the onus of establishing the nonexistence of the attorney-client relationship on the attorney member of the MDP.<sup>167</sup> Even for a sophisticated client,<sup>168</sup> this rule represents a change from the way legal services have been provided. It is important for the lawyer to educate the client on the new MDP structure.

DR 1-107 permits lawyers to form relationships with nonlawyers to provide legal and non-legal services to clients on a systematic and continuing basis, provided that the nonlawyers do not own, control, supervise, or manage, directly or indirectly, in whole or in part, the practice of law by the lawyer or law firm.<sup>169</sup>

---

167. See *supra* note 161 and accompanying text.

168. See *supra* note 144 and accompanying text.

169. Specifically, DR 1-107 reads:

Contractual Relationship Between Lawyers and Nonlegal Professionals

(a) The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it serves. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed "independent professional judgment and undivided loyalty uncompromised by conflicts of interest." Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent professional judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State.

Multi-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values. However, a lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other nonlegal professional services, . . . provided that:

1. The profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions . . . .

2. The lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the



The rule begins with a lengthy preamble about the value of lawyers' maintaining their independent professional judgment.<sup>170</sup> Clients of lawyers practicing in New York are guaranteed "professional judgment and undivided loyalty uncompromised by conflicts of interest."<sup>171</sup> A lawyer, therefore, must remain completely responsible for his or her professional judgment. The New York preamble then contains a statement that comments

---

practice of law by the lawyer or law firm, nor . . . shares legal fees with a nonlawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral; and

3. The fact that the contractual relationship exists is disclosed by the lawyer or law firm to any client of the lawyer or law firm before the client is referred to the nonlegal professional service firm, or to any client of the nonlegal professional service firm before that client receives legal services from the lawyer or law firm; and the client has given informed written consent and has been provided with a copy of the "Statement of Client's Rights [i]n Cooperative Business Arrangements" . . . .

(b) For [these purposes]:

(1) Each profession on the list maintained pursuant to a joint rule of the Appellate Divisions shall have been designated *sua sponte*, or approved by the Appellate Divisions upon application of a member of a nonlegal profession or nonlegal professional service firm, upon a determination that the profession is composed of individuals who, with respect to their profession:

(a) have been awarded a Bachelor's Degree or its equivalent from an accredited college or university;

(b) are licensed to practice the profession by an agency of the State of New York or the United States Government; and

(c) are required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession.

(2) The term "ownership or investment interest" shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.

(c) [These rules] shall not apply to relationships consisting solely of reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm.

(d) [A] lawyer or law firm may allocate costs and expenses with a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship . . . provided the allocation reasonably reflects only the costs and expenses incurred or expected to be incurred by each.

N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-107 (2001).

170. *Id.* 1-107(A). It is interesting to note that these value statements are included in the rule and not offered as part of the comments as is customary in other jurisdictions.

171. *Id.*

upon the challenges presented by MDPs: "Multi-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and . . . a strict division between services provided by lawyers and . . . nonlawyers is essential to protect those values."<sup>172</sup> A lawyer or a law firm may, however, enter into a contractual relationship with nonlegal professionals or nonlegal professional firms to provide joint services to the public.<sup>173</sup>

This part of the rule suggests that, by working with nonlawyers, a lawyer will be less likely to maintain independent professional judgment.<sup>174</sup> However, the statement ignores the fact that today many lawyers practice in environments where they are supervised by nonlawyers. As the Special Committee observed, "[t]he in-house lawyer's role came to be seen in many companies as keeping the corporation free of legal trouble rather than getting the client out of trouble."<sup>175</sup> If in-house counsel can function with success and independence while not compromising ethics rules, it seems logical to take the position that independence would not be compromised in an MDP setting. In fact, an MDP firm, with lawyers held accountable for the actions of other partners, should be less likely to compromise professional ethics. While New York may be the first state to allow MDPs in a limited form, other states, in an effort to attract MDPs to their own jurisdiction, may craft more permissive MDP regulations.

Flowing throughout New York's new guidelines is an undercurrent emphasizing the need for independent professional judgment. However, as Professor Munneke argues, lawyers have successfully continued to practice with independent professional judgment in environments where there would appear to be an inherent conflict of interest clouding a lawyer's professional judgment.<sup>176</sup> Lawyers already work in a number of settings where

---

172. *Id.*

173. *Id.*

174. *See supra* note 125 and accompanying text.

175. Preserving Core Values, *supra* note 151, at 89; *see also* Terry, *supra* note 13, at 928 (defusing the argument that MDPs will be harmful because of third party influence by pointing out that, despite the risk, U.S. regulators trust corporate counsel to comply with ethical obligations despite third-party pressure).

176. For example, many firms today have in-house counsel. While the in-

nonlawyers exercise tremendous influence over the way the lawyers practice law and the decisions the lawyers make.<sup>177</sup> Even private practitioners who represent a single client, as well as lawyers working for any group, such as a provider of legal service programs for the indigent, are often accountable to a nonlawyer board of directors.<sup>178</sup>

Under the New York rule, three circumstances are required for a contractual relationship with nonlawyers. First, the profession of the nonlegal professionals or firms must be one that is included on a list maintained by the New York Appellate Division.<sup>179</sup> A profession may be added to the list through application to the Appellate Divisions.<sup>180</sup> In order to qualify, the profession must be composed of individuals who earn at least a bachelor's degree or its equivalent from an accredited college or university;<sup>181</sup> are licensed to practice the profession by an agency of

---

house counsel are expected to offer independent legal advice, the fact remains that their supervisors and those ultimately responsible for the welfare of the corporation, i.e., the CEO and board of directors, have the ability to exert direct and indirect pressure on in-house counsel.

177. See Gary A. Munneke, *Lawyers, Accountants, and the Battle to Own Professional Services*, 20 PACE L. REV. 73, 90 (1999).

178. See *id.* Professor Munneke observes that the American legal system has been able to accommodate oversight by nonlawyers "where expediency or the Constitution seem[s] to make it feasible." *Id.* It would seem, given the success in these areas, that opponents of MDPs have some other motivation for continuing the ban. Professor Munneke suggests that the primary motivation for the continued prohibition is "economic protectionism, rather than ethical probity." *Id.*; see also Charles W. Wolfram, *The ABA and MDPs: Context, History, and Process*, 84 MINN. L. REV. 1625, 1648 (2000) (discussing how a law student leaving a social work career and working with his spouse, also a social worker, to provide divorce law and marriage counseling services would violate the ban against MDPs in almost every jurisdiction except the District of Columbia); Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for People*, 7 CLINICAL L. REV. 227, 271 (2000) (arguing that social justice concerns—the ability of lawyers to work with social service providers—should be taken into consideration when debating the MDP issue and evaluating its costs and benefits for potential clients).

179. N.Y. Code of Prof'l Responsibility DR 1-107(A) (2001).

180. *Id.* 1-107(B)(1).

181. *Id.* 1-107(B)(1)(a).

the State of New York or the United States Government;<sup>182</sup> and are subject to an ethical code of conduct, similar to that of the legal profession, that allows for a license to be revoked or suspended for professional misconduct.<sup>183</sup> Second, the nonlegal professionals are not permitted to exercise control over the law firm or receive a portion of the profits or share in the legal fees earned by the lawyer or law firm.<sup>184</sup> Third, the contractual relationship between the lawyer or law firm and the nonlegal professional must be disclosed before a client is referred to the nonlegal professional or to the lawyer or law firm.<sup>185</sup> Essentially, disclosure is required before either party may refer a client to the other party. The client must then give informed written consent and receive a copy of "Client's Rights in Cooperative Business Arrangements."<sup>186</sup>

New York's requirement of a contractual relationship between lawyers and nonlawyers could actually serve to make lawyers less accountable for their nonlawyer partners. In a contractual setting, one can see a nonlawyer partner's liability being limited to damages for breach of contract. If nonlawyers were partners in the MDP enterprise, their liability would be increased. As the Special Committee observed, "[w]hen needs arise, lawyers are quite capable" of working effectively with professionals and recommending that their clients engage the services of particular accountants, financial advisors, investment bankers, engineers, brokers, social workers, and other professionals.<sup>187</sup> By confining this relationship to one of contract rather than one of agency or partnership law, New York places the interests of MDP member professionals above the interests of clients. The core values of lawyer independence would be better preserved if these relationships were in the open and regulated as opposed to their current status where they are covertly structured to avoid existing regulations.<sup>188</sup> Furthermore, if lawyers and nonlawyers were

---

182. *Id.* 1-107(B)(1)(b).

183. *Id.* 1-107(B)(1)(c).

184. *Id.* 1-107(A)(2).

185. *Id.* 1-107(A)(3).

186. *Id.*

187. Preserving Core Values, *supra* note 151, at 98.

188. *Id.* at 101 (observing that "there is anecdotal evidence that law firms throughout the country continue to own and operate ancillary business

permitted to share fees (and thus retain liability for their share of the fees),<sup>189</sup> one can argue that they would be more likely to police the actions of their nonlawyer partners. If lawyers were partners with these nonlawyer professionals, their accountability for the work of these professionals would increase, not decrease as the New York rules fear.

The contractual relationship between the lawyer and nonlawyer must be disclosed to the client and the client must sign a consent agreement.<sup>190</sup> The client is advised of the following four items. First, the client is guaranteed "the independent professional judgment and undivided loyalty of the lawyer"<sup>191</sup> and advised that the lawyer's business relationship with a nonlegal professional may not diminish these rights.<sup>192</sup> Second, the client is advised that confidences and secrets disclosed by the client to the lawyer are protected by attorney-client privilege. The lawyer may not disclose these confidences as part of the referral to a nonlawyer without a separate written consent of the client.<sup>193</sup> Third, the protections afforded to the client by the attorney-client privilege might not carry over to dealings between the client and the nonlegal service provider; information that would be protected, if given to the lawyer by the client, might not be so protected when disclosed by the client to a nonlegal service provider; and under some circumstances, the nonlegal service provider may be required to make disclosure to a government agency.<sup>194</sup> Fourth, even when the lawyer refers a client to a nonlawyer, the lawyer's obligation to safeguard client funds in his or her possession continues.<sup>195</sup> Finally, the client is advised of his or her rights to consult an independent

---

subsidiaries within the existing legal and ethical framework governing lawyers.").

189. See, e.g., Uniform Partnership Act § 306(a) (1994) ("Except as otherwise provided . . . all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law."). Lawyers in an MDP would have a vested interest in monitoring the actions of their accountant colleagues to avoid liability.

190. N.Y. Ct. Rules § 1205.4 (2001).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

lawyer or third party before signing.<sup>196</sup>

While the consent agreement raises some critical issues, it provides an innovative choice for clients on whether they want to engage an MDP firm. The SEC may never permit one firm to provide auditing and legal services to the same client unless information known to the lawyers is legally attributable to the auditors.<sup>197</sup> If given a choice, only clients that want auditing and legal services from the same firm will consent to “direct... uninhibited communication between auditors and lawyers about information that is material to the audit.”<sup>198</sup> New York’s consent agreement could even be viewed as an additional safeguard for investors. Consent would be attractive to those who “want to assure investors, regulators and third parties that they have enhanced procedures for detection and prevention of fraud and other illegal acts.”<sup>199</sup>

Under the New York consent agreement, it is unclear what impact the SEC’s disclosure requirements would have on MDPs. Given that the MDP relationship is limited to one of contract, one can assume the SEC’s disclosure requirements would have no additional impact on lawyers and would remain the responsibility of accountants. However, New York’s consent agreement does provide clients with a critical choice: those wishing to waive their possible rights can choose an MDP firm, while those not wishing to

---

196. *Id.*

197. See Richard W. Painter, *Lawyers’ Rules, Auditors’ Rules and the Psychology of Concealment*, 84 MINN. L. REV. 1399, 1430 (2000) (observing that “[w]hile liability concerns might necessitate lawyer-auditor communication within a multidisciplinary firm, this scheme is not mandatory for clients.”); see also Carol A. Needham, *Permitting Lawyers to Participate in Multidisciplinary Practices: Business As Usual or the End of the Profession As We Know It?*, 84 MINN. L. REV. 1315, 1318 (2000) (noting that the SEC has already declared that it considers an auditor’s independence to be impaired if the auditor’s firm also provides legal advice to a client).

198. Painter, *supra* note 197.

199. *Id.* at 1430–31. *Contra* Lawrence J. Fox, *Con: MDPs and Legal Ethics: Big 5 Lay Siege upon Rule 5.4*, OR. ST. B. BULL., July 2000, at 15, 23 (arguing that a lawyer’s duty of confidentiality cannot be waived for the benefit of that lawyer and, even if it could be, a prospective waiver—a waiver granted before engaging the services of the lawyer—would be void because, by definition, it could never be “knowing and intelligent”).

waive their rights can receive legal and accounting services from two independent firms.

### III. SOLUTIONS AND CURRENT ISSUES

If New York's MDP solution is not the most effective, alternatives are available. Professor Wu suggests that there are alternatives outside the MDP form that would avoid its negative consequences.<sup>200</sup> One such solution suggests that law firms organize themselves in "client teams" to meet the more diversified needs of particular clients.<sup>201</sup> Under this approach, law firms would build a "strategic client team" around an individual client.<sup>202</sup> The team, formed early in the provision of services to the client, would contain speciality lawyers (who are trained in financial matters, such as accounting) key to the client's needs.<sup>203</sup> This would result in improved client service through the coordination of expertise and a more satisfying environment for lawyers with additional training to practice.<sup>204</sup> This would be a change from the traditional organization of a firm around practice groups.<sup>205</sup> While this approach may serve the end of providing high-quality service to clients, Wu does not offer solutions on how fee sharing and nonlawyer partners, the most contentious aspects of the MDP debate, would be addressed. Arguably, these client teams would face many of the same hurdles as MDPs without providing any discernible advantages.

The ABA Model Rules of Professional Responsibility apply uniformly to all types of practicing lawyers, both litigators and transactional attorneys. Another proposed solution for the MDP issue is to develop a revised Rule 5.4 that treats different practices of law differently.<sup>206</sup> Lawyers and accountants serve different roles

---

200. Wu, *supra* note 59, at 574-75.

201. *Id.* at 575.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. See generally Marc N. Biamonte, Note, *Multidisciplinary Practices: Must a Change to Model Rule 5.4 Apply to All Law Firms Uniformly?*, 42 B.C. L. REV. 1161 (2001). The author proposes that Rule 5.4 of the Model Rules of

for their clients.<sup>207</sup> As the United States Supreme Court explained in *United States v. Arthur Young & Co.*,<sup>208</sup> an attorney's role is to be "a loyal representative whose duty it is to present the client's case in the most favorable possible light."<sup>209</sup> The Court observed that, by certifying a corporation's public financial reports, an independent certified public accountant assumes a public responsibility and "performs a different role".<sup>210</sup> the accountant that makes this certification owes ultimate allegiance, not to a client, but to the corporation's creditors and stockholders, as well as to the investing public.<sup>211</sup> This responsibility to function as a "public watchdog" mandates that the accountant maintain "total independence from the client at all times and requires complete fidelity to the public trust."<sup>212</sup>

I argue, however, that the Supreme Court's characterization of the different roles played by lawyers and accountants is incorrect, or at least that the roles are different today than at the time of the Supreme Court's decision. Professor Kostant observes that "[i]n practice, corporate lawyers perform transactional work, not litigation."<sup>213</sup> Today, argues Kostant, "[t]he distinction between a lawyer's duties to the corporate 'client' on one hand and an accountant's duties to 'creditors, shareholders . . . and the investing public' . . . is in fact much less clear."<sup>214</sup> One solution to this fundamental change in the role of transactional attorneys is to develop a different set of ethical guidelines to reflect the evolution of the transactional lawyer's role in corporate America.<sup>215</sup>

---

Professional Conduct be changed to allow only small firms to participate in MDPs. *Id.* at 1188. He also argues that such a change would greatly benefit those firms and their clients while causing little, if any, threat to the independent professional judgment of lawyers, and recommends that the bar explore such "creative and unique" solutions to the MDP debate before "closing the book on the issue." *Id.* at 1190-94.

207. See Kostant, *supra* note 134, at 59.

208. *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984).

209. *Id.* at 817.

210. *Id.*

211. *Id.* at 817-18.

212. *Id.* at 818.

213. Kostant, *supra* note 134, at 59-60.

214. *Id.*

215. See, e.g., Carrie Menkel-Meadow, *The Lawyer as Problem Solver and*



MDP opponents argue that legal ethics rules will need to undergo too great a revision to accommodate multidisciplinary practice.<sup>216</sup> One solution is a radical revision. Instead of debating a single rule for both transactional attorneys and litigators,<sup>217</sup> the ABA should recognize that “[o]utside the litigation practice, the line between what is and what is not the practice of law has become even more blurred.”<sup>218</sup>

While a move in the right direction, New York’s rule does not go far enough to make MDPs a viable alternative for American firms. However, shortly after New York became one of the first states to accept limited MDPs, the political environment changed when Enron Corporation (“Enron”) became the largest company in United States history to file bankruptcy.

#### A. The Story of Enron Corporation

“Opponents of letting accounting firms into the U.S. legal business have a new battle cry: Remember Enron.”<sup>219</sup> As do all

---

*Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 808 (1999) (arguing that current rules of legal ethics do not recognize the role of the “lawyer as mediator, arbitrator, . . . consensus building facilitator, neutral evaluator, and dispute systems designer.”).

216. See, e.g., Earl H. Munson, *The Case Against MDPs*, 74 WIS. LAW., Apr. 2001, at 22, 54 (observing that “[t]he rules of professional conduct for attorneys which express the core values of our profession would have to be modified—some of us might say nullified—to accommodate MDPs.”).

217. See, e.g., Christopher L. Noble, *Multidisciplinary Practice: A Construction Law Perspective*, 33 J. MARSHALL L. REV. 413, 423 (2000) (proposing ethics rules that would distinguish between a transactional lawyer’s solicitor-like services and the barrister-like services of the trial lawyer). Further, in Tia Breakley, Note, *Multidisciplinary Practices: Lawyers & Accountants Under One Roof?*, 2000 COLUM. BUS. L. REV. 275, 289, the author points out differences between the motivations of managing partners in law firms and accounting firms and suggests that a lawyer managing partner takes into consideration, as a factor, the probability of success. Probability of success, i.e., winning or losing, has greater relevance in a litigation context. Such a motivation is much less striking in the decision to pursue transactional matters.

218. Munneke, *supra* note 177, at 76.

219. Geanne Rosenberg, *Scandal Seen As Blow to Outlook for MDP*, NAT’L L.J., Jan. 21, 2002, at A1; see also Robert L. Bartley, WALL ST. J., *Thinking Things Over: Enron: First, Apply the Law*, Feb. 11, 2002, at A23 (observing that

publicly traded companies in the United States, Enron engaged an outside auditor to scrutinize its annual financial data.<sup>220</sup> Enron, one of the nation's largest corporations, filed for bankruptcy-court protection on December 2, 2001, "following a loss of investor confidence after the company issued several earnings restatements dating back to 1997."<sup>221</sup> Enron is of special interest to this discussion because of the considerable media attention it received,<sup>222</sup> for the size of its bankruptcy, the actions of the key

---

"Enron" is now "the latest battle cry of a host of agendas—passing campaign finance reform, retreating before the tort-liability bar, and extolling other . . . 'reforms' that may or may not be relevant to the giant bankruptcy.").

220. See David S. Hilzenrath, *After Enron, New Doubts About Auditors*, WASH. POST, Dec. 5, 2001, at A1 (discussing how Enron became the largest bankruptcy in U.S. history).

221. Tom Hamburger et al., *Staff Saw Document Shredding at Enron*, WALL ST. J., Jan. 22, 2002, at A3 (discussing the dismissal of Arthur Andersen's David Duncan for allegedly overseeing the destruction of Enron documents); see Robert L. Bartley, WALL ST. J., *Thinking Things Over: Enron: First, Apply the Law*, Feb. 11, 2002, at A23. Enron originally reported earnings of \$105 million in 1997, \$703 million in 1998, \$893 million in 1999, and \$979 million in 2000. *Id.* After "stripping out the sham transactions," Enron restated its earnings for the previous four years as follows: \$77 million in 1997, \$570 million in 1998, \$645 million in 1999, and \$880 million in 2000. *Id.* Before its first revelations of problems on October 16, 2001, Enron's share price had fallen from \$83.12 to \$33.17 at the close of the previous year. *Id.* In September 2000 the price had briefly touched \$90.00, compared to year-end quotes of \$44.38 in 1999, \$28.59 in 1998, and \$20.78 in 1997. *Id.* After the restatements of earnings, the share price crashed to \$13.90 by the end of October 2001; it stood at 26 cents at the end of November. *Id.* Enron filed for bankruptcy in December. *Id.*

222. Enron's bankruptcy proved pervasive enough to attract the attention of many publications that traditionally do not report on complex financial matters. See, e.g., Steve Rushin, *It's a Bear Out There*, SPORTS ILLUSTRATED, Aug. 5, 2002, 15, 15 (reporting the "rebranding" of the Houston Astros Enron Field to Minute Maid Park following the Enron bankruptcy); see also Laura Washington, *Protecting Your Own 401(k)*, ESSENCE, July 2002, at 139, 139 (reporting "[e]xperts emphasize that the 401(k) is still the best retirement-savings vehicle available to the American worker" even after Enron); Mark Hamstra, *Supermarkets Need to Keep Their Accounting Simple*, SUPERMARKET NEWS, July 29, 2002, at 8, 8 (stating, in an article about supermarket accounting, that "buying and selling bananas and other grocery products shouldn't be as complicated as Enron's business model."); Kayleen Schaefer, *Nike Uses "Doctrine of Conservatism,"* FOOTWEAR NEWS, July 8, 2002, at 15, 15 (reporting Nike CEO Phil Knight's statement that Nike is culturally different from Enron and other

players, and the role of its auditors.<sup>223</sup> Congress is also conducting hearings on the matter.<sup>224</sup> Through Enron's 401(k) retirement plan, its employees elected to put much of their savings in the corporation's shares, based on reports from Enron executives that the company had positive growth potential.<sup>225</sup> However, around the time Enron disclosed serious financial problems, the company froze the assets in the plan.<sup>226</sup> Enron's 401(k) plan had \$2.1 billion in assets, more than half invested in Enron shares, at the end of 2000; less than a year later, the stock had lost ninety-four percent of its value.<sup>227</sup>

Of particular interest to a discussion of MDPs is the role of

---

companies engaged in accounting scandals); *Rising Insurance Rates Require Renewed Vigilance*, *HOTELS*, May 1, 2002, at 12, 12 (listing the Enron bankruptcy as one of several factors causing hotel insurance costs to rise as much as 15 percent to 50 percent); Joe Truini, *More Enron Fallout; Deal with Conn. WTE Group Goes Sour*, *WASTE NEWS*, Apr. 29, 2002, at 4, 4 (discussing a waste management authority's severe financial problems as a result of Enron's collapse); Matthew Benz, *Can Top Media/Music Marriages Be Saved?*, *BILLBOARD*, Apr. 27, 2002, at 1, 1 (discussing the impact of the Enron bankruptcy on the media industry); *Japan's Snow Brand Foods Does an Enron: Meat Mislabeling Scandal Brings It Down*, *QUICK FROZEN FOODS INTERNATIONAL*, Apr. 1, 2002, at 54, 54 (discussing the "Enron" of the Japanese food industry, the bankruptcy of meat packer Snow Brand Foods (SBF)); *Jesse Jackson and Labor Union Seek \$ 100 Million for Ex-Enron Workers*, *JET*, Mar. 4, 2002, at 6, 6 (discussing Rev. Jesse Jackson and the AFL-CIO's filing of a motion in U.S. bankruptcy court on behalf of laid-off Enron employees seeking \$ 100 million in severance payments for former workers).

223. This Note will not attempt to provide an in-depth analysis of Enron, its bankruptcy, or the fate of its auditor, Arthur Andersen. Furthermore, the author makes no judgments about the conduct of Enron Corporation executives, board members, or employees, or of its auditor. Rather, Enron will be briefly discussed to determine its potential impact on the MDP debate and its relationship to the rationales offered by MDP opponents and proponents.

224. See Susan Pulliam, *WorldCom Is Denounced at Hearing: Congressmen Say Executives Mismanaged Company; Grubman Draws Criticism*, *WALL ST. J.*, July 9, 2002, at A3.

225. See Richard A. Oppel Jr., *Employees' Retirement Plan Is a Victim As Enron Tumbles*, *NY TIMES*, Nov. 22, 2001, available at <http://www.nytimes.com/2001/11/22/business/22RETI.html> (last visited Aug. 24, 2002).

226. See *id.*

227. See *id.*

Enron's former auditor, the Big Five accounting firm Arthur Andersen, now at the center of this controversy. Enron's relationship with Arthur Andersen began more than a decade ago when Andersen came to view Enron as a "key building block" in its plan to expand a business of providing internal auditing services along with its traditional external auditing functions.<sup>228</sup> In early negotiations with a committee of Enron's creditors, Andersen extended a litigation settlement offer of between \$700 million and \$800 million.<sup>229</sup>

The controversy surrounding Andersen's actions before the collapse of Enron "seems to me a complete vindication of everything we wrote in the year 2000," says Robert MacCrate, a Sullivan & Cromwell senior counsel, referring to a report issued by the New York State Bar Association's Special Committee on the Law Governing Firm Structure and Operation.<sup>230</sup> MacCrate says that the Enron scandal, including Arthur Andersen's role as both accountant and consultant, illustrates the type of conflict lawyers could face if their practice were based in a Big Five accounting

---

228. See Alexi Barrionuevo, *Questioning the Books: Court Documents Show Andersen's Ties with Enron Were Growing in Early '90s*, WALL ST. J., Feb. 26, 2002, at A6 (noting Andersen's original proposal to take over Enron's internal auditing function included a five-year guaranteed contract; for Andersen, \$18 million in net fees and "value billing opportunities" of as many as 44,440 guaranteed consulting hours; and a potential savings of \$12 million for Enron); see also Steve Liesman et al., *Dirty Books? Accounting Debacles Spark Calls for Change: Here's the Rundown*, WALL ST. J., Feb. 6, 2002, at A1 (noting that the \$27 million of internal auditing work that Andersen did for Enron in 2000 exceeded the "outside" auditing fees by \$2 million).

229. See Mitchell Pacelle et al., *Andersen Makes Offer to Enron Creditors Panel*, WALL ST. J., Feb. 21, 2002, at A3 (reporting that Andersen might be able to pay as much as \$1 billion in a settlement, with funds drawn from insurance, the firm's self-insurance pool, and the company's earnings over the next few years); see also David S. Hilzenrath, *Andersen Focuses on Ability to Pay; Firm in Talks to Settle Lawsuit*, WASH. POST, Feb. 22, 2002, at E4 ("Arthur Andersen's efforts to settle lawsuits with Enron [Corporation] shareholders have focused on how much money Andersen can afford to pay without going out of business . . .").

230. See Rosenberg, *supra* note 219; see also Patrick A. Tuite, *Enron Shows What Problems Might Face MDPs*, CHI. LAW., Mar. 2002, at 13, 13 (discussing how the relationship between Enron and Andersen illustrates the potential for conflicts of interest among MDPs, and arguing ethics rules should not be changed to permit lawyers and accountants to work together).

firm.<sup>231</sup>

*B. The Impact of Enron Corporation on the MDP Debate*

Commentators have discussed the Enron collapse and many view it and the alleged role of its auditors as the end of the MDP debate.<sup>232</sup> Arthur Andersen's lucrative consulting for Enron may have created an irreconcilable conflict of interest, with the desire to retain the profitable consulting work providing a strong financial disincentive for Andersen to meet its public-disclosure obligations.<sup>233</sup> If such conflicts can exist within accounting firms that do not provide legal services to the public, the argument continues, "there can no longer be any serious question that allowing lawyers to practice [together with accountants, with their conflicting] duties of client confidentiality and loyalty, would be a colossal mistake."<sup>234</sup>

MDP opponents further argue Enron reinforces the notion that accountants should not be supervising a law firm business, in part, because they do not have a code of professional conduct that is as strict as the one followed by lawyers.<sup>235</sup> If they did, the argument continues, Enron would not have happened. In order for MDPs and their related ethical obligations to be effective, the legal

---

231. See Rosenberg, *supra* note 219.

232. See Steven C. Krane, *Let Lawyers Practice Law*, NAT'L L.J., Jan. 28, 2002, at A16 (observing that, according to published reports, Enron paid Arthur Andersen tens of millions of dollars for consulting work, in addition to the tens of millions of dollars Andersen earned for its auditing of Enron); see also Liesman et al., *supra* note 228 (noting fees paid by Enron to Arthur Andersen for internal and external auditing work).

233. See Krane, *supra* note 232.

234. See *id.* (noting that in February 2002 the American Bar Association's House of Delegates was to consider the New York State Bar Association's proposal to amend the Model Rules of Professional Conduct to include provisions corresponding to those that recently had been added to New York's rules of attorney ethics).

235. See Brenda Sandburg, *Enron Mess Gives a Boost to MDP Foes*, RECORDER, Jan. 23, 2002, at 1, 1 (noting that the controversy over Arthur Andersen's handling of Enron's financial records many not only harm the accounting firm's reputation, but also serve as a "fatal blow to a marriage between the accounting industry and [the] legal profession.").

profession and the accounting profession must develop collaboratively a set of ethical standards and guidelines. New York failed to take this step promulgating one set of standards for all types of lawyers. Any pressure that accountant-supervisors could place on lawyer-subordinates could be averted if both were operating under a uniform ethical structure.<sup>236</sup>

I disagree with MDP opponents that Enron ends the MDP debate. I argue that Enron demonstrates the need for MDPs. In the aftermath of Enron, the SEC and others have proposed revisions to existing rules and regulations to improve the effectiveness and reliability of independent audits.<sup>237</sup> The SEC may now welcome increased disclosure requirements that would follow in an MDP. As one commentator suggests, “transactional attorneys could improve the quality of audits and ensure that more of the information necessary for good corporate governance and compliance with the law would reach corporate audit committees.”<sup>238</sup> After all, “[a]s a practical matter, after serious

---

236. See Leslie Kiefer Amann, Letter to the Editor, *Same Ethical Rules Must Apply*, TEX. LAW., Feb. 4, 2002, at 38, (observing that “[i]f the same ethical rules apply notwithstanding whether the name on the door is that of an attorney or an accountant,” many of the concerns raised by MDP critics would effectively be addressed).

237. See, e.g., Michael Schroeder, *Lawmakers Plan More Financial Oversight*, WALL ST. J., Feb. 12, 2002, at A3 (discussing proposed legislation that would create a private board to regulate the accounting industry and would establish new restrictions against auditors’ offering certain consulting services to their corporate audit clients); David S. Hilzenrath, *SEC Seeks Reform of Auditor Controls; Battered Enron Fires Accounting Firm*, WASH. POST, Jan. 18, 2002, at A1 (calling the SEC’s proposal for an accounting oversight board that would be funded by the private sector, but kept separate from the American Institute of Certified Public Accountants, the “most significant change in the way accountants are regulated since the Great Depression.”); Michael Schroeder, *SEC Proposes Accounting Disciplinary Body*, WALL ST. J., Jan. 17, 2002, at C1 (discussing the plans of SEC Chairman Harvey Pitt for a series of reforms in the accounting industry, including new types of oversight and new rules mandating expanded corporate disclosures).

238. Peter C. Kostant, *Breeding Better Watchdogs: Multidisciplinary Partnerships in Corporate Legal Practice*, 84 MINN. L. REV. 1213, 1219–20 (2000) (arguing that transactional lawyers working in an MDP setting may be in a better position than those in a traditional law firm to further the SEC’s goals of full disclosure, effective monitoring by corporate audit committees, and the

accounting scandals, corporations routinely bring in law firms to work closely with new accounting firms to help solve these problems.<sup>239</sup> By involving lawyers from the beginning of the transaction rather than after trouble surfaces, corporate managers and accountants could be better informed about liability risks. The organized bar should take care to frame the Enron issue in the following terms: Enron demonstrates why the independent auditors need liability-conscious lawyers as partners. By allowing lawyers and accountants to work together in an MDP from the onset, these professionals can provide the highest level of service and improve compliance with existing laws and regulations. Accountants involved in audits made cognizant of potential liability by their lawyer partners may provide the the best insurance against another Enron.

#### CONCLUSION

For jurisdictions that follow New York and amend their ethics rules to permit MDPs, I offer the following four recommendations. First, future MDP rules should include consent agreements as provided for in New York.<sup>240</sup> This will grant access to MDPs for those clients desiring the benefits of a streamlined firm of interrelated professionals. Under this scheme, the traditional relationship between lawyers and nonlawyers will be preserved for those who may find it in their best interest to engage independent firms. Furthermore, the SEC may be more willing to sanction lawyers' and accountants' working together if the relationship is disclosed to clients.<sup>241</sup> Finally, while sophisticated clients may be in a position to protect themselves from any conflict,<sup>242</sup> less sophisticated clients will be alerted to the relationship in order to put them on notice. Such a disclosure requirement would do considerably more to protect clients than does the existing American scheme, wherein lawyers work inside accounting firms

---

avoidance of both "fraud and the chicanery of 'earnings management'").

239. *Id.* at 1220.

240. *See supra* text accompanying notes 190–96.

241. *See supra* text accompanying note 197.

242. *See supra* note 144 and accompanying text.

without any disclosure about possible conflicts to the clients.

Second, jurisdictions should consider promulgating separate ethics guidelines for transactional lawyers<sup>243</sup> in an MDP setting. Ideally, these separate ethical guidelines should be developed with accountants and other professionals, rather than in isolation. While New York did not take this approach, the bar is capable of recognizing a change in the legal landscape and amending ethics rules to respond to that change. For example, while the bar did not recognize specialization at one time, it now embraces the concept.<sup>244</sup> The legal landscape is changing.<sup>245</sup> No longer are lawyers only advocates; they now serve as key advisors, aiding in structuring increasingly complex business transactions. It is time ethics rules reflect this change.

Third, jurisdictions should avoid New York's approach of rejecting true MDPs in favor of contractual relationships.<sup>246</sup> This contractual relationship will decrease, rather than increase, accountability among professionals. While members of a partnership are jointly and severally liable for the liabilities of the partnership,<sup>247</sup> it is unclear how liability would be apportioned under the New York rule. For example, an accountant and lawyer could be liable to each other only for breach of contract damages,

---

243. See Lisa Bernstein, *The Silicon Valley Lawyer As Transaction Cost Engineer?*, 74 OR. L. REV. 239, 240 (1995) (observing that transactional lawyers in Silicon Valley play several different roles including counseling, dealmaking, matchmaking, gatekeeping, and proselytizing) (citations omitted); Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645, 657 (1992) (stating that lawyers appear to serve more generally as "system integrators," individuals skilled at putting deals together while minimizing risks and costs of undertaking the transaction); see also *supra* text accompanying note 236. Some commentators argue that not even law schools recognize the need to distinguish between litigators and transactional attorneys. See, e.g., Debra Pogrud Stark, *See Jane Graduate. Why Can't Jane Negotiate a Business Transaction?*, 73 ST. JOHN'S L. REV. 477, 478-83 (1999) (criticizing law schools and professors for failing to spend adequate time on transactional matters).

244. See *supra* text accompanying note 163.

245. See *supra* text accompanying note 67.

246. See *supra* text accompanying note 186.

247. See *supra* text accompanying note 189.



rather than the full extent of liability that they would be liable for under partnership law. This contractual relationship developed by New York will actually frustrate the goal of having lawyers and nonlawyers share liability equally: it decreases accountability of MDP professionals. To make an MDP function properly, other jurisdictions should avoid this scheme and permit lawyer and nonlawyer professionals to share equally in the liability of the enterprise.

Fourth, as a corollary to the third recommendation, jurisdictions should permit lawyers and nonlawyers to split fees. This would lead to more efficient and cost-effective service,<sup>248</sup> allowing law firms in the United States to remain globally competitive.<sup>249</sup> If law firms in the United States are not permitted to function as MDPs, corporations will be forced to look overseas for integrated professional services. Furthermore, as indicated in recommendation three, the most critical aspect for an MDP to function properly is joint liability of the partners. Professionals in a fee-sharing environment would have a vested interest in providing high quality services while being cognizant all the while of potential liability.

While some argue that Enron may forever end the MDP debate,<sup>250</sup> I believe that Enron may serve as a tool for developing clear professional ethical guidelines and therefore may provide other jurisdictions with the incentive to move forward on this issue. For these rules to reflect the reality of the business world, lawyers and other professionals knowledgeable about the inner workings of business transactions should take an active role in this debate.

The MDP debate is about how best to preserve the profession's core values while meeting the needs of today's clients in a world of increasingly complex legal problems and business transactions. In order to do this, the organized bar must take action if it wishes to remain relevant in the debate.<sup>251</sup> The four

---

248. See *supra* text accompanying note 63.

249. See *supra* text accompanying note 82.

250. See *supra* text accompanying note 225.

251. See *supra* text accompanying note 82; see also Schneyer, *supra* note 26, at 1474 (observing that powerful economic forces are pushing for the adoption of MDPs); Julian Lonbay, *Lawyer Ethics in the Twenty-First Century: The Global Practice Reconciling Regulatory and Deontological Differences—The European*

steps outlined above will enable the bar to regulate MDPs and streamline the delivery of professional services,<sup>252</sup> helping American firms remain competitive in today's complex transnational marketplace.

---

*Experience*, 34 VAND. J. TRANSNAT'L L. 907, 908 (2001) (observing that for U.S. law firms to remain competitive in a global market, it is important for the bar to permit MDPs).

252. See, e.g., *supra* text accompanying note 65.

## *Notes & Observations*