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Ready or Not, Here They Come: Why the ABA Should Amend the Model Rules to Accommodate Multidisciplinary Practices

Bradley G. Johnson

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I. Introduction

On June 8, 1999, the American Bar Association Commission on Multidisciplinary Practice (Commission on MDPs) recommended that the American Bar Association (ABA) change the Model Rules of Professional Conduct to allow lawyers to split fees with nonlawyers and to deliver legal services through multidisciplinary practices (MDPs).[1] Philip S. Anderson, then President of the ABA, appointed the Commission on MDPs in August 1998 in response to significant debate among practitioners and scholars regarding the appropriateness of MDPs.[2] Recent developments in national and world markets prompted the appointment of the Commission on MDPs.[3] In particular,

1. *See American Bar Association Commission on Multidisciplinary Practice Report to the House of Delegates: Recommendation* ¶ 2, *at* http://www.abanet.org/cpr/mdprecommendation.html (last visited Sept. 13, 2000) [hereinafter *Commission on Multidisciplinary Practice Report: Recommendation*] (recommending that ABA revise Model Rules of Professional Conduct to allow lawyers and nonlawyers to enter into partnerships) (copy on file with Washington and Lee Law Review). In this Note, multidisciplinary practice, or MDP, refers to "a partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) . . . or that holds itself out to the public as providing nonlegal, as well as legal, services." *Id.* ¶ 3.

2. *See Background Paper on Multidisciplinary Practice: Issues and Developments* ¶¶ 1-4, *at* http://www.abanet.org/cpr/multicomreport0199.html (last visited Sept. 13, 2000) (outlining origin of Commission on Multidisciplinary Practice) (copy on file with Washington and Lee Law Review). The Commission on MDPs is made up of twelve members from various backgrounds, including practitioners, judges and academics. *Id.* ¶ 4.

3. *See id.* ¶¶ 1-3 (explaining that as global economy grows "business clients look to teams of professionals from different disciplines for consolidated advice on complex commercial and regulatory issues").

the Big Five[4] accounting firms' delivery of legal services outside the United States attracted the attention of both the ABA[5] and commentators.[6] The ABA also recognized that numerous accounting firms in the United States were aggressively attempting to provide various legal services to their clients.[7] With the recent growth of nonlegal professional service firms, more and more lawyers are joining firms that are not controlled by lawyers and do not resemble traditional law firms.[8] Accounting and other professional firms have sought to avoid the ethical dilemmas that such employment raises by contending that lawyers are not practicing law, but merely rendering advice or consulting services.[9] Legal commentators disagree about whether the Model Rules allow lawyers who work for accounting firms to perform these services.[10] Some scholars believe that by addressing MDPs the Commission on MDPs really is addressing how to regulate entities that, to some extent, already exist.[11]

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4. *See* Rick Telberg, *The Top 100: Going Strong Into the Millennium*, ACCT. TODAY, Mar. 15, 1999, at 4 (noting that "Big Five" is commonly used to refer to Anderson Worldwide, PricewaterhouseCoopers, Ernst & Young, Deloitte & Touche, and KPMG).

5. *See Background Paper on Multidisciplinary Practice: Issues and Developments*, *supra* note 2, ¶¶ 7-12 (noting that some countries allow accounting firms to provide legal services that United States prohibits and that accounting firms are actively pursuing clients in diverse markets which allow such services).

6. *See* John E. Morris, *London Braces for the Big Six Invasion*, AM. LAW., Dec. 1996, at 5 (discussing Big Six assault on European legal market and possible mergers in England); M. Peter Moser, *The Argument for Change*, EXPERIENCE, Summer 1999, at 4, 6 (noting that accounting firms have merged with law firms in Europe and discussing presence of PricewaterhouseCoopers in France); Gianluca Morello, Note, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190, 190-93 (1997) (noting that recently "Big Six accounting firms . . . have moved into the legal services market by establishing, acquiring, or forming ties with law firms around the world").

7. *See Background Paper on Multidisciplinary Practice: Issues and Developments*, *supra* note 2, ¶¶ 13-15 (noting that accounting firm services often include employee-lawyer representation of clients in federal district court or court of federal claims and that accounting firms have started recruiting heavily from law schools, have increased both in number and size, and have started entering into "strategic alliances" with prominent tax law firms).

8. John H. Matheson & Edward S. Adams, *Not "If" But "How": Reflecting on the ABA Commission's Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269, 1272 (2000); *see* Lowell J. Noteboom, *Professions in Convergence: Taking the Next Step*, 84 MINN. L. REV. 1359, 1362 (2000) (noting that today accountant/consultants provide "nearly the same range of services and advice offered by full-service law firms, with the exception of (1) direct representation of clients in litigation, and (2) drafting the *final* version of key documents in estate plans, mergers or acquisitions").

9. Matheson & Adams, *supra* note 8, at 1272.

10. *See id.* ("It is still largely unsettled whether the Model Rules prevent lawyers who work for accounting firms from performing these services.")

11. *See* Charles W. Wolfram, *The ABA and MDPs: Context, History, and Process*, 84 MINN. L. REV. 1625, 1636-38 (suggesting that recent expansion by Big Five into other activi-

However, large professional firms are not the only ones interested in MDPs.[12] Small firm partnership possibilities include estate planning, financial planning, juvenile defense work, and family counseling.[13]

After the Commission on MDPs made its recommendation in June 1999, the accounting firm of Ernst & Young further focused national attention on the issue of MDPs by launching the Washington, D.C.-based law firm of McKee Nelson Ernst & Young.[14] The creation of this new law-accounting firm was possible because the District of Columbia Bar Rules, which unlike the Model Rules of Professional Conduct, allow fee sharing between lawyers and nonlawyers as long as the sole purpose of the entity is to provide legal services.[15] Washington, D.C. is currently the only jurisdiction in the United States that allows lawyers to enter into MDPs.[16]

At the August 1999 annual meeting of the ABA in Atlanta, the House of Delegates, after considering the Commission on MDPs' report and recommendation, adopted a resolution providing that MDPs not be permitted unless or until additional study indicates that the change will advance the public interest without adversely affecting lawyers' independence and commitment to clients.[17] Following the House of Delegates's adoption of this resolution, the

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ties, including acquiring hordes of lawyers, brought MDP issue to organized bar's attention and noting that many lawyers in large firms feel that MDPs already exist).

12. *Id.* at 1648.

13. *Id.* at 1649.

14. *See* Sheryl Stratton, *Ernst & Young Law Firm Adds Partners*, TAX NOTES, Nov. 22, 1999, at 989 (discussing McKee Nelson Ernst & Young's press release announcing addition of five new partners); Sheryl Stratton, *Ernst & Young Launches First Domestic Law Firm*, TAX NOTES, Nov. 8, 1999, at 719 (discussing Ernst & Young press release announcing its decision to finance law firm in District of Columbia).

15. *See* WASHINGTON, D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4(b) (1997) (permitting lawyer to practice in partnerships with nonlawyers who assist in provision of legal services to clients).

16. *See* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 448 (4th ed. 1999) (stating that Washington, D.C. permits partnerships between lawyers and nonlawyers if certain requirements are met); STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 293-95 (1996) (noting District of Columbia adopted rule to allow lawyers and nonlawyers to enter partnerships).

17. *See Commission on Multidisciplinary Practice: Florida Bar Recommendation Statement, at* http://www.abanet.org/cpr/flbarrec.html (last visited Sept. 13, 2000) (adopting Florida Bar proposed resolution) (copy on file with Washington and Lee Law Review). The resolution states:

> RESOLVED, That the American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services though a multidisciplinary practice unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients.

Id.

Commission on MDPs continued to solicit input from interested parties and investigate the consequences of allowing MDPs.[18] Following the ABA's lead, numerous state bar associations have begun to study and discuss MDPs.[19] On February 13, 2000, at the ABA's midyear meeting in Dallas, the ABA held a "town hall" meeting to allow interested parties to represent and discuss all perspectives on MDPs.[20] However, the August resolution to table consideration of the Commission on MDPs' recommendation remained in effect throughout the meeting of the House of Delegates on February 14 and 15, 2000.[21] In March 2000, the Commission on MDPs released an additional Recommendation to the ABA House of Delegates that made minor adjustments to the original recommendation.[22] At the July 2000 annual meeting of

18. *See* William G. Paul, *To MDP or Not to MDP*, A.B.A. J., Dec. 1999, at 6 (noting that commission members have continued to gather information on MDPs since ABA meeting in August 1999).

19. *See* Wade Baxley, *Please Mr. Custer, I Don't Wanna Go*, 61 ALA. LAW. 6, 7 (noting that Alabama has appointed MDP task force "with its mission being to consider what impact MDP will have on the practice of law in Alabama or upon the access to legal services, as well as its impact upon the licensing and regulation of lawyers in Alabama"); Toby Brown, *Accounting 101 for Lawyers or Too Late, You Lose?*, UTAH B.J., May 1999, at 8 ("The Utah State Bar has established a Task Force on Multidisciplinary Practice 'MDP' as well."); Jan Pudlow, *MDP Question Still Open*, FLA. B. NEWS, Feb. 15, 2000, at 1 (noting that Florida's Special Committee on Multidisciplinary Practice and Ancillary Business has not made its recommendations to Florida Board of Governors); Louis N. Teti, *MDPs: The Debate Continues*, PA. LAW., Jan.-Feb. 2000, at 2 (stating that Pennsylvania Bar Association "created its own Commission on Multidisciplinary Practice and Related Trends Affecting the Legal Profession").

20. *See Dallas 2000: Midyear Meeting* ¶ 1, *at* http://www.abanet.org/mdp (last visited Feb. 26, 2000) (announcing that "panel of experts participated in an interactive 'Town Hall' style discussion of multidisciplinary practice and its implications for the profession") (copy on file with Washington and Lee Law Review).

21. *See* Teti, *supra* note 19, at 2 (noting that "it is clear that the ABA intends to consider another proposal regarding MDPs at its annual meeting in mid-July 2000").

22. *See generally American Bar Association Commission on Multidisciplinary Practice Report to the House of Delegates: Recommendation, at* http://www.abanet.org/cpr/mdpfinalrep 2000.html (last visited Sept. 15, 2000) (copy on file with Washington and Lee Law Review). The Commission on MDPs' revised Recommendation states:

> RESOLVED, that the American Bar Association amend the Model Rules of Professional Conduct consistent with the following principles:
>
> 1. Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services. "Nonlawyer professionals" means members of recognized professions or other disciplines that are governed by ethical standards.
> 2. This Recommendation must be implemented in a manner that protects the public and preserves the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and *pro bono publico* obligations.

the ABA, the House of Delegates debated the Commission on MDPs' new recommendation and adopted a recommendation urging each jurisdiction to maintain the prohibition on partnerships and fee sharing between lawyers and nonlawyers.[23] The House of Delegates also dissolved the Commission on MDPs.[24] However, the ABA's refusal to amend the Model Rules does not resolve the controversy surrounding MDPs. "This profoundly anti-experimental stance may only encourage MDP supporters to leave the fractious ABA on the sidelines while they pursue legalization elsewhere."[25]

This Note considers whether the ABA should amend the Model Rules to allow lawyers and nonlawyers to form MDPs. This Note argues that the traditional arguments against partnerships between lawyers and nonlawyers are inadequate to justify the prohibition on MDPs.[26] Because of the lack of adequate reasoning to justify the current prohibition on MDPs, this Note proposes that the ABA should amend the Model Rules to accommodate MDPs in order to provide some guidance to the number of states that presently are considering MDPs.[27] In Part II, this Note will survey the history and development of the ABA's prohibition on partnerships between lawyers and nonlawyers.[28] Part III

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3. Regulatory authorities should enforce existing rules and adopt such additional enforcement procedures as are needed to implement these principles and to protect the public interest.
4. The prohibition on nonlawyers delivering legal services and the obligations of all lawyers to observe the rules of professional conduct should not be altered.
5. Passive investment in a Multidisciplinary Practice should not be permitted.

Id.

23. *American Bar Association: Recommendation* ¶ 7-8, *at* http://www.ababnet.org/cpr/mdprecom10F.html (last visited Sept. 15, 2000) (copy on file with Washington and Lee Law Review). The Recommendation states in part:

7. The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.
8. The law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised.

Id.

24. *Id.*

25. Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1475 (2000). Although Professor Schneyer made this statement in response to the House of Delegates decision to table consideration of the Commission's original recommendation, it is equally applicable here.

26. *See infra* Part VIII (arguing that traditional arguments for prohibiting partnerships between lawyers and nonlawyers are inadequate to justify total prohibition on MDPs).

27. *See infra* Part VIII (arguing that ABA should amend Model Rules to accommodate MDPs in order to provide some guidance to number of states considering MDPs).

28. *See infra* Part II (recounting history and development of ABA's prohibition on partnerships between attorneys and other professionals).

recounts attempts by two jurisdictions to reject the traditional prohibition on MDPs.[29] Parts IV and V examine the traditional arguments for and against maintaining the prohibition on MDPs.[30] Part VI describes the Commission on MDPs' original recommendation to the ABA House of Delegates.[31] Part VII analyzes the Commission on MDPs' original recommendation in light of the traditional arguments against MDPs and recommends a number of changes to the Model Rules to accommodate MDPs and protect the "core values" of the legal profession.[32] Finally, Part VIII concludes that the ABA should make the recommended changes to the Model Rules in order to provide state bar associations with some guidance.[33]

II. History and Development of the Prohibition on MDPs

The Canons of Professional Ethics, which the ABA originally promulgated in 1908, contained no rules expressly prohibiting lawyers from entering into partnerships with nonlawyers.[34] In 1928, the ABA adopted Canons 33, 34, and 35, which prohibited practicing lawyers from entering into partnerships or associations with nonlawyers.[35] The ABA adopted the prohibition out of fear that laymen working in partnerships with lawyers would undermine the integrity of the legal profession and cause the general public to lose confidence in the justice system.[36] Specifically, Canon 33 stated that "[p]artnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where a part of the partnership

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29. *See infra* Part III (discussing attempts by North Dakota and Washington, D.C. to reject traditional prohibition on MDPs).

30. *See infra* Parts IV and V (examining traditional arguments surrounding MDP debate).

31. *See infra* Part VI (describing Commission on MDPs' Recommendation to ABA House of Delegates).

32. *See infra* Part VII (analyzing Commission on MDPs' recommendation in light of traditional arguments against MDPs and advocating changes to Model Rules to accommodate MDPs and protect "core values" of legal profession).

33. *See infra* Part VIII (concluding that ABA should amend Model Rules to accommodate MDPs in order to provide some guidance to number of states considering MDPs).

34. *See* Edward S. Adams & John H. Matheson, *Law Firms on the Big Board? A Proposal for Nonlawyer Investment in Law Firms*, 86 CAL. L. REV. 1, 4 (1998) ("As originally promulgated, the Canons did not address whether practicing lawyers could enter into business associations with nonlawyers.").

35. *See Proceedings of the Fifty-First Annual Meeting of American Bar Association*, 53 REP. OF THE A.B.A. 29, 119-31 (1928) (discussing additions to Canons of Professional Ethics).

36. *See* AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON SUPPLEMENTING THE CANONS OF PROFESSIONAL ETHICS: ANNOTATED CANONS 11 (1926) (suggesting that partnerships between lawyers and nonlawyers would impair "ethical and professional standards, and [destroy] public confidence in the lawyers and the courts with a clamor for recall of judges and decisions").

business consists of the practice of law."[37] However, even at this early point, there were strong objections to the new canons prohibiting MDPs.[38] Despite these objections to the new canons, the ABA Committee on Professional Ethics and Grievances consistently interpreted Canons 33, 34, and 35 to prohibit "any business association between lawyers and nonlawyers that offered legal services."[39]

The ABA replaced the Canons of Professional Ethics with the Model Code of Professional Responsibility (Model Code) in 1969.[40] Within eleven years, almost every state had adopted a modified version of the Model Code.[41] The Model Code retained the restriction found in the post-1928 version of the Canons of Professional Ethics, prohibiting lawyers and nonlawyers from entering into partnerships.[42] Canon 33 appeared in the Model Code as Disciplinary Rule (DR) 3-103(A), which stated that "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."[43] Additionally, the Model Code retained the principal restrictions of Canons 34 and 35.[44]

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37. *See Canons of Professional Ethics*, 53 REP. OF THE A.B.A. 769, 778 (1928) (providing standards of professional conduct expected of legal profession). Canon 34 stated that "[n]o division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility." *Id.* Canon 35 provided that "[t]he professional services of a lawyer should not be controlled or exploited by any agency, personal or corporate, which intervenes between client and lawyer . . . [a lawyer] should avoid all relations which direct the performance of his duties in the interest of such intermediary." *Id.* at 779.

38. *See Report of the Special Committee on Supplements to the Canons of Professional Ethics*, 52 REP. OF THE A.B.A. 372, 378 (1927) (acknowledging that "there is substantial difference of view in the profession respecting its recommendations as to partnerships, division of fees, intermediaries, and the bonding of lawyers"). One member of the drafting committee even stated that "aside from professional policy, there is nothing inherently 'unethical' in the formation of partnerships between lawyers largely engaged in certain kinds of work and an expert engineer, student of finance, or some other form of expert." *Id.* at 388 (minority view of F.W. Grinnell).

39. *See* Adams & Matheson, *supra* note 34, at 5-6 (discussing broad interpretation ABA Commission on Professional Ethics and Grievances took concerning prohibitions on partnerships between lawyers and nonlawyers under Canons 33, 34, and 35).

40. *See* GILLERS & SIMON, *supra* note 16, at 423-24 (discussing promulgation process of Model Code).

41. *See id.* (noting widespread adoption of Model Code among most states, quickly replacing Canons of Professional Ethics nationwide).

42. *See* Adams & Matheson, *supra* note 34, at 6-7 (noting that Model Code of Professional Responsibility retained major provisions of Canons 33, 34, and 35).

43. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-103(A) (1980) [hereinafter MODEL CODE] (prohibiting lawyers from forming MDPs).

44. *See* Adams & Matheson, *supra* note 34, at 6-7 (describing provisions in Model Code which contain principal restrictions found in Canons 34 and 35 of Canons of Professional Ethics). The prohibition against fee-splitting with nonlawyers found in Canon 34 appeared in

In 1977, the ABA established the Commission on the Evaluation of Professional Standards to consider the rules governing the practice of law and to recommend any necessary changes.[45] This commission became known as the Kutak Commission, named after its chairman, Robert J. Kutak.[46] The Kutak Commission rejected the view espoused in the Canons of Professional Ethics and the Model Code that the ABA should prohibit lawyers from entering into partnerships with nonlawyers.[47] The Kutak Commission attacked various bases for the traditional prohibition on partnerships between lawyers and nonlawyers, including the belief that these partnerships impede professional judgment and invite the unauthorized practice of law.[48]

When Proposed Rule 5.4 came before the ABA House of Delegates, some delegates strongly opposed it on a number of grounds.[49] Opponents of the

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Disciplinary Rule DR 3-102(A). *See id.* at 7 (noting DR 3-102 prohibits lawyers from splitting fees with nonlawyers). DR 5-107(B), DR 5-107(C) and Ethical Consideration (EC) 3-3 gave new life to the general provisions of Canon 35. *See id.* (examining several provisions of Model Code).

45. *See* GILLERS & SIMON, *supra* note 16, at 3-4 (describing process establishing Model Rules of Professional Conduct).

46. *See* GEOFFREY C. HAZARD, JR., ET AL., THE LAW AND ETHICS OF LAWYERING 15 (3d ed. 1999) (discussing ABA Commission on Evaluation of Professional Standards).

47. *See Report of the Commission on Evaluation of Professional Standards*, 107 REP. OF THE A.B.A. 828, 886-87 (1982) (describing Kutak Commission's Proposed Rule 5.4). The Kutak Commission's draft contained Proposed Rule 5.4, which stated:

> A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if the terms of the relationship provide in writing that:
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> (a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
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> (b) information relating to representation of a client is protected as required by Rule 1.6;
>
> (c) the arrangement does not involve advertising or personal contact with prospective clients prohibited by Rules 7.2 and 7.3; and
>
> (d) the arrangement does not result in charging a fee that violates Rule 1.5.

Id.

48. *See* COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, PROPOSED FINAL DRAFT: AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT 176-78 (1981) (criticizing legal background for traditional prohibition against partnerships between lawyers and nonlawyers found in Model Code).

49. *See Proceedings of the 1983 Midyear Meeting of the House of Delegates*, 108 REP. OF THE A.B.A. 284, 352-55 (1983) (discussing debate that surrounded Proposed Rule 5.4 in House of Delegates); Adams & Matheson, *supra* note 34, at 10-11 (discussing objections raised to Kutak Commission's Proposal to allow partnerships between lawyers and nonlawyers); Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make*

Kutak Commission's position argued that large companies like Sears and Montgomery Ward would drive many traditional law firms out of business and that nonlawyer influence on lawyers would impede lawyers' professional judgment.[50] Opponents also were concerned that nonlawyer influence would force lawyers to compromise professionalism to achieve economic goals and that the proposal would have an uncertain effect on the legal profession in general.[51] These objections prevailed, and the House of Delegates passed a version of Rule 5.4(a) that expressed the Model Rules' prohibition against MDPs.[52]

On August 2, 1983, the ABA House of Delegates formally adopted the Model Rules of Professional Conduct (Model Rules).[53] As finally adopted by the ABA, Rule 5.4 of the Model Rules contained the prohibition against partnerships between lawyers and nonlawyers that appeared in both the Model Code and the 1928 version of the Canons of Professional Ethics.[54] Specifically, Rule 5.4(a) prohibits a lawyer or law firm from splitting fees with a nonlawyer except in certain listed circumstances.[55] Rule 5.4(b) prohibits a lawyer and nonlawyer from entering into a partnership "if any of the activities of the partnership consist of the practice of law."[56] Under Rule 5.4(c), a non-

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the Rules?, 40 HASTINGS L.J. 577, 595-96 (1989) (noting various House of Delegates's objections to Proposed Rule 5.4); Morello, *supra* note 6, at 212-13 (discussing reasons ABA House of Delegates dropped Proposed Rule 5.4 in favor of traditional prohibition).

50. *See* Andrews, *supra* note 49, at 595 (discussing specific objections ABA House of Delegates raised to partnerships between lawyers and nonlawyers).

51. *See id.* (noting concerns that numerous delegates expressed regarding Kutak Commission's proposal).

52. *See* HAZARD ET AL., *supra* note 46, at 982 (explaining that ABA dropped Kutak Commission's proposal in favor of traditional prohibition against partnerships between lawyers and nonlawyers and examining reasons behind House of Delegates decision).

53. *See* GILLERS & SIMON, *supra* note 16, at 3 (discussing history of Model Rules of Professional Conduct and their adoption in ABA House of Delegates).

54. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1999) [hereinafter MODEL RULES] (listing rules governing professional independence of lawyers).

55. *See id.* Rule 5.4(a) (prohibiting sharing of legal fees with nonlawyers). Model Rule 5.4(a) states:

> 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.

Id.

56. *See id.* Rule 5.4(b) (prohibiting partnerships between lawyers and nonlawyers).

lawyer who is not a client of the lawyer may not control or interfere with the professional judgment of the lawyer.[57] Finally, Rule 5.4(d) lists situations in which the Model Rules prohibit a lawyer from forming a professional corporation or association for the purpose of practicing law.[58] Thus, Model Rule 5.4 preserves the prohibition against partnerships between lawyers and nonlawyers that was seen first in Canons 33, 34, and 35 of the Canons of Professional Ethics[59] and continued in the Model Code.[60]

The majority of states have adopted the Model Rules, either in their entirety or in significant part.[61] Additionally, many of the states that have not adopted the Model Rules have adopted modified versions of the Model Code.[62] In fact, all United States jurisdictions, with the exception of the District of Columbia, have adopted ethical guidelines that are consistent with the ABA's prohibition against MDPs.[63]

III. Jurisdictional Attempts to Reject the Traditional Prohibition Against MDPs

Since the ABA rejected the Kutak Commission's proposal, two jurisdictions have attempted to amend their bar rules to allow lawyers and nonlawyers

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57. *See id.* Rule 5.4(c) (prohibiting nonlawyer interference with professional judgment of lawyer). Model Rule 5.4(c) states that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." *Id.*

58. *See id.* Rule 5.4(d) (restricting lawyer's ability to enter into professional corporation or association). The specific instances in which a lawyer is prevented from forming such a corporation are:

> (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.

Id.

59. *See supra* notes 34-39 and accompanying text (describing provisions of Canons 33, 34, and 35 and objections raised thereto).

60. *See supra* notes 40-44 and accompanying text (discussing Model Code provision prohibiting lawyers from entering into MDPs).

61. *See* Laws. Man. on Prof. Conduct (ABA/BNA) 01:3-01:4 (Dec. 22, 1999) (listing jurisdictions that have adopted Model Rules of Professional Conduct).

62. *See* HAZARD ET AL., *supra* note 46, at 15 (noting that "[s]ome states . . . have decided to retain their version of the Model Code although often with numerous adjustments based on provisions in the Model Rules").

63. *See* Laws. Man. on Prof. Conduct (ABA/BNA), *supra* note 61, at 91:401 (noting that Washington, D.C. is only jurisdiction in United States that permits lawyers and nonlawyers to enter partnerships).

to enter into MDPs.[64] The District of Columbia successfully amended its bar rules to allow the formation of MDPs, but only where the sole purpose of the MDP is to provide legal services.[65] North Dakota also considered amending its ethical regulations to allow partnerships between lawyers and nonlawyers.[66] However, the North Dakota Supreme Court balked at the proposed change.[67]

A. District of Columbia

Washington, D.C. is presently the only jurisdiction in the United States that rejected the ABA's total prohibition of partnerships between lawyers and nonlawyers.[68] The District of Columbia Bar abandoned the prohibition against MDPs because it recognized an increasing demand for a broad range of professional services from a single provider.[69] However, in order to address the ethical concerns associated with MDPs, the District of Columbia's Rule of Professional Conduct 5.4 (D.C. Rule 5.4) imposes traditional ethical requirements on any multidisciplinary organization created under the rule.[70] D.C. Rule 5.4 allows a lawyer to practice law in a partnership with a nonlawyer whose professional services are helpful in providing legal services to clients provided certain requirements are met.[71] The rule allows such a partnership

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64. *See infra* notes 68-88 and accompanying text (discussing District of Columbia's and North Dakota's attempts to change their bar rules).

65. *See infra* notes 68-77 and accompanying text (discussing amendment to District of Columbia's Rules of Professional Conduct allowing lawyers to enter MDPs).

66. *See infra* notes 78-82 and accompanying text (recounting North Dakota's proposal to allow lawyers and nonlawyers to enter partnerships).

67. *See infra* notes 83-88 and accompanying text (discussing North Dakota Supreme Court's rejection of North Dakota's Professional Conduct Subcommittee's recommendation).

68. *See supra* note 63 and accompanying text (noting that District of Columbia is only jurisdiction to reject prohibition against MDPs).

69. *See* WASHINGTON, D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4 cmt. 3 (1997) (explaining reason for adoption of non-traditional rule). The comment to Rule 5.4 provides in part:

> As the demand increased for a broad range of professional services from a single source, lawyers employed professionals from other disciplines to work for them. So long as the nonlawyers remained employees of the lawyers, these relationships did not violate the disciplinary rules. However, when lawyers and nonlawyers considered forming partnerships and professional corporations to provide a combination of legal and other services to the public, they faced serious obstacles under the former rules.

Id.

70. *See id.* Rule 5.4 cmt. 4 (explaining that Rule 5.4 rejects absolute prohibition against MDPs but continues to impose traditional ethical requirements upon them).

71. *See id.* Rule 5.4(b) (allowing partnerships between lawyers and nonlawyers in certain circumstances).

only if it exists solely to provide legal services,[72] the managers and financial interest holders of the partnership commit to abide by the rules of professional conduct,[73] and the lawyers with managerial authority or financial interest in the partnership take responsibility over the nonlawyers as if the nonlawyers were lawyers.[74] Furthermore, the lawyers must clearly explain the conditions and agree to them in writing.[75] D.C. Rule 5.4 also permits fee-splitting between lawyers and nonlawyers in certain circumstances.[76] However, D.C. Rule 5.4 retains the Model Rules' prohibition against nonlawyers directing or regulating a lawyer's professional judgment in the rendering of legal services.[77]

B. North Dakota

In 1986, North Dakota considered abandoning the traditional prohibitions against MDPs in favor of a rule that closely resembled the Kutak Commission's version of Model Rule 5.4.[78] North Dakota's Professional Conduct Study Subcommittee of the Attorney Standards Committee (Subcommittee) recommended replacing the ABA's Model Rule 5.4 with a substitute that would allow partnerships between lawyers and nonlawyers.[79] According to Larry Spears,

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72. *See id.* Rule 5.4(b)(1) (requiring partnerships between lawyers and nonlawyers to provide only legal services).

73. *See id.* Rule 5.4(b)(2) (requiring all partners in MDPs to abide by Washington, D.C. Rules of Professional Conduct).

74. *See id.* Rule 5.4(b)(3) (rendering lawyers in MDPs responsible for conduct of nonlawyers).

75. *See id.* Rule 5.4(b)(4) (requiring partners in MDPs to agree to requirements in writing).

76. *See id.* Rule 5.4(a) (listing circumstances in which lawyer may share fees with nonlawyer). D.C. Rule 5.4(a) tracks the provisions of Rule 5.4(a) of the Model Rules of Professional Conduct, but allows for the sharing of fees "in a partnership or other form of organization" that is permissible under D.C. Rule 5.4(b). *Id.* Rule 5.4(a)(4).

77. *See id.* Rule 5.4(c) (mirroring language of Rule 5.4(c) of Model Rules of Professional Conduct, which prohibits nonlawyer control of lawyer's professional judgment).

78. *See* Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 400 (1988) (describing North Dakota's flirtation with Kutak Commission's version of Model Rule 5.4).

79. *See id.* (explaining development of North Dakota's Proposed Rule 5.4). The final proposal of the subcommittee stated:

> Except as prohibited or restricted by law, a lawyer may provide legal services to a client in association with a nonlawyer if:
> (a) The association does not permit any interference with the lawyer's independent professional judgment or with the client-lawyer relationship;
> (b) Information relating to representation of a client is protected as required by these rules;
> (c) The association does not result in communication about the lawyer, a person professionally associated with the lawyer or their services which violates these rules; and

Assistant State Court Administrator for the North Dakota Supreme Court, some of the members of the Subcommittee believed that the Model Rule's prohibition against MDPs violated the First Amendment by impinging upon lawyers' freedom of association.[80] In a statewide vote, bar members approved the proposed rule.[81] Shortly thereafter, the state bar's Board of Governors and the Attorney Standards Committee also voted to approve the proposal.[82] While the North Dakota Supreme Court was reviewing the proposal, however, the *National Law Journal*[83] and *Business Week*[84] published articles asserting that adoption of the Subcommittee's proposal would lead to "lay acquisition of law firms."[85] According to the assistant court administrator for the North Dakota Supreme Court, the articles inspired a number of letters to the supreme court prophesying that "the world would come to an end if Sears came in."[86] On April 16, 1987, the North Dakota Supreme Court, without indicating any reason for doing so, rejected the Subcommittee's Proposed Rule 5.4 and adopted the Model Rule's language prohibiting MDPs.[87] The court approved the Model Rules on April 22, 1987.[88]

IV. Traditional Objections to MDPs

Opponents of MDPs have raised numerous objections to partnerships between lawyers and nonlawyers.[89] Some opponents argue that MDPs will

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(d) The association does not result in the client being charged a fee that violates these rules.

Id. at 400-01 (quoting Professional Conduct Study Subcommittee of Attorney Standards Committee, proposed North Dakota Rules of Professional Conduct (1986)).

80. *See id.* at 401 (discussing reasons behind North Dakota's Proposed Rule 5.4).

81. *See id.* at 401-02 (describing process by which North Dakota's Proposed Rule 5.4 ascended to North Dakota Supreme Court for approval and adoption).

82. *See id.* (describing process by which North Dakota's Proposed Rule 5.4 ascended to North Dakota Supreme Court for approval and adoption).

83. David A. Koplan, *Ethics Change in Works: Want to Invest in a Law Firm?*, NAT'L L.J., Jan. 19, 1987, at 1.

84. Paula Dwyer, *Soon Anybody May be Able to Own a Law Firm*, BUS. WK., Jan. 26, 1987, at 42.

85. *See* Gilbert & Lempert, *supra* note 78, at 402 (describing articles in *National Law Journal* and *Business Week* and noting that articles prompted numerous lawyers to voice their concerns regarding nonlawyer ownership of law firms to North Dakota Supreme Court).

86. *Id.*

87. *See id.* (recounting North Dakota Supreme Court's rejection of Proposed Rule 5.4 and approval of version found in Model Rules).

88. *See id.* (recounting North Dakota Supreme Court's rejection of Proposed Rule 5.4 and approval of version found in Model Rules).

89. *See infra* notes 95-262 and accompanying text (describing traditional objections raised to MDPs).

adversely affect the legal profession by compromising lawyers' professional independence of judgment[90] and by making it easier for nonlawyers to engage in the unauthorized practice of law.[91] Others argue that MDPs also will hurt clients by jeopardizing client confidentiality[92] and privileged communications.[93] Additionally, opponents fear that MDPs threaten lawyers' economic self-interest.[94]

A. Professional Independence of Judgment

One of the most frequently raised arguments in support of Model Rule 5.4 is that its prohibition on nonlawyer supervision of attorneys prevents laypersons from impairing or adversely affecting a lawyer's professional independence of judgment.[95] In fact, the official comment to Model Rule 5.4 states that "[t]hese limitations are to protect the lawyer's professional independence of judgment."[96] As Professor Luban pointed out, the "professional independence of lawyers" argument has two aspects.[97] Not only are lawyers to be independent from third parties who may attempt to influence the lawyer's judgment,[98] but lawyers also are required to be independent from the client.[99]

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90. *See infra* notes 95-105, 122-24 and accompanying text (noting that opponents fear that MDPs would compromise lawyer's professional judgment).

91. *See infra* notes 214-30 and accompanying text (discussing opponents' argument that MDPs encourage unauthorized practice of law).

92. *See infra* notes 142-50, 166-70 and accompanying text (noting that opponents argue that MDPs will imperil client confidentiality).

93. *See infra* notes 184-87 and accompanying text (noting that opponents argue that MDPs will endanger communications covered by attorney-client privilege).

94. *See infra* notes 251-59 and accompanying text (explaining that underlying rationale for prohibition on MDPs is economic protectionism).

95. *See Commission on Multidisciplinary Practice: Report* ¶ 9, *at* http://www.abanet.org/cpr/mdpreport.html (last modified Aug. 1999) (noting that most frequently raised objection before Commission was that lawyers' professional judgment would be impaired by nonlawyer supervision) (copy on file with Washington and Lee Law Review); *see also* Andrews, *supra* note 49, at 601 (reporting that nonlawyer interest solely in making money is common objection against allowing nonlawyer involvement in practice of law); Gilbert & Lempert, *supra* note 78, at 406 (mentioning that ABA is concerned that business practices will impair ethical obligations of legal profession).

96. *See* MODEL RULES, *supra* note 54, Rule 5.4 cmt. (providing reasoning behind promulgation of Model Rule 5.4).

97. *See* David Luban, *Asking the Right Questions*, 72 TEMP. L. REV. 839, 842-43 (1999) (arguing that "ABA report on multidisciplinary practice focuses exclusively on . . . lawyers' independence from nonlawyers").

98. *Id.* at 842.

99. *Id.* at 843.

1. Independence from Third Parties

Some scholars argue that MDPs will threaten lawyers' professional independence from third parties. They suggest that nonlawyers with a financial interest in a partnership or association may pressure a lawyer to maximize profits to such an extent that the lawyer compromises his own professional judgment.[100] For instance, an attorney may begin to make decisions that are in the best interests of the organization, not the client.[101] This concern is primarily about jeopardizing client loyalty.[102] Opponents argue that nonlawyers are unlikely to comprehend or accept that a lawyer must often do more than is required by a particular rule of conduct to comply with professional obligations.[103] During the debate surrounding the Kutak Commission's proposal, one delegate argued that a nonlawyer partner would only be concerned with what service is "cost effective," not with what is necessary to perform a job properly.[104] One scholar even asserted that MDPs will jeopardize pro bono work because nonlawyers will pressure lawyers to maximize profits and will not want their firms representing indigent criminals.[105]

Other scholars have raised numerous counter arguments to the proposition that MDPs will interfere with lawyers' professional independence from third parties.[106] First, the proposition presupposes that a desire to make a

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100. *See* Adams & Matheson, *supra* note 34, at 16 (describing argument raised by opponents of MDPs); Cindy Alberts Carson, *Under New Mismanagement: The Problem of Non-Lawyer Equity Partnerships in Law Firms*, 7 GEO. J. LEGAL ETHICS 593, 611-13 (1994) (asserting that "non-lawyer partner's primary concern is likely to be a good return on his investment").

101. Adams & Matheson, *supra* note 34, at 16.

102. *See* Eleanor W. Myers, *Examining Independence and Loyalty*, 72 TEMP. L. REV. 857, 861 (1999) (suggesting that concern about independence from third parties "is primarily a concern about impairing client loyalty").

103. *See* Carson, *supra* note 100, at 601-02 (arguing that nonlawyer partners create greater risk of impeding lawyer's professional judgment than managing partners who are lawyers); 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, 1106 (2000) (arguing that Rule 5.4 guards against "interference by nonlaw trained masters who wish us to take short cuts to maximize profits").

104. *See* Andrews, *supra* note 49, at 601-02 (citing Unedited Transcript of ABA House of Delegates Session 41-42 (Feb. 8, 1983)).

105. *See* Fox, *supra* note 103, at 1112-13 (suggesting that MDPs will compromise legal profession's commitment to pro bono).

106. *See* Adams & Matheson, *supra* note 34, at 16-19 (raising number of arguments that MDPs do not threaten professional independence of lawyers); Andrews, *supra* note 49, at 602-03 (same); Carson, *supra* note 100, at 611-13 (noting MDP proponents argue that nonlawyers will respect ethical obligations of lawyers and thus not interfere with lawyers professional judgment); Gilbert & Lempert, *supra* note 78, at 406-07 (arguing that adequate restraints could

profit will adversely affect the provision of legal services.[107] Yet, no empirical evidence supports this assumption.[108] In fact, such a proposition ignores that, for more than thirty years, lawyers have operated law firms according to business principles without destroying their ethical and professional commitments.[109] Some proponents of MDPs even argue that nonlawyer partners have a strong incentive not to interfere with the lawyer's professional judgment. Because a lawyer's ineffective or unethical representation damages the reputation of the firm, the nonlawyer partners stand to lose as much as the lawyer partners.[110] Thus, it is unlikely that nonlawyer partners, who opponents of MDPs characterize as interested only in profits, would act contrary to their own financial interests.[111] Furthermore, Model Rule 5.4 inadequately preserves lawyers' professional independence of judgment because it fails to protect against pressures that other lawyers or employing law firms exert through billable hour requirements, contingent fee arrangements, pressure to

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be placed on nonlawyer partners to protect lawyers' professional judgment, but that restraints might make MDPs less attractive to nonlawyers).

107. *See* Adams & Matheson, *supra* note 34, at 16 (arguing that "[i]n reality, nonlawyer-controlled law firms, which could take the form of private entities with nonlawyer ownership or publicly traded corporations, would be in the business of providing legal services and would succeed only by providing sound legal judgment to consumers, as is the case now"); Andrews, *supra* note 49, at 602 (arguing that opponents of MDPs presuppose "that the profit motive is bound to lead to inadequate or unethical legal services").

108. *See* Adams & Matheson, *supra* note 34, at 16 (noting lack of empirical evidence for MDP opponents' contention that profit motive is unhealthy for legal profession); Andrews, *supra* note 49, at 602 (same).

109. *See* Burnele V. Powell, *Flight from the Center: Is It Just or Just About Money?*, 84 MINN. L. REV. 1439, 1457-58 (2000) (arguing that "legal profession has long recognized that the risk to lawyer independence does not arise from the structure of the practice, but from situations where '[a] non-lawyer has the right to direct or control the professional *judgment* of a lawyer'"); *see also* Schneyer, *supra* note 25, at 1498. Schneyer stated:

> If companies can be left to their own devices in guarding against internal interference with *house counsel's* judgment on their behalf, they can be expected to monitor MDPs to discourage lay interference with the lawyers working on their matters, just as they use house counsel to monitor the outside law firms they retain.

Id.

110. *See* Adams & Matheson, *supra* note 34, at 16 (arguing that nonlawyers "would be acting to their own detriment by interfering with the professional independence and judgment of a firm's lawyer-employees, thereby diminishing the quality of legal services offered"); Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 20 (1998) (arguing that economic functions of lawyers and accountants as reputational intermediaries are similar because both have "strong incentives to develop reputations for honesty and independence").

111. Adams & Matheson, *supra* note 34, at 16-17 ("The dynamics of the marketplace actually militate against the notion that nonlawyer investors would interfere with the lawyer's professional independence and judgment.").

reach desired results in opinion letters, and suggested referrals that may not be in the client's best interest.[112]

Second, there is no reason to assume that members of the legal profession are paradigms of ethics and virtue who are not motivated to make money in the same way as nonlawyers.[113] There is nothing about the legal profession that prevents lawyers from becoming entirely preoccupied with making money any more than there is something about nonlegal professions that prevents them from pursuing purposes other than making money.[114] In fact, within the last generation, a number of law firms, especially big firms, shifted their emphasis to moneymaking.[115] One scholar noted that the legal culture of today, unlike that of past generations, not only tolerates openness about money, "but actively encourages lawyers to be more and more exclusively preoccupied with it."[116] Given these changes in the practice of law, "there is

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112. James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal To Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1198-99 (2000); *see also* James W. Jones, *Focusing the MDP Debate: Historical and Practical Perspectives*, 72 TEMP. L. REV. 989, 998 (1999) ("[T]he only effective line of defense for preserving the professional independence of lawyers is the integrity of the individual lawyer himself.").

113. *See* Adams & Matheson, *supra* note 34, at 17 (arguing that same desire to make money motivates both lawyers and nonlawyers); Andrews, *supra* note 49, at 602 (arguing that MDP opponents assume nonlawyers form partnerships only to make money, but lawyers form partnerships for other reasons). *But see* Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1154 (2000) (suggesting assumption that lawyers will succumb to pressure from nonlawyers is at odds with fundamental assumption of lawyer professionalism "that lawyers' professional training and character . . . are sufficient to ensure lawyers' adherence to their professional obligations to clients and the public").

114. *See* Andrews, *supra* note 49, at 602 (discussing lawyer and nonlawyer motivations to enter into their respective fields).

115. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 294-300 (1993) (asserting that primary motivation for most members of legal profession has become strong desire to make money); NALP FOUND. FOR RESEARCH & EDUC., KEEPING THE KEEPERS; STRATEGIES FOR ASSOCIATE RETENTION IN TIMES OF ATTRITION 13 (1998) (noting that most law students are attracted to large law firms with high salaries); Edward A. Adams & Bruce Balestier, *As Associates' Pay Increases, 'Going Rate' Becomes History*, N.Y.L.J., Aug. 19, 1996, at 1 (noting that law firm pay levels have increased to point that going rate is replaced by salary chaos).

116. *See* KRONMAN, *supra* note 115, at 295 (noting changes in legal culture that impact mentality of modern attorney). Kronman argued that this openness is more than just a "candid acknowledgment of what before was disingenuously concealed." *Id.* at 296. The last generation of lawyers' directness concerning their preoccupation with financial profits served to reinforce the belief that the practice of law was about more than "the mere production of income" and actually combated "the natural interest that lawyers have always had in making money." *Id.* This cultural norm that placed great value on the successful practice of law and de-emphasized

no reason to suppose that corporations or laymen engage in the 'sordid' business of making money any more than do traditional law firms."[117]

Third, the threat that outside pressures exert on the professional judgment of lawyers is not unique to MDPs. As Professor Robert Gordon pointed out:

> Any and all forms of professional practice are subject to pressures, constraints and temptations – pressures form hierarchical superiors or peers, payment systems or fee arrangements, incentive to career advancement or financial reward inside firms or in the profession generally – that may to a greater or lesser extent compromise the exercise of a lawyer's independent judgment. Over the course of this century, the legal profession has adopted many arrangements and organizational forms for representing clients and receiving payment for services that pose conflicts between their own interests on the one hand and the interests of clients and the public good on the other. Hourly billing, to take one of many examples, tempts some lawyers to run the meter, tempts others to shirk on effort, and settle early and low. Such conflicts are unavoidable: No set of arrangements has ever been or ever will be devised that will entirely remove such pressures and temptations. The question your Commission has to ask is, Do the proposed arrangements for lawyers to practice with nonlawyers promise to *add* any significant sources of pressure, constraint and temptation to those that already exist? And even [if] the answer to that question should turn out to be Yes (or Maybe), does the likely cost or risk of adding new sources of pressure offset the likely benefits of multi-disciplinary practices?[118]

Finally, opponents' concern over the effect MDPs will have on a lawyer's professional judgment assumes that all nonlawyer professionals' sole motivation for entering into any occupation is money.[119] Nonlawyers enter into a multitude of occupations every day for reasons other than profit.[120] "This is not to deny that some nonlawyers will enter the business of law solely

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the legal professions' pecuniary aspects certainly affected the way that lawyers acted in practice. *Id.* The recent reversal of this norm has removed the counter pressure against the legal profession's natural preoccupation with profit, causing "the interest in moneymaking . . . to play a larger role in defining the aims of professional life." *Id.* The resulting preoccupation with money has served to make the "lawyer-statesmen ideal" less credible than in previous generations. *Id.*

117. *See* Andrews, *supra* note 49, at 602 (analyzing lawyer and nonlawyer occupation motivations).

118. Letter from Robert W. Gordon, Professor of Law, Yale Law School, to Sherwin P. Simmons, Esq., Chair, MDP Commission, *at* http://www.abanet.org/cpr/gordon.html (last visited Sept. 16, 1999) (copy on file with Washington and Lee Law Review).

119. *See* Andrews, *supra* note 49, at 602 (arguing that nonlawyers have occupational motivation other than financial gain).

120. *Id.*

to make money; but the same can be said of many lawyers entering the business."[121]

2. *Independence from the Client*

As Professor Luban pointed out, opponents on both sides of the MDP argument have given very little attention to the effect that MDPs will have on lawyers' ability to maintain their independence from the client.[122] The preservation of such independence is crucial because it is necessary for lawyers to fulfill their role in carrying out the negotiation between public values and private preferences.[123] The argument against MDPs is that lawyers will be unable to maintain independence from their clients because "the lawyer's role has to a large degree blended with those of people" who care "nothing about the law beyond whatever effect its enforcement may have on his own interests."[124]

Professor Eleanor Myers suggested that within the context of MDPs, the market will determine the independence from the client.[125] To the extent that lawyers do not feel dependent upon a particular client, it is unlikely that their professional judgment will be compromised by their desire to make the client happy.[126] Moreover, if lawyers can maintain independence from the client in the in-house counsel context, they certainly would be able to maintain their independence in the context of MDPs.[127]

B. Nonlawyers Not Subject to Bar Association Ethical Regulation

Opponents of MDPs also have emphasized that nonlawyers are not subject to the rules of professional responsibility adopted in each jurisdiction and are therefore not subject to state court or bar association ethical regulation or control.[128] Because nonlawyers are not subject to the same discipline as lawyers,

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121. *Id.*; *see also supra* notes 113-17 and accompanying text (discussing development of legal profession's preoccupation with money over past generation).

122. *See* Luban, *supra* note 97, at 842-43 (suggesting that sole focus of scholarship surrounding MDPs has been on "lawyers' independence from nonlawyers").

123. *Id.* at 845

124. *Id.* at 843-44.

125. Eleanor W. Myers, *Examining Independence and Loyalty*, 72 TEMP. L. REV. 857, 865 (1999).

126. *Id.*

127. *See* Schneyer, *supra* note 25, at 1498 ("If companies can be left to their own devices in guarding against internal interference with *house counsel's* judgment on their behalf, they can be expected to monitor MDPs to discourage lay interference with the lawyers working on their matters . . . .").

128. *See* Andrews, *supra* note 49, at 600 (acknowledging various objections raised against combination of lawyers and nonlawyers in partnership offering legal services).

nonlawyers may act with greater impunity, compounding any harm nonlawyer ethical violations may cause.[129] Although nonlawyers' ethical violations would be no more deplorable than lawyers' violations, nonlawyers would violate the ethical restrictions more frequently because they have no training in legal ethics and are not subject to disciplinary actions.[130]

This argument, however, may assume too much because it does not recognize that remedies, other than state bar regulation, exist to discourage nonlawyers from engaging in unethical activity.[131] As one proponent of MDPs indicated, both lawyers and nonlawyers owe fiduciary duties of care to their clients for the breach of which they may be civilly liable.[132] For instance, the *Restatement (Second) of Torts* states that "one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."[133] Similarly, most of the duties imposed upon lawyers by the various ethical regulations are imposed upon nonlawyers by the law of contracts, agency, torts, property, evidence, or criminal law.[134] Because the sanctions for violations of ethical duties imposed by courts and disciplinary committees are often mild compared to the substantial judgments awarded to former clients in malpractice actions based on breaches of fiduciary or other duties, it arguably is not the fear of discipline from the bar or the courts, but the fear of malpractice actions, that keeps lawyers in line.[135] Furthermore, some nonlegal professions have their own professional codes of conduct, which impose similar duties upon their members.[136] Thus,

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129. *See* Carson, *supra* note 100, at 613 (describing one danger of allowing nonlawyers to enter partnerships with lawyers).

130. *See id.* (noting argument that nonlawyers lack of legal training would increase frequency of ethical violations within MDPs).

131. *See* Andrews, *supra* note 49, at 603 (arguing that "lack of bar regulation" of nonlawyer does not mean that "there would be no remedies against nonlawyers who are engaged in the business of law").

132. *See id.* at 603-04 (noting that nonlawyers owe fiduciary duties of care to clients).

133. *See* RESTATEMENT (SECOND) OF TORTS § 299A (1965) (establishing standard of care to measure conduct of those engaged in profession or trade).

134. *See* C. WOLFRAM, MODERN LEGAL ETHICS 49 (1986) (noting that "little is required of lawyers that is not already required by other law").

135. *See* Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2601 (1996) (arguing that legal malpractice litigation, despite current shortcomings, remains predominant method to regulate attorney behavior); Schneyer, *supra* note 25, at 1486 (noting that most large law firms are primarily held accountable through civil liability); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 806 (1992) (noting that bar leaders and others have unsuccessfully attempted to separate malpractice from discipline).

136. Andrews, *supra* note 49, at 604 (citing CODES OF PROFESSIONAL RESPONSIBILITY (R. Gorlin ed., 1986)).

nonlawyer professionals who enter into partnerships with lawyers, although not necessarily subject to disciplinary proceedings by the bar association or courts, could still be held accountable for their ethical violations through their own professional codes and the threat of judgments for breach of a duty that substantive law imposes.[137]

Opponents' concerns over the ethical regulation of nonlawyers are excessive because MDPs do not allow nonlawyers to engage in the practice of law.[138] Instead, MDPs allow law firms to provide nonlegal services in combination with legal assistance while continuing to subject nonlawyers to the unauthorized practice of law prohibitions, which often carry criminal penalties.[139] Because lawyers continue to be subject to the ethical restrictions found in the disciplinary rules, "nonlawyers would need to respect the lawyers' ethical duties or they would find themselves without lawyer partners or employees."[140] Thus, both lawyers and nonlawyers would benefit from ensuring that the nonlawyer did not engage in the unauthorized practice of law.[141]

C. *Client Confidentiality*

Another objection to MDPs that opponents frequently raise involves the preservation of client confidences.[142] There are two aspects to this concern. First, opponents fear that nonlawyers in MDPs will gain unnecessary access to confidential client information.[143] Second, opponents suggest that non-

137. *See id.* at 603-04 (analyzing civil liability as remedy to regulate nonlawyer conduct).

138. *See id.* at 604 (arguing MDPs do not pose significant threat that nonlawyers will subject public to imposition or fraud because MDPs would retain prohibition against nonlawyers engaged in unauthorized practice of law).

139. *See id.* (noting that prohibition against unauthorized practice of law continue to apply with context of MDPs). Indeed, the ABA recently adopted a resolution to encourage enforcement of laws prohibiting the unauthorized practice of law. *See* Gregory Pease, *ABA Adopts Unauthorized Practice Measure, Rejects Federal Consumption Tax Principles*, DAILY TAX REP. (BNA), Feb. 16, 2000, at G-3 (noting that ABA resolution encourages jurisdictions to aggressively pursue "any apparent violation of their laws prohibiting the unauthorized practice of law").

140. *See* Andrews, *supra* note 49, at 604-05 (analyzing nonlawyer incentive to respect ethical duties of lawyer in MDP partnership).

141. *See id.* (concluding nonlawyers in MDPs would have incentive not to engage in unauthorized practice of law).

142. *See* Adams & Matheson, *supra* note 34, at 19-20 (describing MDP opponents' concern that nonlawyer partners may compromise sanctity of client confidentiality); Carson, *supra* note 100, at 621-22 (analyzing effect of nonlawyer partnership on preservation of client confidentiality); Gilbert & Lempert, *supra* note 78, at 405-06 (noting danger that nonlawyers will learn client confidences and secrets in MDPs); Richard E. Mickels & Mark I. Davies, *Multidisciplinary Practices: Ethical Concerns or Economic Concerns*, AM. BANKR. INST. J., Aug. 1999, at 20, 21 (examining how MDPs would jeopardize client confidences).

143. *See infra* notes 145-50 and accompanying text (discussing argument that nonlawyers in MDPs will gain unnecessary access to confidential client information).

lawyers may be required by their own ethical rules to disclose information that lawyers are required not to disclose.[144]

1. Unnecessary Access to Confidential Client Information

The objection that nonlawyers in MDPs will gain unnecessary access to confidential client information is based on the fear that the lawyer will inadvertently or deliberately share confidential client information with nonlawyers who have no ethical duty to maintain client confidentiality.[145] Model Rule 1.6 allows a lawyer to reveal client confidences only if the client authorizes the revelation or if such revelation is necessary to represent the client adequately.[146] Likewise, Model Code DR 4-101 prohibits a lawyer from divulging a client's confidences or secrets.[147] Even the District of Columbia Bar recognized the MDP threat to client confidentiality. In order to deal with this threat, the D.C. Bar requires all managers and partners in an MDP to abide by the bar's rules of professional conduct concerning confidentiality[148] and makes MDP lawyers responsible for the nonlawyer participants as if the nonlawyers

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144. *See infra* notes 166-70 and accompanying text (discussing opponents' concern that nonlawyers may be required to disclose information that lawyers are prohibited from disclosing).

145. *See* Carson, *supra* note 100, at 621 (arguing that screening is ineffective to prevent nonlawyers from jeopardizing client confidences); Gilbert & Lempert, *supra* note 78, at 405 (recognizing serious risk that nonlawyers in MDP will learn client confidences); Morello, *supra* note 6, at 229 (same).

146. *See* MODEL RULES, *supra* note 54, Rule 1.6 (discussing lawyer's obligation to keep client information confidential). Model Rule 1.6 states that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." *Id.* Rule 1.6(a). The comment to Model Rule 1.6 explains that "[l]awyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers." *Id.* Rule 1.6 cmt. 8.

147. *See* MODEL CODE, *supra* note 43, DR 4-101 (governing lawyer preservation of confidences and secrets of clients). DR 4-101(A) defines confidences as "information protected by the attorney-client privilege" and secrets as "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." *Id.* DR 4-101(A). Under DR 4-101(B) a lawyer is prohibited from knowingly revealing client confidences or secrets, using client confidences or secrets to the disadvantage of the client, or using confidential client information for the benefit of himself or a third party without the consent of the client after full disclosure. *See id.* DR 4-101(B) (listing restrictions on lawyer use of confidential client information). Finally, DR 4-101(D) states that "[a] lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed under [another section of the rules] through an employee." *Id.* DR 4-101(D).

148. *See* WASHINGTON, D.C. RULES OF PROFESSIONAL CONDUCT, *supra* note 15, Rule 5.4(b)(2) (requiring all MDP partners and managers to follow D.C. Rules of Professional Conduct).

were lawyers.[149] Additionally, some opponents fear that nonlawyer partners in an MDP would demand access to confidential client information to formulate business strategies or personal investment plans.[150]

Proponents of MDPs argue that the existing ethical regulations governing lawyers, the duties that nonlawyer professionals have under substantive bodies of law, and the professional codes of other professions that impose ethical regulations on nonlawyers adequately protect client confidences.[151] Under the current Model Rules, a client can consent to the disclosure of confidential information to persons other than the lawyer.[152] The Model Rules also allow the lawyer to disclose confidential information when the client implicitly has authorized the disclosure to carry out the representation.[153] Under the Model Rules, if a client does not want the lawyer to disclose particular information to the lawyer's partners or nonlawyer associates, the client can direct the lawyer not to disclose the information.[154]

It also should be noted that the duty of confidentiality is not unique to the Model Code and Model Rules in that other sources of law similarly require nonlawyers to maintain client confidences.[155] For instance, Model

149. *See id.* Rule 5.4(b)(3) (making lawyers in MDPs responsible for nonlawyer partners). The comment to D.C. Rule 5.4 states that "[n]onlawyer participants are persons having managerial authority or financial interests in organizations that provide legal services. Within such organizations, lawyers with financial interests or managerial authority are held responsible for ethical misconduct by nonlawyer participants about which the lawyers know or reasonably should know." *Id.* Rule 5.4 cmt. 5. By contrast, the Kutak Commission attempted to protect client confidentiality through a provision that simply required "information relating to representation of a client is protected as required by Rule 1.6." *See Report of the Commission on Evaluation of Professional Standards, supra* note 47, at 886-87 (describing Kutak Commission's Proposed Rule 5.4).

150. *See* Andrews, *supra* note 49, at 614 (citing ABA Memorandum, Subject: Model Rule 5.4, at 7 (Apr. 22, 1987) (unpublished memorandum available from ABA)) (discussing concerns expressed in 1987 ABA Staff Memorandum regarding Model Rule 5.4).

151. *See* Adams & Matheson, *supra* note 34, at 20-21 (arguing that there is no reason to believe that MDPs would create any greater threat to client confidences than traditional law firms); Andrews, *supra* note 49, at 614-16 (same); Gilbert & Lempert, *supra* note 78, at 405-06 (suggesting that attorney's ethical duty of confidentiality may render MDPs unfeasible or unattractive to private enterprises); Jones & Manning, *supra* note 112, at 1202-03 (arguing that many nonlegal professionals already maintain client confidences).

152. *See* MODEL RULES, *supra* note 54, Rule 1.6(a) (prohibiting lawyer from disclosing confidential information unless client consents to such disclosure after consultation).

153. *See id.* (allowing disclosure in certain situations); *see also* Jones & Manning, *supra* note 112, at 1202-03 (noting that it is already common for lawyers to share client confidences with other professionals "when necessary to carry out the purposes of a representation").

154. *See* MODEL RULES, *supra* note 54, Rule 1.6 cmt. 7 ("A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority.").

155. *See* HAZARD ET AL., *supra* note 46, at 203 ("[A]ll agents have a duty to treat information from and about their principals as confidential to the extent that the principal so intends and

Rule 1.6, which governs the treatment of client confidences, finds its equivalent in agency law.[156] An agent, whether lawyer or nonlawyer, is "subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent."[157] Thus, nonlawyer partners, acting as agents, would owe a duty to clients not to disclose confidential information for their own benefit or the benefit of a third party.[158] Lawyer partners, as principals, would be subject to liability for breach of that duty.[159] Even if agency law's duty of confidentiality is more limited in scope than the attorney's duty under the ethical regulations governing the practice of law, nonlawyer professionals still could enter into contrac-

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a duty not to use information about the principal against the principal or for the personal gain of the agent."); Geoffrey C. Hazard, Jr., *Foreword: The Future of the Profession*, 84 MINN. L. REV. 1083, 1093 (2000) (noting that ethical duties of confidentiality, loyalty, and competence are imposed on nonlayer professionals by agency law and law governing fiduciaries).

156. *See* RESTATEMENT (SECOND) OF AGENCY § 395 (1958) (stating prohibition against agent's use or disclosure of client's confidential information).

157. *Id.*

158. *See id.* (prohibiting agent from disclosing client confidences "on his own account or on behalf of another"). The comment to Section 395 states:

> To permit an agent to use, for his own benefit or for the benefit of others in competition with the principal, information confidentially given or acquired by him in the performance of or because of his duties as agent would tend to destroy the freedom of communication which should exist between the principal and the agent.

Id. § 395 cmt. a.

159. *See* RESTATEMENT (SECOND) OF AGENCY § 213 (1958) (explaining liability of principal for acts of agents). Section 213 states:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
> (a) in giving improper or ambiguous orders of in failing to make proper regulations; or
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others:
> (c) in the supervision of the activity; or
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

Id.; *see also* Connelly v. Special Rd. & Bridge Dist. No. 5, 126 So. 794, 797 (Fla. 1930) (stating general rule of agency law that "servant who, without his master's knowledge and sanction, procures from a transaction in which he is acting as his master's agent a personal advantage not provided for, nor contemplated by the contract of hiring, is guilty of a breach of duty"); More v. Burroughs, 205 P. 1029, 1031 (Kan. 1922) (recognizing rule that agent cannot use information acquired by him while acting on behalf of principal for agent's own personal advantage); Bell v. Bell, 3 W. Va. 183, 185 (1869) (finding one who acquired information while acting as agent liable to principal for profit made by purchase and sale based on such information).

tual agreements that subject them to liability for failure to maintain client confidences.[160] Furthermore, as principals of their nonlawyer agents, lawyers are liable to their clients for any nonlawyer agent's breach of the lawyer's duty of confidentiality.[161]

Finally, several existing professional rules would continue to protect client confidences within an MDP.[162] Model Rule 5.3 requires lawyers to make certain that nonlawyer employees comply with the lawyers' professional obligations.[163] Similarly, Model Rule 8.4(a) would serve to protect a client's confidences in an MDP by prohibiting a lawyer from knowingly assisting another person to violate the Rules of Professional Conduct or violating those Rules

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160. *See* Adams & Matheson, *supra* note 34, at 20 (noting that "almost all professional service agreements between investment banks and their clients include a strict confidentiality clause"); Andrews, *supra* note 49, at 615-16 (arguing that under traditional agency law principles nonlawyer professionals possess freedom to contractually agree to expanded duty of confidentiality).

161. *See In re* Estate of Divine, 635 N.E.2d 581, 587 (Ill. App. Ct. 1994) (recognizing attorney liability in malpractice or as ethical violation for acts of paralegal); Lane v. Williams, 521 A.2d 706, 708 (Me. 1987) (finding lawyer responsible for secretary's failure to file notice of appeal prior to deadline even though lawyer instructed secretary to do so); Musselman v. Willoughby Corp., 337 S.E.2d 724, 728 (Va. 1985) (concluding lawyer's failure to disclose crucial language necessary to client understanding of contract provision and lawyer's employment of untrained paralegal to formulate final documents and to play significant role in closing real estate transaction violated attorney's duty to client); RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 5.8, at 379 (4th ed. 1996) (stating that lawyer is "responsible for the efficiency and conduct of employed . . . office staff").

162. *See* Andrews, *supra* note 49, at 616 (exploring rules of professional conduct that protect client confidentiality in MDP context).

163. *See* MODEL RULES, *supra* note 54, Rule 5.3 (explaining responsibilities of lawyers regarding nonlawyer assistants). Model Rule 5.3 provides:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
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> (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
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> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
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> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:
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> (1) the lawyer orders or, with the knowledge of specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Id.

"through the acts of another."[164] In addition, a number of the ethical regulations of nonlawyer professions require nonlawyer professionals to maintain client confidences.[165]

2. *Nonlawyers Duty to Disclose Client Information*

Another concern is that "a nonlawyer in an MDP may be subject to an obligation of disclosure that is inconsistent with the lawyer's obligation of confidentiality."[166] For instance, although the rules exempt lawyers from the confidentiality requirement only to prevent imminent death or serious bodily harm, accountants must waive client confidentiality in order to fulfill their attest function.[167] In fact, the Securities and Exchange Commission (SEC) recently has taken the position that auditors and lawyers in the same firm cannot represent the same client at the same time.[168] Apparently, the SEC is

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164. *See id.* Rule 8.4(a) (describing what constitutes professional misconduct under Rules of Professional Responsibility).

165. *See* Rule 301 of the American Institute of Certified Public Accountants, Inc., Rules of Conduct and the Code of Professional Ethics, *reprinted in* CODES OF PROFESSIONAL RESPONSIBILITY 16-17 (R. Gorlin ed., 4th ed. 1999) ("A member in public practice shall not disclose any confidential client information without the specific consent of the client."); Society of Financial Service Professionals, Code of Ethics, Guide 1.2, *reprinted in* CODES OF PROFESSIONAL RESPONSIBILITY, *supra*, at 183 ("A member shall respect the confidential relationship existing between client and member.").

166. *See Commission on Multidisciplinary Practice: Report*, *supra* note 95, ¶¶ 14-15 (discussing client confidentiality concerns involving MDPs). For example, mental health care workers in cases of suspected child abuse and accountants performing the attest or audit function have different disclosure obligations than lawyers under the Model Rules. *See id.* ¶ 15 (listing specific examples of lawyers and nonlawyers having inconsistent disclosure obligations).

167. *See* Fox, *supra* note 103, at 1102 (arguing that accounting profession's notion of confidentiality bears little resemblance to that of legal profession). Professor Painter provided a succinct description of auditors' duty to disclose information to the SEC. *See* Richard W. Painter, *Lawyers' Rules, Auditors' Rules and the Psychology of Concealment*, 84 MINN. L. REV. 1399, 1411-13 (2000) (discussing auditors' duty to disclose).

168. *See* Letter from Lynn E. Turner, Chief Accountant of the Securities and Exchange Commission, to Sherwin P. Simmons, Chair of the American Bar Association Commission on Multidisciplinary Practice, *at* http://www.abanet.org/cpr/turner.html (last visited Sept. 13, 2000) ("OCA would consider a firm's independence from an SEC registrant to be impaired if that firm also provides legal advice to the registrant or its affiliates.") (copy on file with Washington and Lee Law Review). The SEC is not the only one taking this position. A number of scholars, even those supporting MDPs, do not believe that MDPs should be permitted to simultaneously provide the same client with audit and legal services. *See* 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) (arguing that MDP firms should not provide legal services and audit services to the same client); Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV. 1547, 1616-17 (2000) (arguing that MDPs should not be permitted to deliver legal and audit services to same client).

concerned that the lawyers' duty of confidentiality will affect auditors' independence when determining what information must be disclosed.[169] Similarly, opponents of MDPs fear that the auditors' duty to disclose will jeopardize lawyers' duty of confidentiality.[170]

The Commission on MDPs suggested that MDPs could alleviate these concerns by the construction of "firewalls" between the lawyers and auditors, which would allow each of the professions to continue to operate according to its own rules.[171] However, the "firewall" approach is inadequate for several reasons. First, a "firewall" will only delay a lawyer's revelation of client information to the auditor until the auditor makes a request for such information.[172] Second, "the lawyers may expose themselves to substantial liability for participating in the client's concealment if they do not resign from the representation."[173] Finally, the "firewall" approach fails to address the SEC's concern that lawyers' duty of confidentiality will impair auditors' independent judgment in determining what must be disclosed.[174]

Scholars have suggested a second approach, which would require lawyers in MDPs to "obtain client consent to their sharing with auditors practicing within their firm any information that is material to the audit."[175] This approach would alleviate the SEC's concern by making the relevant information that is known to the lawyers credited to the auditors.[176] Furthermore, only

169. *See* Painter, *supra* note 167, at 1400 (suggesting that SEC's position is based on fear that lawyers will inhibit auditors' independence).

170. *See* Hearings Before the Commission on Multidisciplinary Practice (Feb. 4, 1999) (written remarks of Lawrence J. Fox, Drinker Biddle & Reath LLP), *at* http://www.abanet.org/cpr/fox2.html (arguing that MDPs will abrogate confidentiality "for some lawyers because they work for those with a duty to disclose") (copy on file with Washington and Lee Law Review).

171. *See Commission on Multidisciplinary Practice, American Bar Ass'n, Recommendation: Appendix A Rule 5.8, cmt. 3* (1999), *at* http:/www.abanet.org/cpr/mdpappendixa.html ("[I]t may be necessary for an MDP to implement special procedures to protect confidential information such as building firewalls in the firm's computer information system, restricting access to client files . . ., and physically separating the lawyers and their nonlawyer assistants, paralegals, and secretaries from other service units within the MDP.") (copy on file with Washington and Lee Law Review).

172. Painter, *supra* note 167, at 1429. "The lawyer can refuse to provide the information, and must refuse if the client so requests, but this would likely lead the auditors to resign." *Id.* at 1410.

173. *Id.* at 1429.

174. *Id.*

175. *Id.*; *see also* Andrews, *supra* note 49, at 615 (suggesting that lawyers in MDPs should presume client who seeks representation from MDP has "consented to disclosure of information to nonlawyer associates at the outset of the relationship, to the extent necessary to carry out the representation").

176. *See id.* at 1430 ("The SEC will probably never agree to permit one firm to provide both auditing and legal services to the same client unless information known to the lawyers about the client is legally attributable to the auditors.").

clients who wish to receive legal and auditing services from the same firm need to consent to such a waiver.[177] Some clients might find such a waiver attractive as a way of indicating to regulators and investors that they have nothing to hide.[178]

In opposition to the waiver approach, Lawrence Fox argued that "the duty of confidentiality is not waiveable for the benefit of the lawyer and, even if it were, a prospective waiver would be void since by definition it could never be knowing and intelligent."[179] However, this argument failed to consider that a waiver of confidentiality would be to the benefit of the clients because it enables them to obtain audit and legal services more efficiently than if they had to engage separate firms.[180] Furthermore, most clients requiring both legal and auditing services "are sophisticated enough to decide for themselves whether prospective waiver is appropriate."[181] Fox also failed to cite any authority for the proposition that an *ex ante* waiver of confidentiality would be void.[182] Finally, Fox did not explain how the "concealment of information from auditors" represents a core value of the legal profession.[183]

D. Attorney-Client Privilege

Related to, but separate from the issue of client confidentiality, is the concern that MDPs run the risk of violating or failing to preserve the attorney-client privilege.[184] MDPs could violate the attorney-client privilege in two

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177. *Id.*

178. *See id.* at 1430-31(arguing that waiver of confidentiality will be attractive to some clients who wish to reassure third parties that they have nothing to hide).

179. Hearings Before the Commission on Multidisciplinary Practice (Feb. 4, 1999) (written remarks of Lawrence J. Fox, Drinker Biddle & Reath LLP), *at* http://www.abanet.org/cpr/fox1.html. (copy on file with Washington and Lee Law Review).

180. *See* Painter, *supra* note 167, at 1432 (noting that Fox fails to consider that clients might benefit by waiving confidentiality protections); *see also* Eleanor W. Myers, *Examining Independence and Loyalty*, 72 TEMP. L. REV. 857, 866 (2000) ("[S]ince loyalty is an obligation owed to the client, in many situations the client is in the best position to determine whether it might be impaired by the lawyer's other obligations or whether the client desires to trade off potential impairment of loyalty in favor of other concerns.").

181. Painter, *supra* note 167, at 1432; *see also* Luban, *supra* note 97, at 840 ("But we are talking primarily about very sophisticated business clients who will know better than the ABA does whether they are being well-served by their lawyers.").

182. Painter, *supra* note 167, at 1432.

183. *See id.* ("Fox does not explain why concealment of information from auditors, particularly information that could concern client fraud and illegal acts, should be included among the profession's 'most cherished' values, or a public policy reason why prospective waiver of secrecy by a public company should be void.").

184. *See* Carson, *supra* note 100, at 622 (discussing concern that MDPs jeopardize attorney-client privilege); John D. Conners, Comment, *Law Firm Diversification: An Affront to Profes-*

ways. First, nonlawyer partner involvement may destroy the attorney-client privilege if the nonlawyer's assistance is not necessary to represent the client adequately.[185] Second, a nonlawyer partner might not treat legal matters in the manner necessary to preserve the attorney-client privilege.[186] Additionally, opponents fear that MDPs will inhibit clients from divulging all information surrounding their representation to an attorney because the client has no guarantee that the attorney will prevent nonlawyer partners from waiving the attorney-client privilege.[187]

It is true that, by increasing the frequency of interaction between clients and nonlawyers, MDPs will increase opportunities for waiving the attorney-client privilege. However, MDPs will not increase the risk that lawyers will inadvertently destroy the privilege by disclosing privileged information to nonlawyer partners. Under existing law, a lawyer may disclose privileged information to nonlawyer experts and professionals without destroying the privilege if the nonlawyer is an agent of the lawyer who facilitates the representation.[188] Thus, to preserve the privilege, the law already requires the lawyer to ensure that only agents who facilitate representation have access to privileged

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sionalism?, 17 OHIO N.U. L. REV. 303, 314-15 (1990) (noting MDPs may threaten attorney-client privilege); *Commission on Multidisciplinary Practice: Report, supra* note 95, ¶ 16 (recognizing attorney-client privilege argument against allowing MDPs).

185. *See* Carson, *supra* note 100, at 622 (exploring potential negative impact of MDP on attorney-client privilege); *see also* United States v. Melvin, 650 F.2d 641, 646 (5th Cir. 1981) (observing that "there is no confidentiality when disclosures are made in the presence of a person who has not joined the defense team, and with respect to whom there is no reasonable expectation of confidentiality"); Bolyea v. First Presbyterian Church, 196 N.W.2d 149, 154 (N.D. 1972) (recognizing general rule that attorney-client conversation is not privileged when client openly converses with attorney in presence and hearing of third parties); 8 WIGMORE, EVIDENCE § 2311, at 601-02 ("One of the circumstances by which it is commonly apparent that the communication is not confidential is the *presence of a third person* who is not the agent of either client or attorney.").

186. *See Commission on Multidisciplinary Practice: Report, supra* note 95, ¶ 16 (describing how MDPs might threaten attorney-client privilege and discussing Commission's recommendations).

187. *See* Conners, *supra* note 184, at 314-15 (exploring potential client reluctance to provide full disclosure to attorney in MDP).

188. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118 (Proposed Final Draft No. 1, 1996) ("[T]he attorney-client privilege may be invoked as provided in § 135 with respect to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client."). Section 120 of the Restatement provides that "[p]rivileged persons within the meaning of § 118 are the client (including a prospective client), the client's lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation." *Id.* § 120. This "privilege also extends to communications to and from the client that are disclosed to independent contractors retained by a lawyer, such as an accountant or physician retained by the lawyer to assist in providing legal services to the client and not for the purpose of testifying." *Id.* § 120 cmt. g.

information.[189] Although a lawyer "generally has implied authority to disclose confidential client communications in the course of representing a client,"[190] the privilege may still apply when a lawyer discloses privileged information in clear violation of the lawyer's confidentiality obligation.[191] Furthermore, numerous cases demonstrate that lawyers already must take strong precautions to prevent clients from divulging privileged information when interacting with anyone not required to effectuate representation.[192] In fact, MDPs are likely to decrease the incidences of inadvertent waiver of attorney-client privilege because lawyers working in MDPs constantly will be aware of the need for candor and secrecy when discussing privileged information.

Similarly, lawyers would not allow nonlawyer partners to treat privileged information in a manner that would fail to preserve the privilege. As agents of the lawyer, nonlawyer partners who effectively waive the attorney-client privilege by disclosing confidential client information would subject the lawyer to liability for breach of duty of confidentiality.[193] Given the liability that lawyers face for negligently allowing attorney-client privileges to be waived, lawyers in MDPs certainly would set up procedures to prevent such information from being disclosed and to protect the privilege. Thus, there is little reason to believe that a client of an MDP would hold back information from the attorney for fear that he would not maintain the privilege.

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189. *See id.* § 120 cmt. e ("[A] lawyer should allow a non-client to participate only upon clarifying that person's role and when it reasonably appears that the benefit of that person's presence offsets the risk of a later claim that the presence of a third person forfeited the privilege.").

190. *See id.* § 129 cmt. c (discussing authorized disclosure of confidential information).

191. *See* United States v. Sindona, 636 F.2d 792, 804-05 (2d Cir. 1980) (affirming lower court ruling precluding cross-examination of witness based upon material obtained from witness's attorney in violation of attorney-client privilege); State v. Maxwell, 691 P.2d 1316, 1320 (Kan. Ct. App. 1984) (finding attorney-client privilege applicable when lawyer, without authorization from clients, disclosed damaging and otherwise privileged communications to opposing party's lawyer in clear breach of confidentiality obligation); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 188, § 129 cmt. c ("Upon discovery of an agents' wrongful disclosure, the client must promptly take reasonable steps to suppress or recover the wrongfully-disclosed communication in order to preserve the privilege.").

192. *See In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) ("[I]f a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels – if not crown jewels."); United States v. Landof, 591 F.2d 36, 39 (9th Cir. 1978) (finding no privilege for statements uttered in presence of third person who was lawyer but was not acting as counsel at that time); United States v. Gangi, 1 F. Supp. 2d 256, 263 (S.D.N.Y. 1998) ("Even privileged documents, however, are not protected if a party voluntarily discloses them."); Fry v. McCall, No. 95CIV.1915, 1998 WL 273035, at *3 (S.D.N.Y. May 28, 1998) (explaining that gross negligence may justify finding that disclosure was intentional).

193. *See supra* note 161 and accompanying text (noting that lawyers are liable to their clients for any nonlawyer agent's breach of lawyer's duty of confidentiality).

E. Conflicts of Interest

Opponents also argue that MDPs create potential conflicts of interest problems.[194] The most obvious conflict that MDPs create is the tension between an attorney's duty to promote his clients' best interests and the attorney's obligation to advance the business interests of the nonlawyer partners in the firm or corporation.[195] For example, such a conflict may occur when a lawyer feels pressured to refer a client to nonlawyer professionals in the same firm even though the client's best interests would require the lawyer to recommend a non-partner professional.[196] Another example is that a partnership between a law firm and a consulting firm may create a situation in which a lawyer is reluctant "to inform his client that the law firm's consulting group simply provided bad advice."[197] Finally, a situation could arise in which the interests of a lawyer's client are in conflict with the interest of a nonlegal client who has come to the nonlawyer partners for assistance.[198]

The fear that lawyers in MDPs will make inappropriate internal referrals is unfounded for two reasons. First, clients who take advantage of MDPs will be aware of the partnership between the lawyer and the nonlawyer. In fact, clients are likely to choose an MDP for the benefit of having a single provider address both the legal and nonlegal issues involved in representation.[199] Thus, clients will be aware that MDPs involve the same collective interest among partners that is seen in other partnership arrangements.[200] Second, a lawyer

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194. *See* Carson, *supra* note 100, at 618 (arguing that conflicts of interest are most serious ethical problem associated with MDPs); Conners, *supra* note 184, at 315 (noting that MDPs create potential conflicts of interest problems); Morello, *supra* note 6, at 226-27 (discussing conflicts of interest argument against MDPs).

195. *See* Carson, *supra* note 100, at 618 (describing type of conflict most likely to arise in MDPs). Additionally, a lawyer could obtain information from a non-client customer of the firm's nonlawyer associates that would be beneficial in the representation of the lawyer's client, thus creating a conflict between the lawyer's obligation to clients and obligations to third-party consumers. *See* Conners, *supra* note 184, at 315 (suggesting possible conflict stemming from attorney participation in MDP).

196. *See* Morello, *supra* note 6, at 226 (noting example of conflict of interest opponents offer against MDPs).

197. *See* Conners, *supra* note 184, at 315 (explaining how MDPs could create conflict of interest for lawyers or law firms).

198. *See id.* (suggesting that lawyer could obtain "confidential information from a non-client customer" that would be beneficial to representation of client, "thus creating a potentially serious collision between that lawyer's obligations to clients and obligations to third-party consumers – a classic conflict of interest").

199. *See infra* notes 267-70 and accompanying text (discussing how MDPs offer benefit of increased efficiency in representation).

200. The threat of inappropriate internal referrals already exists in traditional law firms. For instance, any time a lawyer is presented with a case that requires particular expertise in an

subjects himself to malpractice actions for fraud when he knowingly refers a client to a nonlawyer partner who is incapable of adequately representing the client's needs.[201]

Although the formation of large MDPs would increase the potential for conflicts of interest,[202] the fear that a lawyer in an MDP will represent a client with interests that conflict with the interests of a nonlawyer partner or a client of a nonlawyer partner fails to consider the ethical restrictions the Model Rules and the Model Code currently place on lawyers.[203] Model Rule 1.7 prohibits a lawyer from representing a client if the lawyer's own interests or responsibilities to a third party may adversely affect representation of the client, unless the client consents and the lawyer reasonably believes that the client's representation will not be adversely affected.[204] The Model Rules also prohibit a lawyer from knowingly acquiring an interest adverse to a client unless the transaction is fair to the client, the client has an opportunity to seek the advice of independent counsel, and the client consents to the transaction.[205]

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unfamiliar area of the law, there is the risk that the lawyer will refer the client to a partner who is knowledgeable in that area even though the client would be best served by a lawyer who is not a member of the firm.

201. *See* RONALD E. MALLEN & VICTOR B. LEVIT, LEGAL MALPRACTICE 107-08 (1977) (noting that "[w]hen committed by an attorney, the tort of fraud . . . is determined by . . . a false and material representation knowingly made by the attorney with the intent to deceive the client, who justifiably relied upon the representations which proximately caused damage").

202. *See* Jones & Manning, *supra* note 112, at 1201 ("[I]t is likely that a combination of a large law firm and a large accounting firm would produce more potential conflict situations than either organization would have separately, but that would be more the result of 'bigness' than of the multidisciplinary nature of the combined practice.").

203. *See* MODEL RULES, *supra* note 54, Rule 1.8 (outlining transactions prohibited by conflicts of interest rule); MODEL CODE, *supra* note 43, DR 5-101(A), DR 5-104(A) (prohibiting lawyer from representing client with interest in conflict with lawyers own interest or interest of another client, unless clients consent).

204. *See* MODEL RULES, *supra* note 54, Rule 1.7(b) (outlining conflict of interest rule). Model Rule 1.7(b) states:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantage and risks involved.

Id.

205. *See id.* Rule 1.8(a) (describing transactions prohibited by conflicts of interest restrictions). Model Rule 1.8(a) states:

Similarly, the Model Code forbids a lawyer from representing a client without the client's informed consent when the lawyer has any interest that might affect the lawyer's professional judgment.[206] Additionally, the Model Code prohibits a lawyer from entering into a business transaction with a client if the lawyer represents the client in the transaction, unless the client consents after receiving full disclosure from the lawyer.[207]

Other ethical regulations apply the conflicts of interest restrictions collectively against lawyers whom are associated together in a firm.[208] Model Rule 1.10 imputes the disqualification of one lawyer to the entire law firm when the disqualification is due to a prohibited conflict of interest.[209] Model

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> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advise of independent counsel in the transaction; and
>
> (3) the client consents in writing thereto.

Id.

206. *See* MODEL CODE, *supra* note 43, DR 5-101(A) (forbidding lawyer from representing client if lawyer's professional judgment is compromised). Model Code DR 5-101(A) states that "[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." *Id.*

207. *See id.* DR 5-104(A) (prohibiting lawyer from engaging in self-dealing). Model Code DR 5-104(A) states that "[a] lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure." *Id.*

208. *See* MODEL RULES, *supra* note 54, Rule 1.10 (imputing conflicts of interest restrictions to all lawyers associated in same firm); MODEL CODE, *supra* note 43, DR 5-105(D) (prohibiting partners and associates from representing client that lawyer is disqualified from representing).

209. *See* MODEL RULES, *supra* note 54, Rule 1.10 (disqualifying all members of firm when conflicts of interest restriction disqualifies one member). Model Rule 1.10 states:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [Model Rules governing conflicts of interests].
>
> (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
>
> (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

Code DR 5-105(D) also prohibits any member of a law firm from representing a client that one partner is disqualified from representing.[210] Courts and ethics committees have held that the regulations imputing one partner's conflict of interest to all members of the firm apply equally in the case of nonlawyer employees of a firm.[211] Thus, the logical inference is that courts and ethics committees would also extend the imputation of a lawyer's conflict of interest to a nonlawyer partner, thereby prohibiting a lawyer from representing a client when the client's interests are in conflict with the interests of a nonlawyer or a nonlawyer's client. A regulation that imputes conflicts of interests only for clients who purchase legal services from MDPs would be inadequate because many MDP lawyers would continue the current practice of providing legal services and calling it consulting in order to bypass the regulation.[212] One scholar believed that "[i]f conflicts are imputed to other persons working in an MDP, the magnitude of business lost due to the imposition of the new conflicts standards is likely to lead management . . . to pressure attorneys working in those organizations to resign their law licenses."[213] However, if large numbers of lawyers began resigning their licenses, both the organized bar and the courts would begin strictly to enforce the unauthorized practice of law prohibitions.

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(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Id.

210. *See* MODEL CODE, *supra* note 43, DR 5-105(D) (applying conflicts of interest of one partner collectively against entire law firm). Model Code DR 5-105(D) states that "[i]f a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment." *Id.*

211. *See* Kapco Mfg. Co. v. C&O Enters., 637 F. Supp. 1231, 1236 (N.D. Ill. 1985) (applying disqualification analysis used in cases involving attorney conflicts of interest to situation in which secretary-office manager switched sides during litigation); Ethics Comm. of the Bd. of Prof'l Responsibility of the Tennessee Supreme Court, Formal Op. 110 (1987) ("A lawyer may not represent a client in a case when the lawyer's paralegal was previously employed by the opposing party's law firm and the paralegal had such duties in his former employment as interviewing clients and reviewing and monitoring files, unless all parties consent after full disclosure."); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1526 (1988) ("Circumstances sometimes require that a firm be disqualified or withdraw [sic] from representing a client when the firm employs a nonlawyer who formerly was employed by another firm.").

212. Needham, *supra* note 168, at 1354; *see also* Terry, *supra* note 168, at 1620 (suggesting that amount of information shared between lawyers and nonlawyers in German MDPs supports imputation of conflicts to all members of MDPs).

213. Needham, *supra* note 168, at 1355.

F. Unauthorized Practice of Law

Opponents of MDPs also fear that they will lead to the unauthorized practice of law.[214] Although nonlawyer managers or interest holders are unlikely to be interested in giving legal advice to clients of their law firms, the fear is that individual nonlawyer partners will engage, either intentionally or inadvertently, in the unauthorized practice of law.[215] The difficulty is that the definition of the "practice of law" varies from jurisdiction to jurisdiction.[216] For example, some jurisdictions consider the preparation of escrow documents for a real estate transaction to be a function exclusively within the competency of a lawyer, but other jurisdictions consider nonlawyer realtors competent to perform such a task.[217] One critic suggested that "[t]he difficultly lies with services that combine lawyer and lay functions or that do not clearly fall within the lawyer's exclusive domain."[218] Such services create problems because a client who receives advice in a law office in relation to such a service is more likely to expect an accurate legal opinion, even if a nonlawyer is giving the advice.[219]

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214. *See* Adams & Matheson, *supra* note 34, at 21-23 (noting that MDP opponents contend MDPs will increase risk of unauthorized practice of law and arguing that such contentions are unfounded); Andrews, *supra* note 49, at 578-84 (discussing nonlegal corporations that offer legal services and thus violate prohibitions against unauthorized practice of law); Carson, *supra* note 100, at 615-17 (arguing that partnerships between lawyers and nonlawyers will lead to unauthorized practice of law); Gilbert & Lempert, *supra* note 78, at 404-05 (arguing that MDP nonlawyer investors or managers would not necessarily lead to increased risk of unauthorized practice of law).

215. *See* Carson, *supra* note 100, at 615 (explaining how MDPs may result in nonlawyers engaging in unauthorized practice of law).

216. *See* MODEL RULES, *supra* note 54, Rule 5.5 (prohibiting unauthorized practice of law); MODEL CODE, *supra* note 43, DR 3-101 (prohibiting lawyer from aiding unauthorized practice of law). The comment to Model Rule 5.5 states that "[t]he definition of the practice of law is established by law and varies from one jurisdiction to another." MODEL RULES, *supra* note 54, Rule 5.5 cmt. Likewise, EC 3-5 of the Model Code states that "[i]t is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law." MODEL CODE, *supra* note 43, EC 3-5.

217. *See* Melvin F. Adler, *Are Real Estate Agents Entitled to Practice a Little Law?*, 4 ARIZ. L. REV. 188, 191-94 (1963) (discussing how number of jurisdictions address preparation of escrow documents).

218. *See* Carson, *supra* note 100, at 616 (arguing that partnership between lawyers and nonlawyers will lead to unauthorized practice of law).

219. *See id.* (explaining how services that combine legal and lay functions create difficulties); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 257 (1994) (noting that public should be able to distinguish lawyers from nonlawyers). Formal Opinion 257 states:

> it is essential that the public should know who are lawyers and who are laymen, because the privilege – not the right – to practice is granted to lawyers only after

Critics also argue that nonlawyer partners intentionally will engage in the unauthorized practice of law.[220] For instance, a California lawyer encountered such a situation when he entered into a partnership with a nonlawyer insurance agent to practice personal injury law.[221] The nonlawyer insurance agent was responsible for interviewing and screening out potential clients and preparing legal documents for the approval of the lawyer.[222] Upon discovering that the nonlawyer had been soliciting cases, preparing legal documents, forging the lawyer's signature, and settling cases without the lawyer's approval, the lawyer turned himself in to the State Bar Discipline Committee.[223] Because the firm's clients were mostly immigrants and because none of the clients had complained, it is unlikely that the California State Bar Association would have ever discovered the violation if the lawyer had not voluntarily stepped forward.[224] In the same manner, MDPs create the risk that the unauthorized practice of law will occur unnoticed unless the parties involved disclose the violation.[225]

Critics argue that the temptation to engage in the unauthorized practice of law will be even greater for nonlawyer partners who have had legal training.[226] This criticism contemplates that individuals with legal training, but who lack a license to practice, like law school graduates who fail to pass the bar exam or practicing attorneys who are disbarred, will be tempted to put their legal training to use.[227] Because the standard for unauthorized practice

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> they have met the tests of character and learning which have been imposed for the protection of the public by statute or rule.

Id.

220. *See* Carson, *supra* note 100, at 616-17 (examining temptation of nonlawyer partners, especially those with legal training, to intentionally engage in unauthorized practice of law).

221. *See In re* Francis E. Jones III, 2 Cal. St. Bar Rptr. 411, 416 (1993) (holding that attorney violated California Rules of Professional Conduct by forming partnership with nonlawyer and allowing nonlawyer to retain clients and settle cases).

222. *See id.* at 417 (describing responsibilities assigned to nonlawyer partner under partnership agreement with lawyer).

223. *See id.* (recounting lawyer's voluntary disclosure of ethical violations to State Bar Discipline Committee).

224. *See* Carson, *supra* note 100, at 617 (emphasizing that MDPs create risks that unauthorized practice of law will occur unless parties involved voluntarily disclose such unauthorized practice).

225. *See id.* (emphasizing that MDPs create risks that unauthorized practice of law will occur unless parties involved voluntarily disclose such unauthorized practice).

226. *See* Adams & Matheson, *supra* note 34, at 22-23 (arguing that this criticism is unfounded because rules require lawyers to be responsible for nonlawyers); Carson, *supra* note 100, at 617 (asserting that nonlawyer who has had legal training runs greatest risk of violating Model Rule 5.5).

227. *See* Carson, *supra* note 100, at 617 (explaining why nonlawyer partners with legal training would run greater risk of engaging in unauthorized practice of law).

is vague,[228] it is unlikely that nonlawyer partners, not to mention clients, will realize that the nonlawyer partners have crossed the line denoting unauthorized practice of law.[229] Because paralegals, legal secretaries, and other nonlawyers all have legal knowledge that they could abuse, "[i]t would be difficult to defend a rule which would deny law firm partnership to individuals because they possess legal knowledge and grant law firm partnership to individuals because they do not."[230]

The existing ethical standards and regulations already provide for almost every possible situation that an MDP might face regarding the unauthorized practice of law.[231] Traditional law firms employ a number of types of nonlawyers such as secretaries, paralegals, investigators, and bookkeepers who are prohibited from taking actions that might constitute the practice of law.[232] The Model Rules make lawyers responsible for the violations of their nonlawyer employees.[233] Model Rule 5.3(b) requires a lawyer to supervise nonlawyer employees to ensure that such employees do not violate the lawyer's professional obligations.[234] Model Rule 5.3(c) holds a lawyer responsible for the conduct of a nonlawyer employee that violates the Rules of Professional Conduct if the lawyer knowingly approves of the conduct or knows of the conduct at a time when the consequences could be avoided and fails to take remedial action.[235] Furthermore, the Model Rules prohibit a lawyer from assisting nonlawyers in the unauthorized practice of law.[236] If nonlawyer employees and assistants can work within law firms without engaging in the unauthorized practice of law, there is reason to believe that nonlawyer partners and profes-

228. *See supra* note 216 and accompanying text (noting that definition of unauthorized practice of law varies from state to state).

229. *See* Carson, *supra* note 100, at 617 (discussing difficulty of policing nonlawyer partners to prevent unauthorized practice of law from occurring).

230. *See id.* (noting that limiting nonlawyer partnership to only individuals with no legal training seems unfair and does not solve unauthorized practice problem).

231. *See* Adams & Matheson, *supra* note 34, at 22-23 (arguing that "[l]awyers would continue to practice law while other professionals would continue to avoid unauthorized practice of law").

232. *See id.* at 21-22 (noting that most traditional law firms employ nonlawyers who successfully avoid practicing law).

233. *See* MODEL RULES, *supra* note 54, Rule 5.3(b)-(c) (outlining lawyer's professional responsibility regarding nonlawyer assistants).

234. *See id.* Rule 5.3(b) (requiring lawyer to supervise nonlawyer employee's conduct).

235. *See id.* Rule 5.3(c) (describing lawyer's responsibility for conduct of nonlawyer employees).

236. *See id.* Rule 5.5(b) (prohibiting lawyer from assisting anyone in unauthorized practice of law). Specifically, Rule 5.5(b) states that a lawyer shall not "assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." *Id.*

sionals would be able to do so.[237]

The Model Rules also protect against the possibility that MDPs will afford law school graduates who fail to pass the bar and disbarred lawyers an opportunity to practice law without a license because the rules making lawyers responsible for such illicit nonlawyer activity are equally applicable to all nonlawyers.[238] It is also unlikely that many lawyers would engage in this type of violation because few would be interested in obtaining the services of an individual who was unable to pass the bar or whose conduct was so egregious as to warrant disbarment.[239] The benefit of permitting partnerships between lawyers and nonlawyers is not in allowing nonlawyers to engage in the practice of law, but in the ability of a single entity to provide legal and nonlegal services to clients.[240]

G. Violation of Prohibited Fee-Splitting

MDPs arguably run afoul of the current rules governing the sharing of legal fees between lawyers and nonlawyers.[241] Model Rule 5.4(a) generally prohibits a lawyer from splitting fees the lawyer receives for the provision of legal services with a nonlawyer.[242] The Model Code also prohibits the sharing of legal fees between a lawyer and nonlawyer, except in specified circumstances.[243] Two basic concerns gave rise to the prohibition on fee-splitting

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237. *See* Adams & Matheson, *supra* note 34, at 22 (asserting that nonlawyer partners would have no more difficulty in avoiding practice of law than nonlawyer employees).

238. *See id.* ("The reality is that the rules requiring lawyers to be responsible for such nonlawyers' actions apply in this case, just as they do for paralegals or any other nonlawyer."); *supra* notes 162-64 and accompanying text (discussing Model Rules holding lawyers responsible for ethical violations of nonlawyers).

239. *See* Adams & Matheson, *supra* note 34, at 22 (arguing that most lawyers would not enter partnerships with nonlawyers who failed bar admission or were disbarred).

240. *See id.* at 23 (suggesting that real benefit of MDPs is in provision of ancillary services).

241. *See* MODEL RULES, *supra* note 54, Rule 5.4(a) (prohibiting splitting legal fees between lawyers and nonlawyers).

242. *See supra* note 55 and accompanying text (discussing Model Rule 5.4(a)).

243. *See* MODEL CODE, *supra* note 43, DR 3-102(A) (regulating sharing of legal fees). DR 3-102(A) provides that:

> A lawyer or law firm shall not share legal fees with a non-lawyer, except that:
> (1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.
> (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

that appears in the Model Rules and Model Code.[244] First, the prohibition avoids a situation, commonly referred to as "running and capping," in which a nonlawyer recruits potential clients for the lawyer in exchange for a percentage of the lawyer's increased profits.[245] Second, the ABA was concerned that "fee-splitting between lawyer and layman . . . poses the possibility of control by the layperson, interested in his own profit rather than the client's fate."[246]

It already has been noted that MDP proponents argue that nonlawyer partners are unlikely to interfere with the legal representation of clients because any adverse consequences to the firm's reputation will damage both lawyer and nonlawyer partners.[247] It also has been noted that the desire for profit is not the sole motivation of all nonlawyer professionals.[248] Thus, it is unlikely that permitting lawyers and nonlawyers in a partnership to split fees would result in the nonlawyer controlling the judgment of the lawyer.[249] Even one opponent of MDPs agrees that fee-sharing between lawyers and nonlawyers does not impair the independence of lawyers.[250]

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(3) A lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement providing such plan does not circumvent another disciplinary rule.

Id.

244. *See* Carson, *supra* note 100, at 625 (examining justifications for prohibition against fee-splitting between lawyers and nonlawyers).

245. *See id.* at 625-26 (examining justifications for prohibition against fee-splitting between lawyers and nonlawyers).

246. *See* Emmons, Williams, Mires & Leach v. State Bar, 86 Cal. Rptr. 367, 372 (Cal. Ct. App. 1970) (explaining primary purpose behind California's version of Model Rule 5.4(a)); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-355 (1987) (explaining that prohibition on fee-splitting avoids possibility that nonlawyer interference will unduly influence lawyer's independent professional judgment and prevents clients from paying unreasonably high fees); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 86-1519 (1986) (arguing that prohibition protects lawyer's professional judgment from nonlawyer control and discourages nonlawyers from engaging in unauthorized practice of law).

247. *See supra* notes 106-21 and accompanying text (discussing why nonlawyer partners are unlikely to interfere with lawyer's professional judgment).

248. *See supra* notes 107-11 and accompanying text (suggesting that nonlawyers have motivations other than making money for entering professional work).

249. *See* L. Harold Levinson, Essay, *Independent Law Firms that Practice Law Only: Society's Need, the Legal Profession's Responsibility*, 51 OHIO ST. L.J. 229, 241 (1990) (arguing that fee-splitting prohibition is unjustified because sharing fees does not interfere with lawyer's professional independence).

250. *See id.* (stating that restrictions on fee sharing should be relaxed to allow "law firms to enter into fee-sharing or profit-sharing arrangements with nonlawyers, provided these arrangements do not give the nonlawyers any equity interest or managerial role in the law firm").

H. Economic Protectionism

Finally, although opponents of MDPs rarely use economic self-interest to justify the prohibition on partnerships between lawyers and nonlawyers, this rationale has been underlying the prohibition since its inception into the Canons of Professional Ethics.[251] As early as 1920, opponents of nonlawyer partnerships expressed concern that, once allowed to compete in the legal market, nonlawyers would characterize lawyers as inefficient and slothful in efforts to solicit a greater amount of business.[252] In 1983, many opponents of the Kutak Commission's proposal to allow partnerships between lawyers and nonlawyers feared that it would allow large corporations such as Sears and Montgomery Ward to compete with lawyers in the legal market.[253] One delegate believed that such competition would ruin the legal profession:

> You each have a constituency. How will you explain to the sole practitioner who finds himself with competition with Sears why you voted for this? How will you explain to the man in the mid-size firm who is being put out of business by the big eight law [sic] firm? How will you explain that? I submit to you that you cannot on the evidence that has been brought to you by the Commission, because there has been no such evidence.[254]

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251. *See* G. HAZARD JR. & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 471 (1985 & Supp. 1989) (suggesting that economic protectionism is "hidden rationale" behind Model Rule 5.4's prohibition on partnerships between lawyers and nonlawyers); Andrews, *supra* note 49, at 616 (noting that "economic protectionism often can be read between the lines of the justifications given for excluding nonlawyers from the business of law"); Gilbert & Lempert, *supra* note 78, at 409 (concluding that "idea that a nationwide corporation might start offering legal services in its department stores next to the insurance kiosk or, even worse, in the aisle between the shoes and the sporting goods" has prevented amendment of partnership rules); Jones & Manning, *supra* note 112, at 1199 ("Since Rule 5.4 . . . does not cover lawyer-to-lawyer relationships, and since . . . the rule irrationally permits some lawyer-nonlawyer affiliations while condemning others, one must frankly question whether the real motivation for the rule has anything to do with the core value of protecting professional independence.").

252. *See* AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON SUPPLEMENTING THE CANONS OF PROFESSIONAL ETHICS: ANNOTATED CANONS, *supra* note 36, at 10-11 (recounting arguments made in support of prohibition of partnerships between lawyers and nonlawyers). A 1920 report issued by a committee on the conference of delegates of bar associations stated:

> The layman, a natural person or corporate, may only compete with the lawyer in the practice of the law and the doing of law business by orally soliciting or advertising to do it more expeditiously, faithfully, intelligently, and at less expense than the lawyer, thereby imputing to the lawyer slothfulness, infidelity, and extortion.

Id. at 11.

253. *See* Unedited Transcript of ABA House of Delegates Session 28, 37, 46-48 (Feb. 8, 1983) (reporting comments made by various delegates concerning Kutak proposal).

254. *Id.* at 48-49 (presenting remarks by Al Conant). However, the ABA's official legislative history of the Model Rules does not list the fear of competition as one of the reasons the

One proponent of MDPs has argued that the existing rules prohibiting partnerships between lawyers and nonlawyers are incompatible with the policy behind the federal antitrust laws.[255] Since 1890, federal law has prohibited combinations that restrain or inhibit trade and commerce.[256] According to Phillip Areeda and Donald Turner, the policy behind the antitrust laws is to better the economic welfare of consumers through the allocation of scarce resources and the development of more efficient products.[257] State regulations prohibiting partnerships between lawyers and nonlawyers are exempted from federal antitrust law because, under the state action defense, the anticompetitive activity is carried out by private parties in accordance with clearly articulated policies that the state actively supervises.[258] However, proponents

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House of Delegates rejected the Kutak Commission's proposal. *See* THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 160 (1987) (recounting reasons that House of Delegates rejected Kutak proposal).

255. *See* Andrews, *supra* note 49, at 620 (arguing that "existing rules governing the relations between lawyers and nonlawyers are incompatible with federal antitrust policy"). In fact, the Federal Trade Commission (FTC) has adopted the position that the ABA should revoke the ethical regulations prohibiting lawyers from entering into partnerships with nonlawyers. *Id.* at 620. In an attempt to prevent Kentucky from adopting Model Rule 5.4, the Director of the FTC Bureau of Competition wrote a letter to the Chief Justice of the Supreme Court of Kentucky arguing that:

> Proposed Rule 5.4 would limit the ability of lawyers to establish multidisciplinary practices with other professionals, such as psychologists or accountants, to deal efficiently with both the legal and nonlegal aspects of specific problems. [It] . . . also would appear to bar lawyers from including any lay persons, such as marketing directors, as partners in their law firms. Finally, such a restriction would appear to prohibit corporate practice, and thereby prevent the use of potentially efficient business formats . . . .

Id. (quoting Letter from Jeffrey I. Zuckerman, Director of FTC Bureau of Competition, to Robert F. Stephen, Chief Justice of the Supreme Court of Kentucky 5-6 (June 8, 1987)). The FTC sent similar letters to numerous other courts or bar committees considering changes to their rules. *Id.* at 620 n.228.

256. *See* Sherman Antitrust Act, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (1994)) (prohibiting contractual agreements that restrain trade or commerce).

257. 1 P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 7 (1978).

258. *See* Patrick v. Burget, 486 U.S. 94, 100 (1988) (explaining that shielding anticompetitive state action from federal antitrust laws requires challenged state regulation to be clearly and affirmatively expressed as state policy and that anticompetitive conduct in question receives active state supervision); Hoover v. Ronwin, 466 U.S. 558, 567-70 (1984) (applying "clear articulation" and "active supervision" analysis to determine whether Arizona's plan for determining admission to state bar constituted state action); Bates v. State Bar of Ariz., 433 U.S. 350, 359-63 (1977) (concluding state action exception exempts state supreme court mandated rules of professional conduct from complying with antitrust laws); Parker v. Brown, 317 U.S. 341, 350-51 (1943) (finding "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature").

of MDPs argue that despite the fact states have the power to maintain the anticompetitive regulations, the economic protection behind the prohibition against MDPs is an illegitimate interest.[259]

However, some proponents argue if the nonlegal firms continue to encroach on the practice of law and the legal profession fails to "expand its ability to reach more clientele," the result will be a loss of business for traditional law firms.[260] They even suggest that the Commission on MDPs' focus on the business interest of lawyers led it to conclude that MDPs should be permitted.[261] They submit that the Commission on MDPs determined that unless the ABA relaxes its standards, the nonlegal firms will increasingly threaten the viability of the legal profession.[262] Thus, legal scholars disagree about whether or not prohibiting MDPs is in the economic best interests of lawyers.

V. Arguments in Favor of MDPs

Legal scholars who support allowing partnerships between lawyers and nonlawyers argue that MDPs will create a number of benefits for clients.[263] For example, MDPs will allow law firms to meet clients' needs more efficiently.[264] MDPs also will lower the prices of legal services and allow law firms to offer more services to clients.[265] Finally, MDPs will provide clients with the oppor-

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259. *See* HAZARD & HODES, *supra* note 251, at 471("This substitution of a broad prophylactic rule where a narrow one would have sufficed suggests a fifth and illegitimate rationale, namely economic protectionism."); Andrews, *supra* note 49, at 621 ("Protection of the economic well-being of the profession is not such a valid interest."); Powell, *supra* note 109, at 1468 ("When the cost of maintaining the status quo is to open the legal profession to the charge that for the sake of money it is refusing to heed the public's call for the cautious, step-by-step, cost-free alternative represented by the MDP proposal, it is clear that a change is overdue.").

260. Matheson & Adams, *supra* note 8, at 1298.

261. *See id.* at 1294-96 (suggesting that Commission on MDPs' decision was based on economic interest of legal profession).

262. *See id.* at 1295 (arguing that Commission on MDPs concluded that "unless the current regulations are relaxed, these nonlegal firms will so advance their encroachment on the MDP market that the legal profession will become severely crippled"). *See generally* Russell G. Pearce, *A Cautionary Tale From the Multidisciplinary Practice Debate: How the Traditionalists Lost Professionalism*, 72 TEMP. L. REV. 985 (1999) (describing how opponents of MDPs could cause downfall of legal profession).

263. *See infra* notes 267-94 and accompanying text (discussing arguments in favor of MDPs).

264. *See infra* notes 267-70 and accompanying text (examining argument that MDPs will meet clients' needs more efficiently).

265. *See infra* notes 274-79 and accompanying text (discussing proponents argument that MDPs will lower prices and increase number of available services).

tunity to obtain legal and nonlegal services in a familiar and comfortable atmosphere.[266]

A. Increased Efficiency

The combination of legal and nonlegal services that MDPs can offer increases efficiency by allowing a single service provider to address the legal and nonlegal issues involved in the representation of a client.[267] Traditional law firms tend to analyze every problem solely from a legal standpoint, thereby risking "two potentially harmful consequences: (1) the lawyers may fail to perceive or may ignore important nonlegal aspects; or (2) the lawyers may identify the nonlegal aspect of a client's problem, but may attempt to solve it themselves without adequate nonlegal training, rather than referring the client elsewhere."[268] Even if the traditional firm recognized the nonlegal problem and properly referred the client to nonlegal professionals, multidisciplinary firms would be able to fulfill client needs more efficiently and economically.[269] A multidisciplinary firm would be able to recognize more accurately the legal and nonlegal aspects of a client's problem and could competently provide the nonlegal services itself.[270]

One MDP opponent argued that the enhanced efficiency of MDPs will decrease the availability of legal services.[271] This opponent contended that MDPs will cause legal and nonlegal talent to converge on the most profitable geographic locations and subject areas of legal practice.[272] The result of such a shift would be a shortage of legal services in less profitable subject areas and geographic locations.[273]

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266. *See infra* notes 289-91 and accompanying text (noting that proponents argue that MDPs will allow clients to obtain additional services in comfortable atmosphere).

267. *See* Andrews, *supra* note 49, at 623-25 (arguing that multidisciplinary firms could address all facets of client problems in addition to legal aspects); Morello, *supra* note 6, at 239 (discussing pro-MDP argument that partnerships between lawyers and nonlawyers will increase efficiency through client ability to retain organization capable of handling both legal and extralegal issues involved in client's representation).

268. *See* Andrews, *supra* note 49, at 623 (exploring potential disadvantages of traditional law firm representation).

269. *See id.* (countering arguments against MDPs); *see also* Jones & Manning, *supra* note 112, at 1202 (arguing that MDPs could "enhance the quality of services delivered to the client by assuring that all legal services are provided by lawyers at the same time that nonlegal services are provided by other competent professionals"); Matheson & Adams, *supra* note 8, at 1299-300 (arguing that modern clients desire convenience of one firm that can provide both legal and nonlegal services).

270. Andrews, *supra* note 49, at 623.

271. *See* Levinson, *supra* note 249, at 242-43 (arguing that many disadvantages would result if nonlegal firms heavily populated and influenced legal profession).

272. *See id.* at 243-44 (describing disadvantages of MDP's "one-stop shopping").

273. *See id.* (describing disadvantages of MDP's "one-stop shopping").

B. Lower Prices and More Services

MDPs also will increase competition among law firms, resulting in lower prices and more services for clients.[274] One commentator asserted that Model Rule 5.4 creates fewer consumer alternatives through suppression of competition in the supply of legal services, thereby allowing lawyers to charge higher fees.[275] MDPs, on the other hand, permit lawyers to concentrate solely on the legal issues involved while simultaneously allowing nonlawyer partners to address the nonlegal issues, thus reducing the lawyer's number of billable hours.[276] "The client will ultimately save money because non-legal professional time is usually billed at a lower hourly rate."[277] Additionally, the market for legal services would grow as a result of the increased competition and investment that nonlegal companies would bring into legal services.[278] An MDP would allow a law firm to supplement its income with revenue from nonlegal services, resulting in lower prices and increased availability of legal services to people who ordinarily would not have access to a lawyer.[279]

Opponents of MDPs argue that allowing MDPs in the United States legal services market would lead to Big Five accounting firm control of the legal market "because of their advantage in size, diversity, resources, and client base."[280] One such opponent suggested that MDPs run "the risk that the market . . . will concentrate nonlegal as well as legal services in a small number of large firms."[281] These opponents assert that once the market has concentrated legal

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274. *See* Conners, *supra* note 184, at 311 (noting MDP proponents argue that partnerships between lawyers and nonlawyers are cost effective); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 268 (1985) (arguing Model Rule 5.4 serves to decrease competition and raise prices of legal services); Morello, *supra* note 6, at 240-41 (describing argument that "[g]overnment regulation of legal services typically produces a cartel in the domestic legal services market, thereby increasing consumer prices and reducing services as compared to the prices and services in competitive markets").

275. *See* Gillers, *supra* note 274, at 268 (describing how Model Rule 5.4 results in more expensive legal services).

276. *See* Conners, *supra* note 184, at 311 (explaining cost-effective advantage of partnerships between lawyers and nonlawyers).

277. *See id.* (explaining cost-effective advantage of partnerships between lawyers and nonlawyers).

278. *See* HAZARD ET AL., *supra* note 46, at 982 (discussing MDP proponent arguments regarding effects MDPs would have on legal market).

279. *See* Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559, 568-69 (1992) (arguing that ancillary business activities of law firms serves to expand market for legal services through increased service availability).

280. *See* Morello, *supra* note 6, at 241 (noting MDP opponent arguments that MDPs will enhance monopolization of legal services resulting in decreased competition and deflated prices).

281. Levinson, *supra* note 249, at 243.

services in the hands of a few large law firms, any savings from decreased fees will be lost because the lack of competition will result in a collective rise in the price of legal services.[282] Opponents fear that the ability of law firms to provide ancillary services increases the risk that a firm member will encourage a client to use those services even when they are "unnecessary, and in fact would not have been recommended if an outside provider were needed."[283] One commentator pointed to a 1989 study of Florida outpatient physical therapy and rehabilitation facilities to demonstrate that clients are more likely, upon the recommendation of a professional, to use in-house or ancillary services than to seek the services of another professional independently.[284]

A similar argument that MDP opponents advance is that law firms are too "weak and unsophisticated" to successfully compete with the experience and power that nonlegal firms have in the marketplace.[285] Opponents espousing this view argue that because many other professions prohibit or limit the ability of lawyers to have an interest in their organizations, the legal profession should respond in kind.[286] They also assert that, unlike nonlegal professional firms, law firms lack the capital backing necessary to compete in the marketplace.[287] "It seems more likely, however, that nonlawyer-controlled MDPs would flourish because they would have the advantages of ready capital without the disadvantages of a principal who is directly subject to the lawyers' standards of professional conduct."[288]

C. Familiarity and Comfort

Partnerships between lawyers and nonlawyers will enable clients to choose multidisciplinary firms in order to retain the services of a nonlawyer member with whom the clients are familiar.[289] This client loyalty would have

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282. *See* Morello, *supra* note 6, at 241 (discussing MDP opponent arguments concerning higher legal fees).

283. *See* Carson, *supra* note 100, at 603-04 (arguing MDPs result in increased attorney referral of clients to nonlawyer partners even when nonlawyer partner services are unnecessary).

284. *See id.* at 604 & n.60 (arguing MDPs result in increased attorney referral of clients to nonlawyer partners even when nonlawyer partner services are unnecessary); *see also* Levinson, *supra* note 249, at 242 (arguing that MDPs create risk that "law firm[s], having made an economic commitment to [their] nonlaw personnel, will tend to use them at full capacity, whether clients happen to need their services or not").

285. *See* Powell, *supra* note 109, at 1460 (noting that Lawrence Fox and others question legal professions ability to compete with Big Five accounting firms).

286. *See id.* at 1461 (recognizing tit-for-tat argument espoused by some opponents of MDPs).

287. *Id.*

288. *Id.* at 1462.

289. *See* Conners, *supra* note 184, at 311-12 (discussing MDP proponent argument that

two benefits. First, it would allow the client to remain comfortable while obtaining additional services, because the client would not have to deal with an unfamiliar individual.[290] Second, because of the tendency of clients to remain with familiar service providers, each partner would bring a number of potential clients to the partnership in the form of the partner's own client base.[291]

Opponents of MDPs argue that although the Model Rules allow lawyers in traditional law firms to refer clients, to bring in new clients, and to refer them to the appropriate department of the law firm, MDPs create a distinct situation with new concerns.[292] "[A] lawyer, by virtue of his training, can be expected to know when he has crossed the line between an innocent recommendation and a prohibited referral or solicitation. If he crosses the line, he can be disciplined."[293] By contrast, a nonlawyer partner who is unfamiliar with the rules governing professional responsibility is unlikely "to know the distinction, and cannot be disciplined for his lack of knowledge."[294]

VI. Multidisciplinary Commission Recommendation

Although the Commission on MDPs issued a second recommendation in March 2000,[295] this Part will examine only the provisions of the Commission on MDPs' June 1999 Recommendation. That recommendation to the ABA[296] advocates changes to the Model Rules that would not unnecessarily inhibit the development of MDPs.[297] However, the recommendation suggests that the legal profession should take special precautions to protect the "core values"

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clients will follow professionals with whom they are familiar even if those professionals join MDPs).

290. *See* Morello, *supra* note 6, at 244 (noting that MDP proponents "state that MDPs nurture client comfort and confidence with legal representation" and examining how MDPs involving Big Six accounting firms satisfy needs of multinational corporate clients).

291. *See* Carson, *supra* note 100, at 610-11 (describing symbiotic relationship between attorney and nonlawyer partner centering on enhanced client base).

292. *See id.* at 611 (arguing that MDPs will lead to increased risk of prohibited client referral and solicitation).

293. *Id.*

294. *Id.*

295. *See supra* note 22 and accompanying text (discussing Commission's second recommendation).

296. *See infra* notes 297-311 and accompanying text (discussing recommendation made by Commission on Multidisciplinary Practice to House of Delegates).

297. *See Commission on Multidisciplinary Practice Report: Recommendation*, *supra* note 1, ¶ 1 ("The legal profession should . . . not permit existing rules to unnecessarily inhibit the development of new structures for the more effective delivery of services and better public access to the legal system.").

of the legal profession.[298] For instance, the recommendation retains the prohibition against nonlawyers practicing law,[299] requires lawyers in MDPs to maintain professional independence of judgment,[300] imputes the conflicts of interests of any client to the entire MDP,[301] and applies the rules of professional conduct to an MDP.[302] The recommendation also requires lawyers to make certain that clients are aware of the different obligations that lawyers and nonlawyers may have with respect to disclosure of client information.[303] Under the recommendation, lawyers in MDPs would be required to ensure that the conduct of nonlawyers is not inconsistent with the lawyers' professional obligations.[304]

In particular, the recommendation focuses on permitting lawyers to share legal fees with nonlawyers in a manner that protects the "core values" of the legal profession.[305] The Model Rules would continue to prohibit lawyers from splitting fees with nonlawyers, except in the case of lawyer-controlled MDPs or nonlawyer-controlled MDPs subject to particular safeguards.[306] Further-

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298. *See id.* ("The legal profession should adopt and maintain rules of professional conduct that protect its core values, independence of professional judgment, protection of confidential client information, and loyalty to the client through evidence of conflicts of interest . . . .").

299. *See id.* ¶ 4 ("Nonlawyers in an MDP, or otherwise, should not be permitted to deliver legal services.").

300. *See id.* ¶ 6 ("A lawyer acting in accordance with a nonlawyer supervisor's resolution of a question of professional duty should not thereby be excused from failing to observe the rule of professional conduct.").

301. *See id.* ¶ 8 ("[A]ll clients of an MDP should be treated as the lawyer's clients for purposes of conflicts of interest and imputation in the same manner as if the MDP were a law firm and all employees, partners, shareholders or the like were lawyers.").

302. *See id.* ¶ 7 ("All rules of professional conduct that apply to a law firm should also apply to an MDP.").

303. *See id.* ¶ 9 ("[A] lawyer should be required to make reasonable efforts to ensure that the client sufficiently understands that the lawyer and nonlawyer may have different obligations with respect to disclosure of client information and that the courts may treat the client's communications to the lawyer and nonlawyer differently.").

304. *See id.* ¶ 10 ("A lawyer in an MDP who delivers legal services to a client of the MDP . . . should be required to make reasonable efforts to ensure that the MDP has in effect measures to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.").

305. *See id.* ¶ 2 ("A lawyer should be permitted to share legal fees with a nonlawyer, subject to certain safeguards that prevent erosion of the core values of the legal profession.").

306. *See id.* ¶ 12 (allowing fee sharing in MDP). The recommendation states:

> A lawyer should not share legal fees with a nonlawyer . . . except that a lawyer in an MDP controlled by lawyers should be permitted to do so and a lawyer in an MDP not controlled by lawyers should be permitted to do so subject to safeguards similar to those identified in [another provision].

Id.

more, allowing lawyers and nonlawyers to split fees within an MDP would not change the current rules "limiting the holding of equity investments in any entity or organization providing legal services."[307]

In the case of nonlawyer-controlled MDPs, the Commission on MDPs' recommendation requires that the MDP give a number of written assurances "to the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in the delivery of legal services."[308] For instance, the MDP must promise that the MDP will not interfere with the lawyers' professional judgment[309] and that the firm will segregate clients' funds in accordance with the professional obligations of the lawyer.[310] Fi-

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307. *Id.* ¶ 13.

308. *Id.* ¶ 14. *But see* Terry, *supra* note 168, at 1619 (recommending that any certification and audit procedure apply to all MDP lawyers not just nonlawyer controlled MDPs in order to ensure greater familiarity and compliance with these types of provisions); Laurel S. Terry, *A Primer On MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 932-33 (1999) (asserting that court audits of MDP lawyers should include lawyer controlled MDPs as well).

309. *Commission on Multidisciplinary Practice Report: Recommendation, supra* note 1, ¶ 14(A).

310. *Id.* ¶ 14(C). The recommendation states that the MDP's written assurances should provide that:

> (A) it will not directly or indirectly interfere with a lawyer's exercise of independent professional judgment on behalf of a client;
> (B) it will establish, maintain and enforce procedures designed to protect a lawyer's exercise of independent professional judgment on behalf of a client from interference by the MDP, any member of the MDP, or any person or entity controlled by the MDP;
> (C) it will establish, maintain and enforce procedures to protect a lawyer's professional obligation to segregate client funds;
> (D) the members of the MDP delivering or assisting in the delivery of legal services will abide by the rules of professional conduct;
> (E) it will respect the unique role of the lawyer in society as an officer of the legal system, a representative of clients and a public citizen having special responsibility for the administration of justice. This undertaking should acknowledge that lawyers in an MDP have the same special obligation to render voluntary *pro bono publico* legal service as lawyers practicing solo or in law firms;
> (F) it will annually review the procedures established in subsection (B) and amend them as needed to ensure their effectiveness; and annually certify its compliance with subsections (A)-(F) and provide a copy of the certification to each lawyer in the MDP;
> (G) it will annually file a signed and verified copy of the certificate described in subsection (F) with the court, along with relevant information about each lawyer who is a member of the MDP;
> (H) it will permit the court to review and conduct an administrative audit of the MDP, as each such authority deems appropriate, to determine and assure compliance with subsections (A)-(G); and

nally, the court may withdraw permission from the MDPs to deliver legal services or impose other appropriate sanctions upon an MDP for failure to comply with the its written assurances.[311]

VII. Analysis

Although the traditional arguments against MDPs raise some concerns that the present Model Rules do not adequately address, these arguments are themselves inadequate to justify the total prohibition on lawyer and nonlawyer partnerships currently found in Model Rule 5.4.[312] Furthermore, the number of states presently investigating and considering MDPs suggests that there is a strong push in favor of these partnerships that is likely to go forward with or without the approval of the ABA.[313] If the Model Rules are to continue to provide guidance to the states in developing their own ethical regulations, the ABA must develop rules that both allow lawyers to enter MDPs and adequately address the ethical concerns MDPs raise.[314] As the Commission on MDPs' recommendation suggests, the ABA needs to make changes to a number of the Model Rules in order to provide for the development of MDPs while simultaneously protecting the "core values" of the legal profession.[315]

A. Professional Independence of a Lawyer

In order to allow lawyers to enter MDPs, the ABA House of Delegates must remove Model Rule 5.4(b), which prohibits a lawyer from entering into a partnership with a nonlawyer.[316] The ABA must also eliminate Model Rule 5.4(d), which prohibits a lawyer from practicing law in a corporation or

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(I) it will bear the cost of the administrative audit of MDPs described in subparagraph (H) though the payment of an annual certification fee.

Id. ¶ 14.

311. *See id.* ¶ 15 ("An MDP that fails to comply with its written undertaking shall be subject to withdrawal of its permission to deliver legal services or to other appropriate remedial measures ordered by the court.").

312. *See supra* notes 95-262 and accompanying text (discussing arguments against MDPs and their counter arguments).

313. *See supra* note 19 and accompanying text (noting that number of states presently are examining benefits and risks of MDPs).

314. *See* MODEL RULES OF PROFESSIONAL CONDUCT: CHAIRPERSON'S INTRODUCTION (1999) ("The Model Rules of Professional Conduct are intended to serve as a national framework for implementation of standards of professional conduct.").

315. *See Commission on Multidisciplinary Practice Report: Recommendation, supra* note 1, ¶ 1 (recommending legal profession adopt rules that would permit MDPs).

316. *See* MODEL RULES, *supra* note 54, Rule 5.4(b) (forbidding lawyer/nonlawyer partnership if any partnership activity involves practice of law).

association that a nonlawyer owns, directs, or supervises.[317] Because nonlawyer partners in an MDP are unlikely to interfere with the professional judgment of a lawyer, it is not necessary for the ABA to make any additional changes to the Model Rules to protect the professional independence of lawyers within MDPs.[318] Indeed, the Commission on MDPS recognized that many lawyers already work in settings where they are supervised or subject to oversight by nonlawyers, and they have maintained independence in those settings.[319] However, to clarify the position of the ABA and to quiet the fears of opponents, the House of Delegates should consider adding a provision to Model Rule 5.4, similar to the Commission on MDPs' recommended amendment, providing that a lawyer subject to nonlawyer supervision is not excused from exercising the lawyer's independent professional judgment in order to comply with the rules of professional conduct.[320]

B. Client Confidentiality

The Commission on MDPs' recommendation suggests that any change in the Model Rules to accommodate MDPs should include a change to Model Rule 1.6 to protect confidential client information.[321] However, agency law and existing legal and nonlegal ethical regulations adequately protect client confidences by giving the client power to direct nondisclosure and by subjecting lawyers and nonlawyers to liability for unauthorized disclosures.[322] Thus, in order to accommodate MDPs and to continue to protect client confidences, the ABA should not make any significant changes to Model Rule 1.6. Rather, the ABA should simply add a provision requiring the lawyer to "make reasonable efforts to ensure that the client sufficiently understands that the lawyer and nonlawyer may have different obligations with respect to disclosure of client information."[323]

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317. *See id.* Rule 5.4(d) (regulating attorney practice in professional corporations and associations).

318. *See supra* notes 106-21, 125-27 and accompanying text (explaining why MDPs do not interfere with professional independence of lawyers).

319. *Commission on Multidisciplinary Practice: Report, supra* note 95, ¶ 9.

320. *See Commission on Multidisciplinary Practice Report: Recommendation, supra* note 1, ¶ 6 (recommending adoption of provision to protect lawyer's independence of professional judgment).

321. *See id.* ¶ 1 ("The legal profession should adopt and maintain rules of professional conduct that protect . . . confidential client information . . . but should not permit existing rules to unnecessarily inhibit the development of [MDPs].").

322. *See supra* notes 151-65 and 175-183 and accompanying text (explaining why MDPs do not jeopardize client confidentiality).

323. *See Commission on Multidisciplinary Practice Report: Recommendation, supra* note

Additionally, the ABA should amend the Model Rules specifically to allow clients who wish to obtain both legal and audit services from a single MDP prospectively to waive confidentiality with regard to information relevant to the audit.[324] Scholars currently disagree about whether a prospective waiver of confidentiality would be void under the current regulations.[325] Thus, a rule explicitly providing for prospective waiver for such clients would remove any uncertainty and alleviate the concerns of the SEC.[326]

C. Attorney-Client Privilege

MDPs do not significantly increase the risk that nonlawyers or clients will waive attorney-client privileges.[327] The attorney-client privilege already protects communications to nonlawyer agents who facilitate representation.[328] Lawyers who negligently allow nonlawyer agents to waive attorney-client privileges through the disclosure of confidential client information are subject to liability for breach of the duty of confidentiality.[329] Thus, no change to existing law is required in order to protect attorney-client privileges within an MDP.

D. Conflicts of Interests

The Commission on MDPs correctly recommended that the ABA amend Model Rule 1.10 to impute the conflicts of interest of nonlawyers' clients to the entire MDP.[330] Although courts and ethics committees likely would extend current Rule 1.10 to impute the nonlawyers' conflicts to the law-

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1, ¶ 9 (recommending attorney inform client of different obligations of lawyer and nonlawyer concerning disclosure of confidential client information).

324. *See supra* notes 166-83 and accompanying text (discussing concerns over nonlawyers duty to disclose).

325. *See supra* notes 179-83 and accompanying text (noting arguments by Lawrence Fox and Richard Painter).

326. *See supra* notes 168-70 and accompanying text (discussing SEC's fears regarding MDPs).

327. *See supra* notes 188-93 and accompanying text (discussing how existing law adequately protects attorney-client privileges in MDP context).

328. *See supra* note 193 and accompanying text (noting that attorney-client privilege protects communications to lawyers and nonlawyer agents).

329. *See supra* note 170 and accompanying text (noting that lawyers are liable for negligent acts of their agents).

330. *See Commission on Multidisciplinary Report: Recommendation, supra* note 1, ¶ 8 ("[A]ll clients of an MDP should be treated as the lawyer's clients for purposes of conflicts of interest and imputation in the same manner as if the MDP were a law firm and all [nonlawyers] were lawyers.").

yer,[331] Rule 1.10, as currently written, does not provide explicitly for such imputation.[332] Thus, an amendment to Rule 1.10 to provide explicitly for such imputation would clarify the conflict of interest provisions of the Model Rules as they relate to MDPs and would quiet the concerns of some MDP opponents who fear an explosion of conflicts problems.

E. Unauthorized Practice of Law

No change in the Model Rules is necessary to prevent nonlawyers from engaging in the unauthorized practice of law. The Model Rules already hold a lawyer responsible for the conduct of his nonlawyer employees when that conduct violates the ethical regulations.[333] These rules also prohibit a lawyer from assisting a nonlawyer in the unauthorized practice of law.[334] Nonlawyers in an MDP would still be subject to the general restriction prohibiting nonlawyers from delivering legal services.[335]

F. Prohibited Fee-Splitting

Finally, in order to accommodate MDPs, the ABA must amend the prohibition against lawyers sharing fees with nonlawyers found in Model Rule 5.4(a).[336] Permitting lawyers and nonlawyers to split fees will not result in nonlawyers controlling the professional judgment of lawyers.[337] As the Commission on MDPs suggested, Rule 5.4 must be amended to allow lawyers to split fees with nonlawyers, at least in the MDP context.[338]

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331. *See supra* notes 208-11 and accompanying text (explaining why Model Rule 1.10 would likely be extended to impute nonlawyers' conflicts to lawyers within MDP).

332. *See* MODEL RULES, *supra* note 54, Rule 1.10 (providing general rules for imputed disqualification).

333. *See supra* notes 133-37 and accompanying text (explaining that Model Rules hold lawyers responsible for nonlawyer employee's violations).

334. *See supra* notes 231-40 and accompanying text (explaining that nonlawyers in MDPs already are prohibited from practicing law).

335. *See supra* notes 231-32 and accompanying text (demonstrating that nonlawyers in MDPs are not exempt from restrictions prohibiting unauthorized practice of law).

336. *See* MODEL RULES, *supra* note 54, Rule 5.4(a) (regulating fee-splitting between attorneys and nonlawyers).

337. *See supra* notes 106-21, 125-27 and accompanying text (discussing why MDPs will not compromise professional independence of lawyers).

338. *See Commission on Multidisciplinary Practice Report: Recommendation, supra* note 1, ¶ 12 (stating that "[a] lawyer should not share legal fees with a nonlawyer . . . except that a lawyer in an MDP . . . should be permitted to do so"). However, the Commission on MDPs recommended that allowing fee-sharing and ownership interest in the MDP context does not change "current provisions limiting the holding of equity investments in any entity or organization providing legal services." *Id.* ¶ 13.

VIII. Conclusion

Although the ABA consistently has maintained the prohibition against partnerships between lawyers and nonlawyers since 1928,[339] the traditional arguments against allowing lawyers and nonlawyers to enter partnerships are inadequate to justify the total prohibition on MDPs that currently is found in Model Rule 5.4.[340] Likewise, the economic protectionism rationale underlying the prohibition constitutes an illegitimate basis for the restriction.[341] Furthermore, MDPs would enable law firms to meet their clients' needs more efficiently,[342] lower the cost of legal representation,[343] and increase the availability of legal services.[344] In order to accommodate MDPs, the ABA must change Model Rule 5.4(b) to permit lawyers and nonlawyers to enter partnerships.[345] Additionally, the ABA must make a number of important, but simple, changes to various other rules to protect the "core values" of the legal profession.[346] In order to adequately advise the numerous states that currently are considering providing their citizens with the numerous advantages that MDPs have to offer,[347] the ABA should adopt the necessary changes to allow MDPs.

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339. *See supra* notes 34-63 and accompanying text (recounting history and development of prohibition on MDPs).

340. *See supra* notes 95-262 and accompanying text (examining arguments against MDPs and their counter arguments).

341. *See supra* notes 251-62 and accompanying text (discussing economic self-interest rationale for prohibition against MDPs).

342. *See supra* notes 267-73 and accompanying text (discussing how MDPs would increase efficiency).

343. *See supra* notes 274-77 and accompanying text (noting argument that MDPs would reduce the cost of legal services).

344. *See supra* notes 278-79 and accompanying text (arguing that MDPs would increase the availability of legal services).

345. *See supra* notes 312-15 and accompanying text (asserting that Model Rule 5.4 must be changed in order to accommodate MDPs).

346. *See supra* notes 316-38 and accompanying text (examining changes to Model Rules necessary to accommodate MDPs).

347. *See supra* note 19 and accompanying text (noting that number of states are presently considering MDPs); *see also* Schneyer, *supra* note 25, at 1473-76 (arguing that MDP legalization is inevitable in United States and suggesting that MDP supporters may leave ABA on sidelines and seek legalization elsewhere).