

MULTIDISCIPLINARY PRACTICE AND PROFESSIONAL RESPONSIBILITY AFTER ENRON

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The author would like to thank Stephen Durden and Colleen C. Manning for comments on an earlier draft of this manuscript.

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I. INTRODUCTION:

Many articles have been written on the subject of Multidisciplinary Practice (MDP). After the occurrence of the Enron tragedy, there will undoubtedly be additional articles addressing the pros and cons of permitting accounting firms to practice law. This author suspects that MDP opponents will interpret the events surrounding Enron's demise as hard evidence that MDP has no redeeming value and as such, it should be banned and discussed no further. Conversely, MDP advocates may dismiss the situation as an isolated incident; more of an aberration to the rule than the rule itself.

This article will define MDP and discuss the pros and cons of MDP with an emphasis on the Enron debacle and Arthur Andersen's (Andersen) involvement. Further, it will examine methods employed by other countries to address the concept of MDP. This article will then provide a summary of U.S. cases addressing MDP and the unauthorized practice of law statutes

in several states. The next section addresses the importance of continuing to examine MDP. In the discussion, an argument is presented for allowing MDP in the U.S. with the exception of accountant-lawyer MDP. In the concluding recommendations, this author proposes that MDP should be permitted in the U.S. with certain limitations. Emphasis should be placed on creating a widely accepted definition of the practice of law so that better unlawful practice of law statutes may be created and enforced.

a. MDP defined:

Whether MDP should be allowed in the United States has been called the most important question to face the legal profession.¹ Articles relating to this issue tend to proffer positions for and against the legalization of MDP.² The position advanced in this article is conceptually different. However, before examining this new approach, it is necessary to define the term MDP.

The ABA Commission defined a MDP as:

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

¹Commission on Multidisciplinary Practice to the ABA House of Delegates, *Background Paper on Multidisciplinary Practice: Issues and Developments*, Jan. 1999, at Cover Letter, available at <http://www.abanet.org/cpr/multicomreport0199.html>.

²*E.g.*, Ronald A. Landen, *The Prospects of the Accountant-Lawyer Multidisciplinary Partnership in English-Speaking Countries*, 13 EMORY INT'L LAW REV. 763 (1999).

arrangement.³

b. Article's focus:

The concept of MDP in this paper shall not be limited to accounting firms delivering legal service. For the purpose of this article, the term MDP includes any combination of lawyers and nonlawyers as described in the above definition. Some practical examples of MDPs might include the partnership of an attorney, certified financial planner, and healthcare specialist such as a geriatric care manager or social worker to service elderly clients; a lawyer and a certified financial planner; as well as the traditional accountant-lawyer partnership.⁴

The term MDP may be somewhat misleading as it conveys the perception that the practice of law will occur in conjunction with other types of professional practice in a purely professional practice context.⁵ In fact, MDPs could include life insurance agents, financial planners and trust officers who are not professionals.⁶ As ethical codes and rules differ among the various professions,⁷ ethical conflicts may arise which affect the quality of the service

³Michael V. Bourland et al., *Multidisciplinary Practice: Challenges and Opportunities - Alternative Models and Client Service Opportunities*, in ESTATE PLANNING FOR THE FAMILY BUSINESS OWNER 523, 531 (A.L.I.-A.B.A. Course of Study, July 5-7, 2001).

⁴See Commission on Multidisciplinary Practice to the ABA House of Delegates, *Background Paper on Multidisciplinary Practice: Issues and Developments*, *supra* note 1, at 4 n.1.

⁵Professor Colin Boyd, *The Transformation of the Accounting Profession: The History Behind the Big 5 Accounting Firms Diversifying into Law* at 42 (Special Committee of the International Practice of Law; Canadian Bar Association, May 1999), *available at* <http://www.commerce.usask.ca/faculty/boyd/mpacc801/FinalCBAReport.htm>.

⁶Bourland, *supra* note 3, at 529.

⁷Compare MODEL RULES OF PROFESSIONAL CONDUCT and AICPA CODE OF PROFESSIONAL CONDUCT *available at* <http://www.aicpa.org/about/code/index.htm>.

provided. As will be illustrated later in this article, the partnership of professionals (attorneys) and nonprofessionals (others) may give rise to deviation from the ethical standards to which attorneys are sworn. Such problem ethical areas include confidentiality, independence, conflict of interest, and assurance that all providers of legal services adhere to and are governed by the rules of ethics.⁸ This author believes that these conflicts occurred in Arthur Andersen contributing to Enron's demise.

c. Arthur Andersen's contribution to the Enron story:

Enron had not reported as much as a bad quarter when it suffered the largest corporate bankruptcy in American history on December 2, 2001.⁹ Stock that had traded for as much as \$90.75 per share¹⁰ dropped to as low as \$0.08 per share¹¹ representing a 99% decrease. Thousands of employees whose pension plans became worthless also lost their jobs with the demise of the energy giant.¹² The government launched investigations¹³ and hearings¹⁴ into

⁸Bourland, *supra* note 3, at 531.

⁹Jenny B. Davis, *The Enron Factor*, A.B.A. J. Apr.2002, at 1.

¹⁰*Equities Keep Falling in Value as Prices Drop & California's Woes Continue*, PIPELINE & GAS J., Aug. 1, 2001, at 14.

¹¹*No Accounting for Logic: Enron Lives as Penny Stock*, WALL ST. J., Nov. 27, 2002, at C1.

¹²Ellen E. Schultz, *Enron Workers Face Losses on Pensions, Not Just 401(k)s*, WALL ST. J. Dec. 19, 2001, at C1.

¹³Kathryn Kranhold and Tom Hamburger, *Accounting for Enron: Investigation Raises Oliver North Problem*, WALL ST. J., Jan. 18, 2002, at C15.

¹⁴*Id.*; and e.g., *U.S. Senator Paul Sarbanes (D-DM) Holds Hearing on Enron Accounting and Investor Issues*, Before the Senate Comm. on Banking, Hous. and Urban Affairs, 107th Cong.

Enron's business and accounting practices and lawsuits¹⁵ against Enron began to pile up. "The Enron Factor has extended to bankruptcy legislation pending in Congress, securities, and even professional conduct rules for lawyers."¹⁶

Central to this investigation has been Arthur Andersen's (Andersen) involvement with Enron.¹⁷ Andersen performed both the roles of accountant and consultant.¹⁸ Enron paid Andersen twenty-five million dollars for audit services and twenty-seven million dollars for consulting work and other related services.¹⁹ The consulting and related services often include legal services under the guise of tax advice.²⁰ In reviewing the MDP definition mentioned above, Andersen's tax lawyers and accountants worked together and shared ownership and fees making it a defacto MDP. Much of the blame levied at Andersen's accountants and lawyers

(Feb. 12 2002).

¹⁵E.g., *Newby v. Enron Corp.*, 188 F.Supp.2d 684 (S.D. Tex. 2002).

¹⁶*No Accounting for Logic: Enron lives as Penny Stock*, *supra* note 11.

¹⁷E.g., *Destruction of Enron Audit Documents*, Hearing before the Oversight and Investigations Subcommittee, 107th Cong. (Jan. 24, 2002). (Opening statement of Rep. Edward J. Markey).

¹⁸*Corporate Responsibility*, Hearing Before the Subcommittee on consumer Affairs, Foreign Commerce and Tourism Committee on Senate Commerce, Science, and Transportation, 107th Cong. (July 18, 2002) (statement by Joan Claybrook President, Public Citizen).

¹⁹Daniel Kadlec, *Who's Accountable?; Inside the growing Enron scandal: how evidence was shredded and top executives fished for a bailout as the company imploded*, TIME, Jan. 21, 2002, at 34. *See also*, *Corporate Responsibility*, *supra* note 18.

²⁰C.f. Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 234-35 (2000) (Discussing how "the big five's strategies for establishing and expanding their legal services capability).

relates to MDP issues including loyalty, confidentiality and independent judgment.²¹

d. Rules impacting the existence of MDP in the United States:

The ABA is a professional association that is regarded as the “national leader for discussing, drafting, and promulgating rules governing lawyer conduct.”²² The individual state courts and legislatures are charged with the responsibility of regulating their legal systems.²³ The ABA has no direct authority over lawyers in the U.S.; however it is very influential with respect to state courts and legislatures.²⁴ State courts frequently adopt the ABA’s Model Rules of Professional Conduct in similar form.²⁵ In addition to the model rules adopted by 40 states,²⁶

²¹Davis, *supra* note 9, at 5.

²²Katherine L. Harrison, *Multidisciplinary Practices: Changing the Global View of the Legal Profession*, U. PA. J. INT’L ECON. L. 879, 887 (2000) (citing Promoting Professionalism: ABA Programs, Plans and Strategies, at 9). Additional information concerning this material is available by telephoning 1-800-285-2221.

²³John H. Matheson and Edward S. Adams, *Not “If” but “How”: Reflecting on the ABA Commission’s Recommendations on Multidisciplinary Practice*, 83 MINN. L. REV. 1269, 1274 (2000).

²⁴*Id.*

²⁵Thomas R. Andrew, *Nonlawyers in the business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 596-900 (1989).

²⁶ Those states that have not adopted some version of the Model Rules have adopted a version of the Model Code of Professional Responsibility. *See generally*, Thomas D. Morgan and Ronald D. Rotunda, 2002 Selected Standards on professional Responsibility (Foundation Press 2002); and Laws, Man. on Prof. Conduct (ABA/BNA) 91:402 (May 18, 1994)). Rule 5.4(b) and (d) are identical to the DR 3-103(A) and DR 5-107 of the Model Code of Professional Responsibility, respectively. Laws, Man. on Prof. Conduct (ABA/BNA) 91:402 (May 18, 1994)). Guidelines similar to those in ABA Model Rule 5.4(b) and (d) can be found in the ethics codes of 49 states, all except North Carolina. *Id.*

several states have adopted Unauthorized Practice of Law (UPL) statutes,²⁷ which carry various penalties and are intended to limit legal practice by unlicensed individuals.²⁸

Several barriers to MDP exist in the Model Rules including Rule 5.4 - Prohibition of Fee sharing with Nonlawyers, Rule 1.6 - Confidentiality of Information and Rule 1.10 Imputed Disqualifications.²⁹ Rule 5.4 of the Model Rules of Professional Conduct (Professional Independence of a Lawyer) prohibits the creation of an entity that provides legal services where the partners include lawyers and nonlawyers.³⁰ Rule 5.4(a) states that a “lawyer or law firm shall

²⁷In Florida for example, Bar Rule 1-8.2 provides:

The board of governors shall act as an arm of the Supreme Court of Florida for the purpose of seeking to prohibit the unlicensed practice of law by investigating, prosecuting, and reporting to this court and to appropriate authorities incidents involving the unlicensed practice of law in accordance with chapter 10.

FLA. BAR RULE 1-8.2 (West 1994).

²⁸Florida Statute section 454.23 states that:

Any person not licensed or otherwise authorized by the Supreme Court of Florida who shall practice law or assume or hold himself or herself out to the public as qualified to practice in this state, or who willfully pretends to be, or willfully takes or uses any name, title, addition, or description implying that he or she is qualified, or recognized by law as qualified, to act as a lawyer in this state, and any person entitled to practice who shall violate any provisions of this chapter, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

FLA. STAT. ch. 454.23 (2001).

²⁹MODEL RULES OF PROF'L CONDUCT R. 5.4, 1.6, and 1.10 (1997).

³⁰MODEL RULES OF PROF'L CONDUCT R. 5.4. Since Model Rule 5.4 is a barrier to the establishment of MDPs it is included in this footnote. Model Rule 5.4 provides:

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

- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or

not share legal fees with a nonlawyer.”³¹ Rule 5.4(b) further states 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.”³² Additionally, Rule 5.4(d) states that a lawyer “shall not practice with or in the form of a Professional Corporation or an Association authorized to practice law if a nonlawyer has any interest therein, as a corporate director or officer, or has the right to direct or control the professional judgment of the lawyer.”³³ Therefore a lawyer cannot have nonlawyer partners.

Model Rule 1.6 provides in relevant part that a lawyer may not reveal a client’s information without that client’s consent.³⁴ In a MDP, confidentiality may be lost for any

retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

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

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

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

(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.

³¹*Id.*

³²*Id.*

³³*Id.*

³⁴MODEL RULES OF PROF’L CONDUCT R. 1.6(a). The exceptions to the confidentiality of client information allow divulging client information to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or substantial injury to the financial interest or property of another. *Id.* Model Rule 1.6 provides:

information conveyed by the client to the lawyer in the presence of any third person not connected with the representation.³⁵

Concern exists as to whether the client will know when the confidentiality privilege applies in the scenario where multiple professionals are providing a client with information on legal and other issues.³⁶ As such, the client may believe his communications with persons in the MDP are protected when in fact, they are not.

Model Rule 1.10 requires the imputation of conflicts of interest to all members of a law firm.³⁷ If any member of a firm has a conflict with a particular client, then the firm shall not

(a) 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, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id.

³⁵See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 25 (1998).

³⁶See 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).

³⁷MODEL RULES OF PROF'L CONDUCT R. 1.10. Model Rule 1.10 provides:

(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 Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse

represent the client.³⁸ For example, if one lawyer in the MDP represents a client and owes that client the duty of confidentiality, all members of the firm owe that same duty. This creates a conflict when another member of the MDP is supposed to perform audit services for the same client because audit services require public disclosure. To study these conflicts with respect to MDP, the ABA created a commission.³⁹

e. The ABA studies MDP:

The ABA created the Commission on Multidisciplinary Practice (MDP Commission) in 1998.⁴⁰ The purpose of the MDP Commission was to study MDP and propose appropriate changes to the Model Rules of Professional Conduct with respect to “the delivery of legal services by professional services firms.”⁴¹ To provide for different points of view on the issue of

to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter. (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Id.

³⁸PROFESSIONAL RESPONSIBILITY STANDARDS, RULES AND STATUTES, 42 (John S. Dzienkowski ed., 1999). Rule 1.10 operates from the “premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.” *Id.*

³⁹Commission on Multidisciplinary Practice to the ABA House of Delegates, *Report to the House of Delegates*, Jan.1999, at Report, *available at* <http://www.abanet.org/cpr/mdpreport.html>.

⁴⁰*Id.*

⁴¹*Id.*

MDP, the committee members included lawyers, judges, and academics.⁴² In 1999, after substantial investigation and discussion, the MDP Commission recommended that Rule 5.4 be redrafted to permit lawyers and nonlawyers to share fees and form partnerships.⁴³ The MDP Commission further “concluded that with appropriate safeguards a lawyer can deliver legal services to the clients of an MDP without endangering the core values of the legal profession or the interests they are designed to protect.”⁴⁴ In fact, the MDP Commission drafted a proposed Model Rule 5.8, Responsibilities of a Lawyer in a Multidisciplinary Practice.⁴⁵ The proposed rule mandates that the same ethics rules applicable to lawyers in the practice of law shall govern MDP.⁴⁶

⁴²See Commission on Multidisciplinary Practice to the ABA House of Delegates, *Background Paper on Multidisciplinary Practice: Issues and Developments*, *supra* note 1, at 2.

⁴³Commission on Multidisciplinary Practice to the ABA House of Delegates, *Report to the House of Delegates*, *supra* note 39.

⁴⁴*Id.*

⁴⁵*Id.* at Appendix A, available at <http://www.abanet.org/cpr/mdpappendixa.html>.

⁴⁶*Id.* Proposed Rule 5.8 provides:

- (a) A lawyer shall not share legal fees with a nonlawyer or form a partnership or other entity with a nonlawyer if any of the activities of the partnership or other entity consist of the practice of law except that a lawyer in an MDP controlled by lawyers may do so, subject to the present provisions limiting the holding of equity investments in any entity or organization providing legal services. A lawyer in an MDP not controlled by lawyers may do so, subject to the conditions set forth in paragraphs (c)(1)-(5), and subject to the present provisions limiting the holding of equity investments in any entity or organization providing legal services.
- (b) A lawyer in an MDP remains subject to all the Model Rules of Professional Conduct, unless this Rule provides otherwise.
- (c) A lawyer may practice in an MDP in which lawyers do not own a controlling interest only if the MDP provides the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in the delivery of legal services written undertakings signed by the chief executive officer (or similar official) and the board of directors (or similar body) that:

After two years of investigation and discussions, the MDP Commission's recommendation to favor allowing MDP was rejected by the ABA House of Delegates at the

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

Id.

July 11, 2000 annual meeting.⁴⁷ Several state bar associations including New York, Florida, Illinois, and Ohio opposed the MDP Commission's pro-MDP agenda.⁴⁸ Through these states' efforts, Resolution 10F was passed.⁴⁹ Resolution 10F promoted the retention of core values of the practice of law including independent professional judgment, loyalty to the client, protection for the attorney client privilege, avoidance of conflict of interest, promoting access to justice and maintaining a single profession of law.⁵⁰ In addition, Resolution 10F discharged the MDP Commission, terminating the ABA's investigation of the MDP issue.⁵¹ The general rule in the U.S. continues to be the prohibition of MDP. An exception to this general rule exists in the District of Columbia where MDP is permitted.⁵²

f. MDP in the District of Columbia:

The District of Columbia is the only jurisdiction in the United States that has adopted a version of Rule 5.4 which allows partnership arrangements and fee sharing between lawyers and

⁴⁷See Commission on Multidisciplinary Practice to the ABA House of Delegates, *American Bar Association Commission on Multidisciplinary Practice Report to the House of Delegates*, July 2000, available at <http://www.abanet.org/cpr/mdpfinalrep2000.html>.

⁴⁸See Commission on Multidisciplinary Practice to the ABA House of Delegates, *Report 10F*, July 2000, available at <http://www.abanet.org/cpr/mdp-report10f.html>.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.*

⁵²See D.C. RULES OF PROF'L CONDUCT R. 5.4 (2000).

nonlawyers.⁵³ Although the D.C. rule permits MDP, it is restrictive as it allows a MDP as long as the partnership agreement is structured as a law firm that provides legal services to clients.⁵⁴ As adopted by D.C., ABA Formal Opinion 91-360⁵⁵ further narrows the rules governing MDP in

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- ⁵³See D.C. RULES OF PROF'L CONDUCT R. 5.4 (2000). The D.C. rule provides:
- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
 - (1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) A lawyer who 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;
 - (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; and
 - (4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b).
 - (b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:
 - (1) The partnership or organization has as its sole purpose providing legal services to clients;
 - (2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;
 - (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;
 - (4) The foregoing conditions are set forth in writing.
 - (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Id.

⁵⁴See Commission on Multidisciplinary Practice to the ABA House of Delegates, *Background Paper on Multidisciplinary Practice: Issues and Developments*, *supra* note 1, at 17 n.5.

⁵⁵ABA Commission on Ethics and Professional Responsibility, Formal Opinion 91-360 (1991), *available in* Laws, Man. on Prof. Conduct (ABA/BNA) 1001:105 (Mar. 25, 1992).

D.C. It prohibits law firms with offices in more than one jurisdiction from forming partnerships with nonlawyer professionals in the D.C. office.⁵⁶ With these restrictions, it appears that D.C. only allows fee sharing and partnerships between lawyers and nonlawyers all located in D.C., where lawyers are providing legal services and the nonlawyers are providing incidental or support services.⁵⁷ For example, the D.C. rule allows family lawyers to work with psychologists who assist in counseling clients and tax lawyers to work with accountants on tax issues.

The D.C. rule allows the lawyer and nonlawyer to work together in providing legal services without delegating the nonlawyer to the role of employee.⁵⁸ The nonlawyer is entitled to have a financial interest in the law firm and exercise management control over the firm's business, as long as the nonlawyer performs services to assist the business in providing legal services to its clients.⁵⁹ This provides for more flexibility in structuring the business arrangement between lawyers and nonlawyers who choose to work together. Clearly this type of arrangement should be helpful to attorneys and law firms that require investment capital or management expertise.

g. MDP in Countries other than the United States:

Several countries including Canada, Australia, France, Spain, Switzerland, and Belgium

⁵⁶*Id.*

⁵⁷Harrison, *supra* note 22, at 887.

⁵⁸Gianluca Morello, *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, 207 (1997).

⁵⁹*Id.* at 208.

currently allow MDP.⁶⁰

1. Canada:

In 1997, the Canadian Bar Association (CBA) established the International Practice of Law Committee (Committee) to “assist in the development of the CBA’s ‘position’ with respect to the globalization of legal practice and the trend toward multi-disciplinary practices.”⁶¹ The Committee recommended allowing MDP and proposed discussions on seven approaches to effective regulation.⁶² The first approach, called Laissez-Faire, details that no specific attempt be made to regulate MDP.⁶³ This concept proffers the idea that MDPs should give express notice to potential customers and explain the nature and risks associated with using a MDP so that an informed choice may be made.⁶⁴ This approach seems similar to caveat emptor. It does not provide for any safeguards for the concerns of MDP opponents in the U.S., so it is doubtful that this model would receive widespread acceptance in the U.S.

Rather than regulate specific issues, the second concept provides for regulation of the fundamental values.⁶⁵ Although MDPs would have to meet specific requirements, the lawyers in

⁶⁰*Harrison, supra* note 22, at 918.

⁶¹Special Committee on the International Practice of Law, *Multi-Disciplinary Practices: An Interim Report*, Aug. 1998, at i (presented at the 1998 Annual Meeting of Council), available at <http://www.cba.org/mdp/BackGroundPapers>.

⁶²*Id.* at 4.

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Id.*

the MDPs would be responsible for meeting them.⁶⁶ In other words, the requirements might dictate that the MDP is to avoid conflicts of interest between customers and persons in the MDP but leave the method for achieving that objective to the lawyer's discretion. With the high degree of concern regarding MDP voiced by the U.S. legal profession, it is doubtful that this model for regulation would gain general acceptance.

In contrast to regulating fundamental values, the third approach to regulation recommends addressing specific issues and potential problems.⁶⁷ It is doubtful that any group could identify all the issues and problems that could occur with MDP. This method would also require exhaustive time and effort to work out the details.⁶⁸

The Committee also suggests regulating the services provided by MDPs in an effort "to promote more effective and targeted regulation."⁶⁹ This model is currently used in the District of Columbia, where MDPs are strictly limited to providing legal services to clients.⁷⁰ Although restrictive with respect to MDP, this model alleviates many of the concerns of the ABA's Commission on MDP discussed earlier in this article. It is doubtful that MDP advocates would desire this form of regulation as it would be extremely limiting. It would not provide for the objectives of the "Big Five,"⁷¹ who have been the driving force behind the legalization of MDP

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*See* D.C. RULES OF PROF'L CONDUCT R. 5.4.

⁷¹The Big Five are the largest public accounting firms. The Big Five include Ernst and Young, Andersen, Price Waterhouse Coopers, KPMG, and Deloitte and Touche. For statistics

in the U.S.⁷²

The fifth approach is to regulate MDPs and the lawyers in them.⁷³ Both MDP and the lawyers engaged in the MDPs would be subject to the relevant regulations.⁷⁴ The effect of this concept would be to expand the authority of provincial law societies⁷⁵ to cover nonlawyers by contractual agreement.⁷⁶

The Committee also proposed the concept of requiring lawyers to dominate MDPs.⁷⁷ The reason for placing lawyers in control is to force the MDPs to operate with the same ethical rules and standards of professional conduct as lawyers.⁷⁸ However this model would be less desirable to others in the MDP since they could not control the MDP regardless of how much money they might invest in it.

The seventh and final proposal suggested by the Committee would be a general

regarding the size and scope of these firms see George Swan, *The Political Economy of Interprofessional Imperialism: The Bar and Multidisciplinary Practice, 1999-2001*, 24 J. LEGAL PROF. 151, 156-57 (2000).

⁷²Boyd, *supra* note 5, at 41. Professor Boyd notes that entry into the legal services profession by the Big Five is an explicit strategy that is being eagerly pursued by these firms. *Id.* “If these firms see themselves as “global professional services firms,” then legal advice to business must fall squarely into the centre (sic) of this definition.” *Id.*

⁷³Special Committee on the International Practice of Law, *Multi-Disciplinary Practices: An Interim Report*, *supra* note 61, at 5.

⁷⁴*Id.*

⁷⁵Provincial law societies are equivalent to state bar associations in the U.S.

⁷⁶Special Committee on the International Practice of Law, *Multi-Disciplinary Practices: An Interim Report*, *supra* note 61, at 5.

⁷⁷*Id.*

⁷⁸*Id.*

prohibition of MDP with the possibility of a firm obtaining an exemption from the general rule.⁷⁹ This approach would require potential MDPs to apply to the appropriate law society with a proposal on how it would provide for the retention of the core concepts (ethics issues).⁸⁰ The potential MDP would also be required to show that it also satisfies the requirements of any other relevant professional body (such as the Canadian Institute of Chartered Accountants; CICA) before such approval or licensing could occur.⁸¹ Unfortunately, this approach would undoubtedly require costly applications and supervision by the appropriate professional bodies. The Big Five, lawyers, and bar associations would probably view this approach as undesirable because of its restrictive nature.

The Canadian Bar Association adopted resolution 00-03A in August 2000.⁸² This

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹*Id.*

⁸²Canadian Bar Association, *Canadian Bar Association August 2000 MDP Resolution 00-03-A* (Aug. 2000), available at <http://www.cba.org/epigram/november2000/resolution%5F00%2D03%2Da.asp>. The resolution passed by the Canadian Bar Association in detail provides:

BE IT RESOLVED THAT:

1. Lawyers should be permitted to practice in MDPs provided that the MDP's delivery of legal services is controlled by lawyers.
2. Lawyers should be permitted to share fees with non-lawyers in MDPs.
3. The relevant law society** should require MDPs to obtain a licence as a condition to offering legal services. Licences should be conditional on the MDP satisfying the law society that it has taken all reasonable steps to comply with the core values, ethical obligations, standards and rules of professional conduct of the legal profession. The law society should be empowered to suspend or withdraw an MDP's licence to offer legal services in the event of non-compliance.
4. MDPs should be regulated under comprehensive principles which apply to MDPs whether the MDPs are fully integrated partnerships, involve "captive" or "affiliated" law firms, operate under the same trade name as another firm or otherwise are held out to the public as constituting one firm or having integrated

resolution was further amended by CBA Resolution 01-01-M.⁸³ The CBA proposes that fee

management or business relations.

5. MDPs should be required to adhere to the core values, ethical obligations, standards and rules of professional conduct of the legal profession. These include, but are not limited to, respect for the confidentiality of client information, protection of solicitor-client privilege and avoidance of conflicts of interest.

6. MDPs should be required to ensure that they comply with the core values, ethical obligations, standards and rules of professional conduct of the legal profession and remain responsible for their failure to do so. Lawyers should not practice in an MDP that fails to comply with these requirements.

7. Law societies should require that the MDP:

a. advises clients that the firm includes those who are not subject to the legal profession's values, obligations, standards and rules; and

b. maintains insurance for each lawyer practicing in the MDP that is:

i. of at least the same nature, scope and quantum as that required for other practicing lawyers; and

ii. of such a nature and quantum that no additional risks are added to the insurance coverage carried for lawyers by or on behalf of the law society than would be the case were the lawyers in the MDP not practicing with non-lawyers.

8. Law societies should develop rules for ensuring that lawyers do not practice in MDPs with other service providers having conflicting ethical responsibilities. For instance, lawyers practicing in MDPs should not provide legal services to clients who retain the MDP for auditing services.

9. The CBA and law societies should develop rules which will address:

a. the protection and preservation of solicitor-client privilege and confidentiality and the avoidance of conflicts of interest within MDPs, and in this latter regard those rules ought to consider every client of the MDP also to be the client of each lawyer within it; and

b. the obligation of lawyers practicing in MDPs to maintain the secrecy and confidentiality of a client's affairs and documents when others in the firm may be subject to statutory or regulatory disclosure obligations.

10. Only lawyers and Quebec notaries should be permitted to practice law in MDPs. Law society regulation governing the unauthorized practice of law should apply to MDPs.

*"Lawyer" includes Quebec notaries throughout.

**"Law society" refers throughout to all provincial and territorial governing bodies of the legal profession, including the Barreau du Québec and the Chambre des notaires.

Id.

⁸³Canadian Bar Association, *Resolution 01-01-M Multi-Disciplinary Practices* (2000), available at

<http://www.cba.org/news/releases/2001%5Freleases/01%2D02%2D19%5Fresolution.asp>.

Resolution 01-01-M amends Resolution 00-03-A as follows:

WHEREAS in 1997 the Canadian Bar Association established the International Practice of Law Committee, whose mandate includes recommending a policy framework to the CBA concerning multi-disciplinary practices (MDPs) which offer legal services;

WHEREAS MDPs are business arrangements in which lawyers* and non-lawyers practice together to provide a broad range of advice, including legal advice, to consumers, and which encompass a variety of forms, from highly integrated organizations with lawyers and non-lawyers working under one ownership structure to loose referral networks,

WHEREAS the Committee issued its report in August 1999, entitled Striking a Balance;

BE IT RESOLVED THAT:

1. Lawyers should be permitted to practice in MDPs provided that the MDP's delivery of legal services is controlled by lawyers.
2. Lawyers should be permitted to share fees with non-lawyers in MDPs.
3. The relevant law society** should require MDPs to obtain a licence as a condition to offering legal services. Licences should be conditional on the MDP satisfying the law society that it has taken all reasonable steps to comply with the core values, ethical obligations, standards and rules of professional conduct of the legal profession. The law society should be empowered to suspend or withdraw an MDP's licence to offer legal services in the event of non-compliance.
4. MDPs should be regulated under comprehensive principles which apply to MDPs whether the MDPs are fully integrated partnerships, involve "captive" or "affiliated" law firms, operate under the same trade name as another firm or otherwise are held out to the public as constituting one firm or having integrated management or business relations.
5. MDPs should be required to adhere to the core values, ethical obligations, standards and rules of professional conduct of the legal profession. These include, but are not limited to, respect for the confidentiality of client information, protection of solicitor-client privilege and avoidance of conflicts of interest.
6. MDPs should be required to ensure that they comply with the core values, ethical obligations, standards and rules of professional conduct of the legal profession and remain responsible for their failure to do so. Lawyers should not practice in an MDP that fails to comply with these requirements.
7. Law societies should require that the MDP:
 - a. advises clients that the firm includes those who are not subject to the legal profession's values, obligations, standards and rules; and
 - b. maintains insurance for each lawyer practicing in the MDP that is:
 - i. of at least the same nature, scope and quantum as that required for other practicing lawyers; and
 - ii. of such a nature and quantum that no additional risks are added to the insurance

sharing between lawyers and nonlawyers be allowed.⁸⁴ However, the practice of law and business activities in the MDPs must be effectively controlled by the lawyers in the MDPs.⁸⁵ MDPs must follow the core values, ethical rules, and standards of professional conduct required by the legal profession.⁸⁶ Lawyers are not to practice in MDPs that do not follow these directives.⁸⁷ The CBA urges Provincial Law Societies to follow these concepts when drafting their own rules and emphasizes that they guard against lawyers forming MDPs with service

coverage carried for lawyers by or on behalf of the law society than would be the case were the lawyers in the MDP not practicing with non-lawyers.

8. Law societies should develop rules for ensuring that lawyers do not practice in MDPs with other service providers having conflicting ethical responsibilities. For instance, lawyers practicing in MDPs should not provide legal services to clients who retain the MDP for auditing services.

9. The CBA and law societies should develop rules which will address:

a. the protection and preservation of solicitor-client privilege and confidentiality and the avoidance of conflicts of interest within MDPs, and in this latter regard those rules ought to consider every client of the MDP also to be the client of each lawyer within it; and

b. the obligation of lawyers practicing in MDPs to maintain the secrecy and confidentiality of a client's affairs and documents when others in the firm may be subject to statutory or regulatory disclosure obligations.

10. Only lawyers and Quebec notaries should be permitted to practice law in MDPs. Law society regulation governing the unauthorized practice of law should apply to MDPs.

* "Lawyer" includes Quebec notaries throughout.

** "Law society" refers throughout to all provincial and territorial governing bodies of the legal profession, including the Barreau du Québec and the Chambre des notaires.

Id.

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Id.*

providers that have conflicting ethical responsibilities.⁸⁸ This suggests that while the CBA supports the concept of MDP, they would not support the concept of Accountant-Lawyer MDP because of the inherent conflict between a lawyer's duty of confidentiality and an auditor's duty of disclosure.

To date, the Law Society of Upper Canada (Ontario, Canada) has been the only Provincial Law Society to adopt these rules and allow MDP.⁸⁹ In an approved MDP, lawyers are permitted to share fees with nonlawyers.⁹⁰ Lawyers are responsible for informing clients that they are rendering legal services to the client and receiving supplemental services from a nonlawyer.⁹¹ A client must provide payment for supplemental services by nonlawyers in the MDP separate from the retainer given for legal services.⁹² Lawyers in MDPs must act as the watchdogs to ensure that their nonlawyer partners follow the rules regarding MDPs.⁹³

2. Australia:

In Australia there are twelve State and Territory Bar Associations and Law Societies

⁸⁸*Id.*

⁸⁹Canadian Bar Association, *Modernizing the CBA Code of Professional Conduct - A Consultation Paper*, EMERGING PROF'L ISSUES INITIATIVE NEWSL, Feb. 2002, available at <http://www.cba.org/EPIIgram/february2002/>.

⁹⁰Law Society of Upper Canada, REVISED RULES OF PROF'L CONDUCT R. 2.08(10). available at <http://www.lsuc.on.ca/services/contents/rule2.jsp> (last visited 4/3/02).

⁹¹*Id.* at 2.01 commentary.

⁹²*Id.*

⁹³*Id.* at 2.04(13) commentary.

which are represented by the Law Council of Australia.⁹⁴ This Law Council represents 35,000 lawyers in Australia.⁹⁵ MDP had historically been prohibited in Australia.⁹⁶ However, in 1994, the Australian Trade Practices Commission, currently known as the Australian Competition and Consumer Commission (AC&CC), recommended that all jurisdictions in Australia repeal the rules preventing lawyers from sharing fees with nonlawyers.⁹⁷ The AC&CC also recommended the repeal of the rules preventing lawyers from incorporating their practices to form MDPs and incorporated practices.⁹⁸ Only New South Wales has amended their rules to permit MDP.⁹⁹ In

⁹⁴Fabian Dixon and Peter Levy, *Paris Forum on Transnational Practice for the Legal Profession* (Discussion Paper: Presented by the Law Council of Australia), 18 DICK. J. INT'L L. 137, 137 (1999).

⁹⁵*Id.*

⁹⁶See Steven Mark, *Harmonization or Homogenization? The Globalization of Law and Legal Ethics - An Australian Viewpoint*, 34 VAND. J. TRANSNAT'L L. 1173 (2001).

⁹⁷*Id.* at 1195.

⁹⁸Dixon, *supra* note 94, at 141-142.

⁹⁹See LAW SOCIETY OF NEW SOUTH WALES SOLICITOR'S RULE 40 (Multi-disciplinary partnerships) available at <http://www.lawsocnsw.asn.au/profreg/solrules/solrules-40.html> (last visited 4/3/02.) This rule provides that:

40. A practitioner who conducts a legal practice in partnership with other persons who are not practitioners holding New South Wales practicing certificates entitling them to practice on their own account or in partnership whether or not the partnership provides, or offers to provide other services in addition to the legal services provided by the practice must ensure that:

40.1 the New South Wales practitioners who are members of the partnership must have the authority and responsibility for the management of the legal practice and delivery of legal services in NSW;

40.2 the partnership conducts the legal practice and delivers legal services in compliance with the Legal Profession Act, the Regulations and Rules made thereunder;

40.3 the partnership conducts the legal practice and delivers legal services in conformity with the general requirements of the law, established ethical and professional standards in relation to areas such as client privilege, conflict of

fact, it is the only jurisdiction in the world to allow legal entities, such as MDPs, to incorporate as businesses.¹⁰⁰ The predominate statutory restraint that enjoins MDP in all jurisdictions but New South Wales is the prohibition on fee sharing between lawyers and nonlawyers.¹⁰¹

In 1999, twenty six MDPs existed in New South Wales.¹⁰² The typical MDP is a small partnership joining one or a few lawyers and accountants, insurance consultants, industrial relations consultants, migration consultants or other service providers.¹⁰³ When the concept of MDP was being investigated in New South Wales there was great concern that the Big Five would establish MDPs.¹⁰⁴ This phenomenon has not occurred.¹⁰⁵ Instead, traditional law firms have partnered with the Big Five.¹⁰⁶ To date, no complaints have been registered with the office of the legal services commissioner regarding these MDPs.¹⁰⁷ It is interesting that no complaints

interest and duties to disclose;

40.4 the partnership conducts the legal practice and delivers legal services in a way that ensures that the ethical and professional duties of solicitor members of the partnership are not affected by other members of the partnership;

40.5 the services offered by the partnership are accurately and fairly represented to clients and potential clients and that the partnership should disclose to clients the qualifications of persons providing those services.

Id.

¹⁰⁰Mark, *supra* note 96, at 1195.

¹⁰¹Dixon, *supra* 94, at 142.

¹⁰²Mark, *supra* note 96, at 1201.

¹⁰³*Id.*

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 1202.

have been registered considering the numerous concerns and negative view of MDP by lawyers in North America.

3. Other Countries - Germany and the Netherlands:

MDP proponents frequently cite Europe as a successful example of MDP.¹⁰⁸ However, in a survey of 350 of England's largest corporations, eighty-eight percent of the corporations "do not want an amalgamation of their now independent lawyers and accountants," a view shared by both chief financial officers and chief legal officers.¹⁰⁹

In Germany, lawyers have a constitutional right to partner with nonlawyers in MDP.¹¹⁰ The German Constitutional Court, the Bundesverfassungsgericht, decided the case in 1982 substantiating the propriety of MDP.¹¹¹ The court found the regulations that prohibited German tax advisors from partnering with nontax advisors were unconstitutional as they violated the constitutional guarantee of freedom of professional practice.¹¹² Since 1982, German authorities

¹⁰⁸Stephanie Francis Cahill, *MDP-Free Europe? European High Court Rules Against Multidisciplinary Practice*, A.B.A. J. EREPORT, Mar. 1, 2002, 1 No 8 ABAJEREP 2.

¹⁰⁹Bernard Wolfman, Hearing Testimony on Multidisciplinary Practice to the Commission on Multidisciplinary Practice (Feb. 12, 2000), *available at* <http://www.abanet.org/cpr/wolfman4.html>.

¹¹⁰Laurel S. Terry, *German MDPS: Lessons to Learn*, 84 MINN. L. REV. 1547, 1560 (2000).

¹¹¹*Id.* (citing Bundesverfassungsgericht [BverfG] [StB] (1982), 219).

¹¹²*Id.* (citing Bundesverfassungsgericht [BverfG] [StB] (1982), 219).

have maintained that German lawyers have a constitutional right to partner with nonlawyers since any limitation on MDP would not be necessary to secure the core values of confidentiality, independence and answerability of German lawyers.¹¹³ German rules on MDP have since been codified in the Berufsordnung legal ethics rules and BRAO legislation and MDP was approved in the 1994 revisions of the BRAO.¹¹⁴ The BRAO is the federal statute that regulates lawyers in Germany.¹¹⁵ The German findings that MDP does not interfere with the cores values of the legal profession are interesting since they are opposite to what several other countries have described.

Although MDP is allowed in several European countries, the European High Court of Justice recently ruled that lawyers in the Netherlands may be specifically restricted from partnering with accounting firms.¹¹⁶ This case involved Dutch lawyers who wanted to form a partnership with PriceWaterhouseCoopers and Andersen Legal, a division of Andersen Worldwide that employs 3,600 lawyers in 36 countries.¹¹⁷ The governing body for lawyers, the General Council of the Netherlands, has barred the formation of MDPs by lawyers and accountants since 1993.¹¹⁸ The Dutch Bar's complaint alleged that the companies were violating professional rules of conduct by allowing accountants and lawyers to work together in a MDP.¹¹⁹

¹¹³*Id.* (quoting Bundesverfassungsgericht [BverfG] [StB] (1982), 219).

¹¹⁴*Id.* (quoting Bundesverfassungsgericht [BverfG] [StB] (1982), 219).

¹¹⁵Terry, *supra* note 110 at 1557.

¹¹⁶Cahill, *supra* note 108.

¹¹⁷*Id.*

¹¹⁸*Id.*

¹¹⁹*Id.*

The lower court upheld the Dutch Bar's position regarding the prohibition of the accountant-lawyer partnership.¹²⁰ Although the Netherlands allows MDP, it is evident that they are not willing to group accountant-lawyer MDPs with other MDPs since they so strongly opposed them in this case. Although this European decision might not normally have a large impact on American views on MDP, its combination with the allegations that Andersen approved Enron's misleading financial statements leading to Enron's collapse is certain to slow any progress by the Big Five toward legalizing MDP in the U.S.

h. Summary of the Literature - U.S. cases involving MDP and the Unauthorized Practice of Law

One of the reasons that the ABA has been unsuccessful in keeping the Big Five out of the practice of law was the United States Supreme Court's decision in *Goldfarb v. Virginia State Bar*.¹²¹ The Court in *Goldfarb* held that non-public bar associations are subject to federal antitrust laws and as such, not permitted to limit competition between lawyers and nonlawyers.¹²² The definition of non-public bar associations encompassed organizations such as the ABA and non-mandatory state and local bar associations.¹²³ This decision effectively takes the teeth out of any ABA action to prevent other groups, such as accounting firms, from practicing law. As witnessed by the ABA's termination of its active Committee on Unauthorized Practice of Law in

¹²⁰*Id.*

¹²¹421 U.S. 773 (1975).

¹²²*Id.* at 792-93 (The Virginia Bar association was unable to prove that the state-action exemption applied to them).

¹²³*Id.*

1984,¹²⁴ the ABA has shifted its efforts away from actively enforcing the prohibition of the legal practice upon competing professions.

However, one state court has recently made the prosecution of the unauthorized practice of law more easily enforceable.¹²⁵ An Illinois appellate court held that “because the practice of law by an entity not licensed constitutes an infringement upon the rights of those who are properly licensed, attorneys and law firms have standing to bring a cause of action for such unauthorized practice of law.”¹²⁶ This is “the first [Illinois] case in sixty years to affirm the right of attorneys to file an action to block the unauthorized practice of law.”¹²⁷

Still, state courts have shown a reluctance to prosecute accountants who practice law.¹²⁸ Evidence of such judicial support for accountants to practice law is illustrated in *Knight v. Day*.¹²⁹ In this 2001 Arkansas case, Knight alleged that Day, an accountant, committed accounting malpractice and engaged in the illegal practice of law without a license.¹³⁰ While

¹²⁴Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 262 n.120 (2002).

¹²⁵See *Richard F. Mallen & Associates, Ltd. v. Myinjuryclaim.com Corp.*, 769 N.E.2d 74 (Ill. 1st Dist. 2002) (rejecting that only the state bar association may bring an action for the unauthorized practice of law).

¹²⁶*Id.* at 76.

¹²⁷*Major victory notched in ULP war*, ISBA BAR NEWS, May 1, 2002, at 1, available at <http://www.isba.org/Association/025-1a.htm#gen15>.

¹²⁸E.g., *Knight v. Day*, 36 S.W.3d 300, 343 (Ark. 2001); E.g., *In Re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 422 S.E.2d 123, 125 (S.C. 1993).

¹²⁹*Knight*, 36 S.W.3d at 343.

¹³⁰*Id.*

Day did not hold himself out as a lawyer, Day held himself out as capable of practicing law and did in fact, incorrectly interpret Arkansas law and regulations, advise Knight to set up an s-corporation, and set up the s-corporation for Knight.¹³¹ The Supreme Court of Arkansas held that Day did not commit constructive fraud by engaging in the unauthorized practice of law.¹³²

The decision of the Supreme Court of South Carolina in *In Re Unauthorized Practice of Law Rules Proposed By the South Carolina Bar* further supports the contention that certified public accountants do not engage in the unauthorized practice of law when they render professional assistance within their professional expertise and qualifications.¹³³ This approach helps create a gray area of services that accountants may perform. Apparently, the services that qualify under this area has grown. This is illustrated by the figures representing the accounting and other services provided by Andersen to Enron, to the point where billing for other services exceeds that of accounting services.¹³⁴ Of the forty-one million dollars that BristolMyersSquibb paid to PricewaterhouseCoopers in 2001, approximately thirty-eight million was payment for

¹³¹*Id.*

¹³²*Id.* (Glaze, J. and Glaze, T., dissenting). Justice Tom Glaze wrote a blazing dissent criticizing the majority for not recognizing that Day actually practiced law. *Id.* (Glaze, T., dissenting). The majority seemed to indicate that a person can practice law as long as the person does not call himself a lawyer. *See generally, Id.*

¹³³*In Re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 422 S.E.2d 123, 125 (S.C. 1993). The Bar subcommittee proposed rules governing the unauthorized practice of law. *Id.* The South Carolina Supreme Court refused to adopt the proposed rules and held in part, that certified public accountants “do not engage in unauthorized practice of law when they render professional assistance within their professional expertise, including compensated representation before agencies and the Probate Court, that is within their professional expertise and qualifications.” *Id.*

¹³⁴Bill Sternberg, *Accounting’s Role in Enron Crash Erases Years of Trust*, USA TODAY, Feb. 22, 2002, at A.01.

non-audit services, while a mere three million dollars paid for traditional audit services.¹³⁵ It appears that the traditional audit services are becoming a loss leader in order to attract clients such as Enron, with the strategy of marketing more profitable consulting services to them as part of a full service package deal.¹³⁶ Since companies such as Andersen now employ thousands of lawyers¹³⁷ and provide more legal consulting services than accounting audit services,¹³⁸ why are we still talking about MDP? It is clear that they already exist in the form of the Big Five.¹³⁹

¹³⁵*Corporate Responsibility, supra* note 18.

[Enron] paid \$52 million to Arthur Anderson in 2000, a mere 52 percent for non-audit services. The highest percentage [of non-audit services] found was for BristolMyersSquibb, which in 2001 paid \$41 million to PricewaterhouseCoopers, 93 percent for non-audit services. Halliburton in 2001 paid \$27 million to Arthur Anderson, 73 percent for non-audit services. The year before, Halliburton paid \$52 million to the company, 86 percent for non-audit services. Global Crossing in 2000 paid \$14 million to Arthur Anderson, 84 percent for non-audit services. Tyco paid \$35 million in 2001 to PricewaterhouseCoopers, 62 percent for non-audit services. Worldcom paid \$17 million to Arthur Anderson in 2001, 74 percent for non-audit services.

Id.

¹³⁶Michael W. Loudenslager, *Cover Me: The Effects of Attorney-Accountant Multidisciplinary Practice on the Protections of the Attorney-Client Privilege*, 53 BAYLOR L. REV. 33, 39 (2001).

¹³⁷John E. Sexton, "Out of the Box" *Thinking about the Training of Lawyers in the Next Millennium*, 33 U. TOL. L. REV. 189, 191 (2001).

The total number of lawyers at the Big Five accounting firms now dwarfs the number of attorneys at the five largest law firms in the world. For example, Arthur Andersen has employed more than 3,600 attorneys, 2,800 practicing law outside the United States and another 750 law school graduates in the United States working in tax and corporate finance.

Id.

¹³⁸*See generally, Id.*

¹³⁹*Cf. Fox, supra* note 36, at 1097-99.

The Big 5 accounting firms have mounted a frontal assault on the legal profession that threatens to destroy the foundation of professional independence, loyalty and confidentiality that the lawyers of America have always promised the public.

i. Why are we still talking about MDP?

In recent years, the number of large accounting companies has declined from eight to what is now described as the Big Five.¹⁴⁰ They may soon be known as the “Fat Four” after the courts and shareholders complete litigation with Andersen for its role in Enron’s demise.¹⁴¹ As the number of large accounting firms shrinks, these firms have continually diversified their service products in an attempt to increase profits and decrease their dependence upon their traditional public audit role.¹⁴² Unfortunately, the Big Five have experienced few restrictions on the practice of law. It seems that court actions are an ineffective way of preserving the practice of law for lawyers and law firms. The state of Texas illustrated this observation when it contemplated imposing charges against Andersen LLP for the unauthorized practice of law.¹⁴³ The state backed away from the case publicly claiming that it could not find a lawyer to

Ignoring our rules that lawyers may not share fees with nonlawyers, . . . [T]he accounting firms have hired thousands of lawyers who leave their law firms on Friday and show up on Monday doing the exact same thing for the exact same clients, but now as employees of the nonlawyer Big 5.

Id. at 1098.

¹⁴⁰Charles Wolfram, *The ABA and MDPs Context, History and Process*, 84 MINN. L. REV. 1625, 1637 (2000).

¹⁴¹Editorial, *Countdown to Four*, FIN. TIMES, Mar. 12, 2002, available at <http://specials.ft.com/enron/>.

¹⁴²*Id.*

¹⁴³Wolfram, *supra* note 140 (citing Canadian Bar Ass’n, Yearbook of the Canadian Bar Ass’n and the minutes of the Proceedings of Its Eighth Annual Meeting Held in St. John’s Newfoundland August 20-26, 1998, at 93, 95 (1998) (featuring the remarks of Sherwin Simmons before the Canadian Bar Association during a panel discussion on MDP at the annual meeting of the CBA)).

represent the state.¹⁴⁴ A more persuasive reason “might have been caution learned from the immediate and strongly unfavorable political reaction of the state legislature to the state bar’s momentarily successful suit to enjoin sale of Quicken’s legal-forms software distribution on the ground that it violated the state’s unauthorized practice of law statute.”¹⁴⁵ This makes one wonder about the purpose of having unauthorized practice of law statutes if they are not to be enforced. In essence, the Big Five are already defacto accountant-lawyer MDPs.¹⁴⁶

II. DISCUSSION:

The United States should allow MDP with certain limitations. Many benefits may be gained by allowing lawyers to partner and share profits with other professionals. American MDPs would provide clients with the convenience of one-stop shopping and a wider range of client services.

An elder law practice is an excellent example of how clients would benefit from a MDP. It is easy to understand how literally “one-stop” shopping could benefit our aging population. With respect to mobility, many seniors not only have trouble with physical bodily movement,

¹⁴⁴*Id.*

¹⁴⁵*Id.* (citing *Unauthorized Practice of Law Commission v. Parsons Tech., Inc.*, 179 F.3d 956, (5th Cir. 1999) (observing that the grant of summary judgment by the district court barring software sales had been effectively overturned with the legislature’s prompt amendment to the Unauthorized Practice of Law statute requiring Quicken to include a disclaimer with its software informing customers that the software was not meant as a replacement for a consultation with a lawyer).

¹⁴⁶*Cf.* Fox, *supra* note 36, at 1097-99. (Employing thousands of lawyers who consult on legally related issues, the Big Five undermine the legal ethical rules).

but many seniors are limited drivers or cannot drive at all.¹⁴⁷ If a senior could make only one trip to a single office, the senior has reduced the burden on the body and on any person or services used to get to that office. More important is that the coordination of services can be highly desirable to a senior client.¹⁴⁸ This is most clearly seen with married seniors who face the situation where one spouse is of failing health which is increasingly requiring more and more financial resources. The healthy senior is faced with trying to survive financially while continuing to provide appropriate care to their spouse, often for many years.

A law practice in which a lawyer is allowed to partner with a financial planner and a geriatric care manager would benefit most seniors in this situation.¹⁴⁹ The lawyer can address the issues of wills, the desirability of trusts, alternative housing contracts, or other options. The financial planner would be able to work with the lawyer to determine the senior's eligibility for governmental or other financial aid, as well as plan for the eventuality of future eligibility. The geriatric care manager can help the senior understand and identify areas where the seniors could

¹⁴⁷“About 8.4 million senior citizens 65 years and older [are] without drivers’ licenses, [and] 25 to 30 million people with severe disabilities who are transit dependent. . . .” Jon E. Burkhardt, et al., Administration on Aging, *“Mobility and Independence” Changes and Challenges for Older Drivers*, Executive Summary available at <http://www.aoa.gov/transportation/olderdrivers.html> (last modified May 30, 2000).

¹⁴⁸See generally, Michael J. Myers, *“Elder-Comp, L.L.C.” a Multi-Disciplinary Prototype for Tomorrow’s Elder Law Practice*, 45 S.D. L. REV. 540 (2000). “Clients currently move from one disconnected professional to another. The process is often duplicitous and expensive” *Id.* at 541. The elderly need “integrated legal, financial and support services.” *Id.* at 542. See also, Louise G. Trubek and Jennifer J. Farnham, *Social Justice Collaborative: Multidisciplinary Practices for People*, 7 CLINICAL L. REV. 227 (2000) (making similar arguments for integrated services for low income individuals).

¹⁴⁹Elder law “lawyers accepted long ago that when it comes to the elderly, they don’t know it all. They realize their clients have a variety of needs.” Aida Rogers, *The Geriatric Care Manager*, SHEPARD’S ELDER CARE/LAW NEWSL., April 15, 1991 at 9. These clients often need “services that a lawyers can’t provide.” *Id.*

benefit from contracted or social services.¹⁵⁰ Appropriate services can provide a safer environment for both spouses and may delay institutionalization of the failing spouse.¹⁵¹ Seniors often find the coordination of services by a care manager provides a sense of reassurance and emotional support.¹⁵² The coordinated services that could be provided by an elder MDP would best serve the complicated needs of many seniors.

A client should be permitted to use one professional firm to meet their needs. This would provide for better coordination between service providers, increased efficiency and lower cost to the client. MDPs with professions having similar and non-conflicting duties and philosophies will benefit clients and society in general.

However, accountant-lawyer MDPs provide a high level of risk. From the very nature of the conflicting duties of lawyer-client confidentiality versus the public audit, it is evident that these professions serve conflicting purposes. As evidenced by Andersen's involvement with Enron, performance of strategic tax consulting work and auditing of the same strategies by the same firm, can have catastrophic consequences.¹⁵³ The audit function is too important to risk a compromise of its integrity.¹⁵⁴

¹⁵⁰For a general discussion of a geriatric care manager, see *Id.*

¹⁵¹*Id.* See also, Colleen C. Manning, The Medicare Alzheimer's Disease Demonstration, 1 ELDER L. J. 113, 131 (1993).

¹⁵²Rogers, *supra* note 149. See also, Manning, *supra* note 149.

¹⁵³See Chris Mondics, *Corporate abuse proves difficult to shut down*, PHILADELPHIA INQUIRER, February 20, 2003, at C01.

¹⁵⁴“This article does not address the special issues that arise when a person is both a lawyer and a member of another profession,” such as a person who is a lawyer and an accountant (CPA). Harold Levinson, *Collaboration Between Lawyers and Others: Coping with the ABA Rules after Resolution 10F*, 36 WAKE FOREST L. REV. 133, 162 n.115 (2001).

Some efficiency gains would undoubtedly be created by allowing accountant-lawyer MDPs, as tax attorneys could work closely with accountants. Limitations could be created that restrict a single accountant-lawyer MDP from tax planning and auditing the same company. However, these limitations would appear to decrease the efficiency gained from creation of the accountant-lawyer MDP while creating an increased possibility that one of these MDPs would perform both the tax planning and auditing functions for the same business organization.

Thousands of people relied on Enron's financial information as prepared by Andersen.¹⁵⁵ While the consulting arm of Andersen was busy creating offshore partnerships which effectively hid millions of dollars of Enron's losses by keeping them off Enron's books, Andersen's audit department was voicing their approval of these strategies through its preparation of Enron's financial reports.¹⁵⁶ This resulted in little or no warning to stockholders. As observed through this Enron debacle, lack of warning because of deception by the auditor can have devastating repercussions.

In addition to the policy issues involved in the regulation of dual licensees, constitutional issues arise. One constitutional issue involves separation of powers under the state constitution, indicating the need to avoid or resolve conflicts between the regulation of the practice of law (by the state courts and agencies under their control) and the regulation of the practice of another profession, such as accounting (by the state legislatures and agencies under their control). Another constitutional issue is a matter of federalism, indicating the need to avoid or resolve conflicts between state and federal regulation of professions.

Id.

¹⁵⁵*U.S. Senator Byron Dorgan (d-ND) Holds Hearing on the Impact of Enron's Influence on State Pension Funds*, Before Senate Comm. on Commerce, Science and Transp.: Subcommittee on Consumer Affairs, Foreign Commerce and Tourism, 107th Cong. (May 16, 2002). *See also, Bankruptcy Impact on Enron Employees 401(k) Plans*, Before the Senate Comm. on Governmental. Affairs, 107th Cong. (Feb. 5, 2002) (statement of Erik Olsen, AARP Member).

¹⁵⁶*See U.S. Senator Byron Dorgan (D-ND) holds Hearing on the Impact of Enron's Influence on State Pension Funds*, *supra* note 155.

The impartiality of the audit is very important and it seemed to get lost in the process. If the audit and consulting services provided to Enron by Andersen were not improper, there is still the appearance of impropriety. Just as society trusts the media to be the watchdogs of government, auditors are supposed to provide society with an unbiased examination and public statement of business records. Investors put their trust and resources into businesses because they believe that the auditor's statements are reliable and accurate.

It is easy to see the potential for conflicts when examining the core duties of accountants and attorneys. Accountants are supposed to disclose a client's information to the public while lawyers, in general, are sworn to keep that information confidential. When members of these two professions form a partnership the question arises as to who is in control. Had Enron's auditors and tax planners not been the same or related entities, there is a much better chance that Enron's true financial position might have been publicly disclosed. This is not to say that the same events could not have occurred with unrelated auditor and consulting companies. However, the cause would more likely be auditor incompetence rather than deception, and the appearance of impropriety is less likely.

Attorneys argue that accountant-lawyer MDPs should be allowed as long as the lawyer is in control.¹⁵⁷ Proponents of this idea contend that it will protect clients from unethical treatment

¹⁵⁷ See e.g., Joint Task Force on Multidisciplinary Practice, Colo. Bar Ass'n & Denver Bar Ass'n, Report to the Board of Governors of the Colorado Bar Association and the Board of Trustees of the Denver Bar Association, project summary (May 2000), available at <http://www.cobar.org/static/mdp/page2.cfm#reportssummary>. See also, Stacy L. Brustin, *Legal Services Provision through Multidisciplinary Practice--Encouraging Holistic Advocacy While Protecting Ethical Interests*, 73 U. COLO L. REV. 787, 816-17 (citing The Maine State Bar Ass'n Task Force on the Future of the Practice of Law, Preliminary Report and The Minnesota State Bar Ass'n Multidisciplinary Task Force Report, May 23, 2000).

by the MDP as the lawyer is in control. In theory, this permits the lawyer to ensure that no ethical legal issues are breached. This theory is flawed. It may save the lawyer from being forced to make unethical judgments, however it does not protect the accountant's duty with respect to audits. If the theory is applied to the Enron scenario and the lawyers had control of the MDP that performed the consulting and audit services for Enron, their duties would include the duty of confidentiality to their client and the duty of disclosure. If the duty of confidentiality was allowed to reign supreme, the auditor's duty to disclose would have again been compromised resulting in a similar outcome.

It is clear that the ABA's role is one of establishing policy and making recommendations to state and local bar associations. To enforce the prospective rules prohibiting MDP between accountants and lawyers, it is necessary to define the unauthorized practice of law. This may prove to be a daunting task as no single definition exists which is universally accepted in the U.S. Under the guise of practicing tax instead of law, lawyers are currently working in accounting firms, performing the same tasks as law firms and avoiding penalties, such as loss of their licenses for practicing law with nonlawyers. Without this definition, it is difficult to enforce the limitation of the practice of law to these lawyers.

Legislation and enforcement may be the key to solving the MDP dilemma. Action is required at the state level. States should adopt a policy that permits MDPs that benefit certain types of legal practice so long as this is accomplished without compromising the core values of the legal profession. Further, state legislators and state bar associations should draft more

comprehensive statutes, such as Unauthorized Practice of Law statutes,¹⁵⁸ that prohibit partnerships and fee sharing between lawyers and nonlawyers in areas that compromise the core values of the practice of law and ensure that these rules are enforced.

Some lawyers may believe that it is too late for this approach since the Big Five have become so powerful and influential. However, the legal profession may not have a choice if it wants to maintain its status as an ethical profession instead of a business. As a group that self-regulates, lawyers must address these issues, formulate policy and draft rules and regulations with effective enforcement. Only through these activities can it hope to remain a cornerstone of our society.

III. RECOMMENDATIONS:

Unlike most articles which are for or against MDP in the absolute, the proposal in this paper proposes legalizing MDP with certain limitations. An outright ban on forming MDPs in

¹⁵⁸For example, recently the Florida Supreme Court listed acts commonly understood to be the practice of law to include the following:

 serving as a primary contact for conferences on legal disputes; holding himself out as an attorney in dealings with others; attempting to argue and advocate the merits of cases, the applicability of the law, evidentiary issues, liability issues, discovery matters, and settlement matters with opposing counsel; attempting to analyze statutory and case law and to discuss it with clients and opposing counsel; trying to advise clients on the strengths and weaknesses of their cases and on how to proceed; actively participating in and presenting clients' cases at mediation sessions; actively participating in and presenting the complainants' cases at settlement sessions; extensively involving himself with fee arrangements; attempting to advise clients of their obligations under legal documents; drafting detailed letters and legal documents; signing court-filed documents; and discussing legal documents with clients without any attorney present.

The Florida Bar v. Neiman, 816 So.2d 587, 588 (Fla. 2002).

the U.S. is not required. MDPs can be beneficial to U.S. society. States should allow the combination of lawyers and other professionals. Effective combinations could include MDPs that serve elderly clients without compromising any ethical obligations. However, as the Enron catastrophe illustrates, accountants and lawyers have conflicting ethical obligations. Accountant-lawyer MDPs present too many risks for breach of professional ethical obligations and as such, it should not be permitted. In fact, a universally accepted definition of the practice of law should be adopted so that proper enforcement measures may be taken to stop the accounting firms, such as the Big Five, from practicing law.

Finally, for those who claim that Enron's demise is one of a very few isolated incidents, this author suggests that several other examples similar to those surrounding Enron exist, but have yet to be identified in the United States business and financial sectors. Reform must occur quickly to bolster the confidence of the American people and lessen the financial instability currently plaguing the stock markets and economy.