

MAIN STREET MULTIDISCIPLINARY PRACTICE FIRMS: LABORATORIES FOR THE FUTURE

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This Article examines the debate over multidisciplinary practice in the wake of the collapse of Enron and Arthur Andersen. Part I addresses the history of the scholarly debate about multidisciplinary practice in the United States. It discusses the focus on large multidisciplinary firms, feared threats to independent professional judgment, and the current rule concerning lawyers and multidisciplinary practice.

Part II examines the reasons for allowing multidisciplinary practice. The author argues that client demand, lawyer demand, and policy reasons all provide valid reasons for permitting “one-stop” shopping. Part II also discusses existing forms of multidisciplinary practice. The author argues that the methods used by those groups in dealing with ethical and professional considerations indicate that small-scale, or “Main Street” multidisciplinary firms can provide improved service to clients without endangering the legal profession.

In Part III, Professor Poser proposes a solution: permitting small-scale multidisciplinary practice, on a state-by-state basis. The author argues that permitting such firms would meet client demand for improved, integrated service, while also allowing state bar associations to determine if larger-scale multidisciplinary practice is feasible, based on the experience of smaller firms.

INTRODUCTION

Fully integrated, multidisciplinary practice (MDP) has been defined as a partnership, professional corporation, or other association or entity that includes lawyers and non-lawyers and has as one, but not all, of its purposes the delivery of legal services to clients other than the MDP itself or that holds itself out to the public as providing non-legal, as well as legal, services.¹

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1. AMERICAN BAR ASSOCIATION (ABA) COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES 1 (1999), available at <http://www.abanet.org/cpr/mdpreport.html> (on file with the University of Michigan Journal of Law Reform) [hereinafter *1999 Report*].

Under current ethics rules in every state, it would be a violation of professional ethics to participate in any type of MDP. The rules prohibit law firms from partnering with accountants in order to expand the services they provide to their corporate clients, and they prohibit solo practitioners from partnering with financial planners and social workers to advise divorce and estate-planning clients. In the District of Columbia, some types of MDPs are allowed provided that the non-lawyers are only facilitating the legal advice and not advising clients on non-legal matters.² In 1999 and 2000, the Multidisciplinary Practice Commission of the American Bar Association (MDP Commission) recommended that the American Bar Association (ABA) amend its Model Rules of Professional Conduct to permit fully integrated MDPs. The House of Delegates of the ABA rejected the recommendation and retained the current prohibition.

This Article argues that the focus of the MDP debate has been both too narrow and too broad. It has been too narrow because the debate has centered almost exclusively on “Wall Street MDPs,” that is, the prospect of large business organizations such as accounting firms or banks hiring lawyers to give legal advice to their large corporate and business clients.³ But as one person who testified before the MDP Commission put it: “The question of whether a Fortune 500 company could save money if one of the giant accounting firms could offer legal services, tax advice and other types of business services under one roof just doesn’t necessarily resonate with ordinary people.”⁴ The debate has been too broad because it has

2. In 1991, the District of Columbia adopted a more flexible version of Model Rule 5.4 which allows lawyers and non-lawyers to share fees so long as the organization’s sole purpose is the provision of legal services, and the members of the firm abide by the legal ethics rules. See, D.C. RULES OF PROF’L CONDUCT R. 5.4 (1991); 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, 243–44 (2000). In February 2002, the American Bar Association adopted a further exception that allows a non-profit organization to share court-awarded fees with a lawyer who is retained, recommended, or employed by the non-profit. MODEL RULES OF PROF’L CONDUCT R. 5.4(a)(4) (2002).

3. Phoebe A. Haddon, *The MDP Controversy: What Legal Educators Should Know*, 50 J. LEGAL EDUC. 504, 517 (2000) (noting that the issue of Main Street MDPs was overshadowed by the large, professional service firm issue). See also Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 539 (1994) (describing the legal profession as divided into “two hemispheres: lawyers who serve individuals and those who serve corporate clients.”); Sydney M. Cone, III, *Views on Multidisciplinary Practice with Particular Reference to Law and Economics, New York, and North Carolina*, 36 WAKE FOREST L. REV. 1 (2001).

4. Written Remarks of Lora H. Weber, President and Executive Director, Consumers Alliance of the Southeast, to ABA Comm’n on Multidisciplinary Practice (Mar. 11, 1999), available at <http://www.abanet.org/cpr/weber1.html> (on file with the University of Michigan Journal of Law Reform).

been assumed that if fully integrated MDPs were permitted, it would have to be under a one-size-fits-all rule that covered global corporations, small-firm practices, and everything in between.⁵ Those who object to permitting the large accounting firms to practice law, whether for ethical or economic reasons, do not seem to have considered the possibility of fully integrated MDPs for a limited type of private firm.

This Article focuses on the “Main Street MDP”⁶ and proposes a rule that would allow for that form of practice only. The Main Street MDP is exemplified by the small firm or solo practitioner that forms a partnership with other professionals in order to provide more comprehensive and efficient service to clients. Family law and estate planning are often mentioned as practices that a Main Street MDP would deliver more efficiently.⁷ A narrower, more focused MDP rule would provide an opportunity to promote the States as laboratories and take an incremental approach to introducing and testing the MDP concept.⁸ It makes sense to begin with the small firm, which is the most common way in which law is practiced,⁹ because it poses fewer ethical risks.

Recent events do not inspire confidence that the organized Bar will soon embrace multidisciplinary practice as a legitimate and ethical way to serve clients. The ABA, at every opportunity, has re-

5. Professor Terry recognized that the question of whether the same rules should apply to all MDPs was a threshold question, and recommended that they should apply. Laurel S. Terry, *A Primer on MDPS: Should the “No” Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 892 & 952 (1999). *Cf.* Cone, *supra* note 3, at 3; David Luban, *Asking the Right Questions*, 72 TEMP. L. REV. 839, 840 (1999). Professor John Dzienkowski, in his written testimony before the MDP Commission, said that he thought broad rules would allow for different types of MDPs to develop. *See* Written Testimony of Professor John Dzienkowski, University of Texas School of Law, to ABA Comm’n on Multidisciplinary Practice (Feb. 5, 1999), *available at* <http://www.abanet.org/cpr/dzienkowski.html> (on file with the University of Michigan Journal of Law Reform). This Article suggests this be done in the reverse order—create a narrow rule, and expand it over time.

6. The phrases “Main Street MDP” and “Wall Street MDP” appear to have been coined by Laurel S. Terry. *See* Terry, *supra* note 5, at 882–83.

7. George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession’s Shift to a Corporate Paradigm*, 70 FORDHAM L. REV. 775, 776 (2001). *See also* Dzienkowski, *supra* note 5; Russ Alan Prince, *Advice for Advisors*, TRUSTS & ESTATES, July 2002, at 19–20.

8. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“There must be power in the states and the nation to remould [sic], through experimentation, our economic practices and institutions to meet changing social and economic needs.”).

9. 63% of the private practice bar in this nation consists of firms of 1–5 attorneys. Testimony of Robert L. Ostertag, Chair, Senior Lawyer Committee of the ABA General Practice, Solo and Small Law Firm Practitioners Section, before the ABA Comm. on Multidisciplinary Practice (Oct. 9, 1999), *available at* <http://www.abanet.org/cpr/ostertag.html> (on file with the University of Michigan Journal of Law Reform).

jected any new rule that would permit lawyers to practice in multidisciplinary organizations. Legend has it that when the Model Rules of Professional Conduct were debated in 1983 and a rule permitting MDPs was proposed, an ABA delegate questioned whether permitting lawyers to share legal fees would mean that Sears, Roebuck could open up a law office. When there was an affirmative response, the debate ended and MDPs were rejected.¹⁰ More recently, in 1999 and 2000, the ABA rejected its own MDP Commission's recommendations to permit MDPs.¹¹

The nail in the MDP coffin, according to some commentators, was the role that Arthur Andersen, one of the formerly "Big Five" accounting firms, played in the downfall of Enron Corporation. The involvement of Arthur Andersen, which employed thousands of lawyers to deliver consulting services to its clients, in the debacle, led many to predict the demise of the MDP concept.¹² This prediction was widespread despite a lack of any evidence that Andersen lawyers who were serving Andersen's clients, i.e. lawyers not serving as corporate counsel, were guilty of misconduct.¹³

The ABA rejected MDPs because "[t]he sharing of legal fees with non-lawyers and the ownership and control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession."¹⁴ The core values identified by the ABA House of Delegates were:

10. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 5.4:102 (2d ed. Supp. 1998).

11. See *infra* notes 25–46, and accompanying text.

12. See, e.g., Robert G. Seidenstine, *Multi-Disciplinary Practices: Will the Issue Go Away?*, 11 N.J. LAW. WKLY. NEWSPAPER, May 31, 2002, at 933; Judi Russell, *Enron Scandal Clouds Future of Professional Team-Ups*, NEW ORLEANS CITY BUS., Apr. 22, 2002, at 31; Mark Schauerte & Nathaniel Hernandez, *Enron Throws Fuel on Hot Debate Over Multidisciplinary Practices*, CHI. LAW., Mar. 28, 2002, at 1; Geanne Rosenberg, *The Enron Implosion: Scandal Seen as Blow to Outlook for MDP*, NAT'L L.J., Jan. 21, 2002, at A1; Brenda Sandburg, *Enron Accounting Scandal Seen as Damaging to MDPs*, N.Y.L.J., Jan. 24, 2002, at 5. See also Charles W. Wolfram, *Comparative Multi-Disciplinary Practice of Law: Paths Taken and Not Taken*, 52 CASE W. RES. L. REV. 961, 984–86 (2002).

13. Ward Bower, *MDP Isn't the Problem*, NAT'L L.J., Mar. 11, 2002, at A21. The conviction of Andersen for obstruction of justice was based, by juror accounts, on the conduct of Andersen's in-house counsel, whose client was Andersen itself, not Andersen's clients. Thus, the ethical issue, if one existed, involved the duties of corporate counsel, which are not germane to the MDP issue. Kurt Eichenwald, *Andersen Trial Yields Evidence in Enron's Fall*, N.Y. TIMES, June 17, 2002, at 1. See also Susan P. Koniak, *Who Gave Lawyers a Pass?* FORBES, Aug. 12, 2002, at 58. According to some, the "last gasp of air" was the ABA approval in August 2002 of Model Rule 7.2 which permits referral agreements between lawyers and non-lawyers. This new rule is intended as a substitute for MDPs. William Freivogel & Lucian Pera, *ETHICS & LAWYERING TODAY*, Sept. 2002, available at <http://ethicsandlawyering.com/Issues/0902.htm> (on file with the University of Michigan Journal of Law Reform).

14. ABA Recommendation 10F (July 2000), available at <http://www.abanet.org/cpr/mdprecom10f.html> (on file with the University of Michigan Journal of Law Reform).

- a. the lawyer's duty of undivided loyalty to the client;
- b. the lawyer's duty competently to exercise independent legal judgment for the benefit of the client;
- c. the lawyer's duty to hold client confidences inviolate;
- d. the lawyer's duty to avoid conflicts of interest with the client; and
- e. the lawyer's duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.
- f. The lawyer's duty to promote access to justice.¹⁵

This Article argues that many of those "core values," particularly loyalty, competence, and access to justice, would be promoted by Main Street MDPs without seriously threatening other core values identified by the ABA, such as independent judgment, confidentiality, and avoidance of conflicts of interest. The challenge is to define productive and ethical multidisciplinary practice while avoiding both the threat to ethical practice created by allowing large law firms to expand uncontrollably as they try to compete with the large accounting firms, and the distasteful notion of picking up a divorce at Wal-Mart.

Part I of this Article briefly recounts the history and current status of the MDP debate. Part II discusses justifications for the Main Street MDP and the separate and distinct nature of its potential contributions. Part III suggests the principal elements of a rule permitting Main Street MDPs, and Part IV offers some concluding thoughts.

PART I

This Part recounts the history of the MDP debate within the American Bar Association and among lawyers and scholars who study this issue. It also briefly recounts the States' approach to MDPs, which seem to indicate some willingness to experiment with this form of practice.

15. *Id.* See also Harris & Foran, *supra* note 7, at 778.

A. Background to MDPs

The history and current status of the MDP debate has been recounted recently and frequently, so a short summary will suffice.¹⁶ In 1928, the ABA added Canons 33 through 35 to the original Canons of Professional Ethics. These provisions prohibited fee sharing and partnering with non-lawyers if the partnership practiced law. Canons 33 through 35 also prohibited lawyers from being employed by non-lawyers for the purpose of serving clients other than the employer.¹⁷ When the ABA adopted the Model Code of Professional Responsibility in 1969, it included DR 3-102 and DR 3-103, which prohibited lawyers and non-lawyers from sharing legal fees or forming a partnership “if any of the activities of the partnership consist of the practice of law.”¹⁸ DR 5-107 continued the prohibition against lawyers being employed by non-lawyers or allowing non-lawyers to influence their professional judgment.¹⁹

In 1983, the Kutak Commission, which drafted the new Model Rules of Professional Conduct to replace the Model Code, proposed a rule that would have lifted the prohibition on fee sharing and partnering with non-lawyers, subject only to the caveat that the arrangement not interfere with the lawyer’s duties of independent judgment, confidentiality, appropriate advertising, and avoidance of improper fees.²⁰ However, the “fear of Sears,” as described above, led to the defeat of the Kutak proposal; and Model Rule 5.4 was adopted instead.²¹

Model Rule 5.4: Professional Independence of a Lawyer states, in pertinent part:

- (a) A lawyer or law firm shall not share legal fees with a non-lawyer . . .²²

16. See, e.g., Daly, *supra* note 2; John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83 (2000); Terry, *supra* note 5; Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994).

17. Harris & Foran, *supra* note 7, at 779.

18. MODEL CODE OF PROF’L RESPONSIBILITY DR 3-103(A) (1980).

19. MODEL CODE OF PROF’L RESPONSIBILITY DR 5-107(C) (1980).

20. STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS, STATUTES AND STANDARDS 305 (2002); Terry, *supra* note 5, at 875–76.

21. Terry, *supra* note 5, at 876–77; Cramton, *supra* note 16, at 577.

22. MODEL RULES OF PROF’L CONDUCT R. 5.4 (2002). The exceptions in sections (a)(1)–(3) refer to short-term arrangements involving payments to an estate following the death of a lawyer or the purchase of a law practice after the death or disappearance of a lawyer. The rule also provides that non-lawyers can share in compensation or retirement

- (b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law. . . .
- (c) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
 - (1) a non-lawyer owns any interest therein . . .
 - (2) a non-lawyer is a corporate director or officer thereof; or
 - (3) a non-lawyer has the right to direct or control the professional judgment of a lawyer.²³

Every state adopting the Model Rules adopted this rule in relevant part. The ABA did not substantially revisit the subject until 1998.²⁴ In 1998, ABA President Philip S. Andersen appointed the MDP Commission and gave it a mandate to “study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public.”²⁵ The mandate instructed the commission to address whether it would be in the public interest to modify the ethical rules governing the provision of legal services by professional service firms.²⁶

Following this mandate, the primary focus of the MDP Commission and of the testimony before it was on the advisability of permitting lawyers to dispense legal advice to clients while working for large business organizations, like the (formerly) “Big Five” accounting firms. Concomitantly, the MDP Commission considered whether it would be consistent with lawyers’ ethical obligations if law firms could open up partnerships to non-lawyers, particularly accountants and financial planners.

The primary focus on these issues was not surprising, because it was competition on a national and global scale from the accounting firms that provided the impetus for the MDP Commission in

plans that might technically violate the rule. 5.4(a)(4) was recently adopted by the ABA and allows sharing of court-awarded fees with non-profit organizations.

23. *Id.* The few states that still adhere to the Model Code of Professional Responsibility retained the language of DR 3-102 and DR 3-103.

24. The ABA did approve, in 1994, a rule allowing lawyers to partner with non-lawyers to deliver non-legal, “ancillary,” services. See MODEL RULES OF PROF’L CONDUCT R. 5.7, *infra* notes 172–174, and accompanying text.

25. ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE, REPORTER’S NOTES, Appendix C, at 1 (1999) available at <http://www.abanet.org/cpr/MDPappendixc.html> (on file with the University of Michigan Journal of Law Reform) [hereinafter *Appendix C*].

26. *Id.*

the first place.²⁷ Beginning with Germany after World War II, European countries increasingly embraced MDPs as accounting firms expanded to serve their large corporate clients with a mix of financial and legal advice.²⁸ The accounting firms hired thousands of lawyers, so that branches of some of the largest U.S. accounting firms currently comprise some of the largest law firms in Europe.²⁹ The ABA's decision to study the issue was therefore motivated in part by a fear that large, corporate, clients were ready to look abroad for integrated services prohibited here.³⁰ In the United States, lawyers working for accounting firms continue to avoid disciplinary reproach by claiming that they are "practicing tax," or "consulting," not practicing law, and are therefore not violating their obligations under the ethics rules.³¹ Much of this practice may violate the prohibition on sharing fees, but enforcement has been virtually nonexistent.³²

The scholarly literature has mirrored this concern with accounting firms and focuses mainly on the issue of whether lawyers could maintain their ethical standards while serving as employees or partners of accountants and other financial planners in large business organizations or law firms.³³ The scholarly literature barely mentions the potential benefits of Main Street MDPs, although there does seem to be some consensus that Main Street MDPs would not present ethical problems as often or as serious as the

27. Michael V. Bourland & W. Marc McDonald, *Multidisciplinary Practice: Challenges and Opportunities—Alternative Models and Client Service Opportunities*, SG020 ALI-ABA 523, 531 (2001) (American Law Institute—American Bar Association Continuing Legal Education, ALI-ABA Course of Study, July 5–7, 2001, Estate Planning for the Family Business Owner—apparently an article based on a paper presented by Bourland in 2000); G. Ellis Duncan, *The Rise of Multidisciplinary Practices in Europe and the Future of the Global Legal Profession Following Arthur Andersen v. Netherlands Bar Ass'n*, 9 TUL. J. INT'L & COMP. L. 537, 554 (2001); Joseph L. Kociubes, et al., *Boston Bar Association Task Force on Multi-Disciplinary Practice: Interim Report on Multi-Disciplinary Practice*, BOSTON B.J., Sept./Oct. 2000, at 4.

28. Duncan, *supra* note 27, at 541-42.

29. *Id.*

30. Dzienkowski & Peroni, *supra* note 16, at 88.

31. Terry, *supra* note 5, at 881.

32. See Wolfram, *supra* note 12, at 969; Daly, *supra* note 2, at 258 (noting dismissal of investigation into prosecution of one of the "Big Five" accounting firms for unauthorized practice of law in Texas).

33. See, e.g., Daly, *supra* note 2; Duncan, *supra* note 27, at 541-42; Dzienkowski & Peroni, *supra* note 16; Lawrence J. Fox, *Old Wine in Old Bottles: Preserving Professional Independence*, 72 TEMP. L. REV. 971 (1999); John D. Messina, *Lawyer + Layman: A Recipe for Disaster? Why the Ban on MDP Should Remain*, 62 U. PITT. L. REV. 367 (2000); Adam A. Shulenburg, Note, *Would you Like Fries With That? The Future of Multidisciplinary Practices*, 87 IOWA L. REV. 327 (2001). Cf. Cone, *supra* note 3, at 5-6 (noting the "preoccupation with business form" in the MDP debate); Terry, *supra* note 5, at 882.

“Wall Street” variety would.³⁴ Professor David Luban has suggested that were it not for the ethical issues that arise when lawyers are employed by large accounting firms, which compete with law firms, the ABA would never have gotten involved in the MDP debate.³⁵

Just as a major scientific discoveries are often made while the scientist is looking for something else,³⁶ the preoccupation with accountants³⁷ in the study of the MDP phenomenon has revealed information about and demand for a different and more fruitful category of MDPs that is worth exploring—the Main Street MDP.³⁸ Yet despite significant testimony concerning the practicability of and demand for Main Street MDPs, the MDP Commission treated the various types of MDPs together, thus enabling the ABA to throw out the Main Street baby with the Wall Street bath water.

The MDP Commission spent two years studying the issue and holding hearings. To facilitate discussion, it proposed five possible models for law practice that involved non-lawyers, ranging from the “cooperative model” in which the lawyer works with non-lawyer professionals that the lawyer or client employs (a model that is currently permitted in all 50 states),³⁹ to the “fully integrated model” in which lawyers and non-lawyers could be partners in a firm that provided both legal and non-legal services.⁴⁰

In 1999, the MDP Commission recommended to the ABA that it adopt the fully integrated model. In making this recommendation, the MDP Commission was mindful of what it identified as the “core values” of the legal profession: “independence of professional judgment, the protection of confidential client information, and loyalty to the client through the avoidance of conflict of interests.”⁴¹ The MDP Commission suggested that these values were best

34. ABA COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES 2 (2000), available at <http://www.abanet.org/cpr/mdpfinalrep2000.html> (on file with the University of Michigan Journal of Law Reform) [hereinafter *2000 Report*].

35. Luban, *supra* note 5, at 840 (“The debate has never been about how best to help Mom and Dad plan their retirement. It is about high-end lawyers who want to merge with other high-end financial professionals to compete more effectively for the business of the Masters of the Universe.”).

36. See generally ROYSTON M. ROBERTS, SERENDIPITY: ACCIDENTAL DISCOVERIES IN SCIENCE 159–64 (1989) (discussing Dr. Fleming’s discovery of penicillin).

37. Lawrence Fox, for example, who offers some of the most caustic criticism of MDPs, focuses almost exclusively on the accounting firms. See, e.g., Fox, *supra* note 33.

38. Professor Terry recognized this as an unintended consequence. Terry, *supra* note 5, at 882–83. See also *Appendix C*, *supra* note 25.

39. Dzienkowski & Peroni, *supra* note 16, at 131.

40. *Appendix C*, *supra* note 25, at 2–3. These models and their relative merits are discussed at length in Daly, *supra* note 2.

41. *Appendix C*, *supra* note 25, at 7.

preserved through regulation rather than prohibition of MDPs.⁴² The Commission recommended that MDPs be subject to the same ethical constraints as law firms and be regulated through a certification process by the state bars.⁴³ It also proposed that MDPs controlled by non-lawyers should abide by more stringent regulation than lawyer-controlled MDPs.⁴⁴ At the ABA annual meeting in August 1999, these recommendations were tabled pending further study. The MDP Commission held more hearings and subsequently revised its proposals, placed more emphasis on the need to preserve the core values of the profession and the need to give lawyers “control and authority necessary to assure lawyer independence,” but retained its recommendation of fully integrated MDPs.⁴⁵ At its meeting in July 2000, the ABA House of Delegates rejected those recommendations, adopted a resolution that reaffirmed the core values of the legal profession and its longstanding opposition to MDPs, and disbanded the MDP Commission.⁴⁶

B. Objections to MDPS

Competing views have emerged to explain the ABA’s summary rejection of MDPs in the face of their growing importance in Europe and what many suggest is their inevitability in the United States.⁴⁷ One view is that the ABA was genuinely concerned with the very real ethical dilemmas that could arise in MDPs. Others contend that the ABA was more concerned with the economic well-being of lawyers and viewed MDPs as threatening the monopoly of legal services.

Many potential ethical pitfalls of MDPs exist. One concern is that non-lawyers in the MDP would inappropriately influence lawyers’ professional judgment and independence by exerting pressure on lawyers to eschew their best legal judgment in favor of

42. *Id.*

43. Dzienkowski & Peroni, *supra* note 16, at 132.

44. *Id.* at 132–33.

45. *2000 Report*, *supra* note 34, at 1 (2000). The “control and authority” language was discussed in the report to the House of Delegates, but largely left to the states to define. *Id.*

46. The ABA House of Delegates adopted Resolution 10F, proposed jointly by the state bars of Illinois, New Jersey, New York, Florida, Ohio, Erie County, and Cuyahoga County, ABA, *supra* note 14. *See also* Dzienkowski & Peroni, *supra* note 16, at 179–80.

47. Dzienkowski & Peroni, *supra* note 16, at 90; Oral Remarks of Sidney Traum, Miami lawyer-CPA practitioner, to ABA Comm’n on Multidisciplinary Practice (Feb. 4, 1999), *available at* <http://www.abanet.org/cpr/traum.html> (on file with the University of Michigan Journal of Law Reform).

the bottom line.⁴⁸ Another serious concern is the prospect of both defining and dealing with the complex conflicts of interests that would arise in business organizations with thousands of employees offering varying services, only some of which would be legal services.⁴⁹

Others have expressed concern that the varying duties of confidentiality and avoidance of conflicts of interest between lawyers and other professionals would interfere with the stricter duties of lawyers and ultimately mislead and harm clients. Lawrence Fox, a Philadelphia lawyer and active member of the ABA, is one of the most vociferous critics of MDPs. He contends that they are dangerous and would deliver a mortal blow to the profession.⁵⁰ Fox points to the attest function of auditors, which requires public disclosure of what might be confidential information if acquired by a lawyer.⁵¹ Fox has accused accountants of having conflicts of interest rules that are “loosey-goosey,” and far more relaxed than those of lawyers, because they recognize conflicts only when clients are on opposite sides of the same matter.⁵² To make his point about independent judgment, Fox simply points to the advent of HMOs and the loss of professional independence to doctors.⁵³

The MDP Commission’s 2000 recommendations addressed these issues and suggested ways to ensure that lawyers practicing in MDPs would not fall into these ethical pitfalls. On the question of independent judgment, the MDP Commission recommended the creation of law departments within large MDPs where lawyers alone would supervise other lawyers directly.⁵⁴ Interestingly, the report noted that this would likely be less of a problem in small MDPs where practitioners have already developed methods of keeping legal and non-legal advice separate.⁵⁵ It has also been

48. Dzienkowski & Peroni, *supra* note 16, at 179–80; *see also* Written Testimony of Gary T. Johnson to the ABA Comm’n on Multidisciplinary Practice (Oct. 8, 1999), *available at* <http://www.abanet.org/cpr/johnson.html> (on file with the University of Michigan Journal of Law Reform).

49. Fox, *supra* note 33, at 975–77; *see also* Dzienkowski & Peroni, *supra* note 16, at 135.

50. Fox, *supra* note 33.

51. *Id.* at 973–74

52. *Id.* at 976. Charles Wolfram referred to Fox’s comments as “laughable in any forum but a gathering of lawyers.” *See also* Wolfram, *supra* note 12, at 974.

53. Fox, *supra* note 33, at 972. *But see generally* Harris & Foran, *supra* note 7, at 820 (arguing that although managed care has its downside, overall it has not affected the quality of medical care, in part because of the incentives created by doctors’ ethical duties and liability rules).

54. *2000 Report*, *supra* note 34, at 2.

55. *Id.* This point was recently reiterated by Professor Brustin in the context of non-profit public interest organizations that offer legal and non-legal services. *See also* Stacy L.

noted that these same arguments about interference with professional judgment were once made in opposition to in-house counsel and pre-paid legal plans, which are now universally accepted as legitimate practice settings.⁵⁶

On the issue of confidentiality and conflicts of interest, the MDP Commission noted that the duties of different types of professionals might vary, and put the onus on the lawyer both to explain this variation to the clients and to guard against impairment of confidentiality or the attorney-client privilege.⁵⁷ While lawyers already share confidences with non-lawyers such as secretaries, paralegals, and clerks, it is the lawyer's duty to ensure that the non-lawyers do not reveal confidences.⁵⁸ The MDP Commission did not suggest any changes to the conflicts rules, noting that the rules that currently apply to law firms would apply to MDPs.⁵⁹ The MDP Commission also recommended that the same entity should not be allowed to give legal advice to and perform audits for the same client.⁶⁰

Others have suggested that economic protectionism and self-interest were driving the ABA's wholesale rejection of MDPs.⁶¹ If MDPs were allowed, accounting firms and banks would accelerate their own growth and would out-perform most law firms. Typically, law firms lack both established organizational forms for providing an array of services, and the access to capital enjoyed by large accounting firms and financial institutions that can take advantage of capital markets for growth.⁶² Professors Dzienkowski and Peroni have suggested that some leaders of the bar "prefer to bury their heads in the sand and return to the imagined golden years, when

Brustin, *Legal Services Provision Through Multidisciplinary Practice—Encouraging Holistic Advocacy While Protecting Ethical Interests*, 73 U. COLO. L. REV. 787 (2002).

56. Daly, *supra* note 40, at 271.

57. 2000 Report, *supra* note 34, at 5.

58. See MODEL RULES OF PROF'L CONDUCT R. 5.3, cmt. 1–2; Statement of Professor John Dzienkowski, University of Texas School of Law, to ABA Comm'n on Multidisciplinary Practice (Apr. 8, 1999), available at <http://www.abanet.org/cpr/dzienkowski2.html> (on file with the University of Michigan Journal of Law Reform).

59. 2000 Report, *supra* note 34, at 6.

60. *Id.*

61. Dzienkowski & Peroni, *supra* note 16, at 89; Tia Breakley, Note, *Multidisciplinary Practices: Lawyers & Accountants Under One Roof?*, 2000 COLUM. BUS. L. REV. 275, 288 (2000).

62. It has been suggested that, in tandem with permitting MDPs, law firms should be permitted to have passive investors, but these suggestions have fared even less well than MDPs and their relative merits are beyond the scope of this Article. The MDP Commission specifically recommended prohibiting passive investment in MDPs in its 2000 recommendations. See 2000 Report, *supra* note 34.

the practice of law was viewed as a profession, rather than a business.”⁶³

C. The States' Response to MDPs

Whatever the reasons, the MDP debate at the national level in the ABA appears to be over, for now. But regulation of the legal profession is done at the state level, with the ABA's role confined to suggesting model rules in the hopes of both influencing substance and achieving uniformity. It is ultimately the States that will determine whether MDPs are permissible. Study and debate about multidisciplinary practice at the State level has proceeded apace despite the ABA's rejection of MDPs in 1999 and 2000.

As of April 2003, all but six state bar associations or state supreme courts had created task forces that have studied or are currently studying the MDP issue.⁶⁴ While 17 task forces have issued reports favorable to MDPs, only 3 state bars have come out formally in favor of MDPs.⁶⁵ Nineteen state bars or courts have formally rejected MDPs.⁶⁶ The rest of the states, regardless of the view of the task force that studied the issue, have taken less definitive action, such as deferring votes or recommending further study.⁶⁷ It appears

63. Dzienkowski & Peroni, *supra* note 16, at 88. See generally 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 (2000).

64. The states that have not addressed the MDP issue are Alaska, Hawaii, Louisiana, Massachusetts, Nevada, and Vermont. ABA, MDP Information (Apr. 2003), available at http://www.abanet.org/cpr/MDP_state_summ.html (on file with the University of Michigan Journal of Law Reform).

65. The state bar associations that rejected the pro-MDP position of their own task forces are Indiana, Pennsylvania, South Carolina, Utah, and Virginia. Even among this group, not all of the decisions appear final. In Utah, for example, the Utah Supreme Court showed a willingness to revisit the issue in the future if other jurisdictions adopt MDPs and can provide useful information. *Id.*

66. These states are Arkansas, Florida, Illinois, Indiana, Kansas, Maryland, Nebraska, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia, West Virginia, and Wyoming. *Id.*

67. According to the ABA website that tracks this information, at least 19 state bars have not taken a final position on MDPs. Delaware, for example, has taken the position that if the ABA changes its position on MDPs, it will also reconsider. Connecticut has received a report recommending no changes to the rules, but continues its study of the issue. States including Arizona, California, Georgia, Michigan, and Wisconsin have either specifically deferred voting on the issue or put the matter on a future agenda. States including Alabama, Connecticut, Iowa, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, South Dakota, and Washington have task forces that either have not completed their study or have taken the position that, in a general way, they will continue to study the issue. *Id.*

that only Idaho and Mississippi disbanded their task forces without a recommendation.⁶⁸ Although only one state bar association,⁶⁹ in addition to the District of Columbia bar association, has formally approved the MDP concept, the majority of state bars have indicated a willingness to listen and learn from further study and the experience of others. Like the MDP Commission of the ABA, the state bar task forces that studied MDPs focused on the accountant problem in large firms and did not consider the very different nature of the Main Street MDP.⁷⁰

PART II

This Part explores the demand for Main Street MDPs, and argues that permitting them would be a productive and low-risk experiment that might shed light on the merit and feasibility of MDPs in general. The evidence for this comes from solo and small firm practitioners as well as representatives of consumer groups who have testified before the ABA Commission,⁷¹ from the few scholars and commentators who have addressed the issue, and from law school clinics and legal aid organizations around the country that have run successful MDPs. This Part will discuss the demand for Main Street MDPs from clients and lawyers alike. It will then argue, by analogy to non-profit MDPs, that Main Street MDPs are practicable and can be structured in a way that minimizes the risks of unethical practice.

68. *Id.*

69. The Board of Governors of the Colorado State Bar Association has adopted a resolution supporting MDPs. *Id.*

70. Little evidence in the state MDP committee reports indicates that smaller firms were considered in whether to alter the ethics rules pertaining to MDPs. Many committees only recognized the impact on large firms and their association with accounting firms, financial institutions, and insurance companies. *See* Report of the Ohio State Bar Ass'n Council of Delegates on Multidisciplinary Practice and The Legal Profession, Apr. 2000; Connecticut Bar Ass'n Study Committee on Multidiscipline Practice Report, May 2000; Oklahoma Board of Governors Report on Multidisciplinary Practice, Feb. 2002; Tennessee Bar Ass'n Report from the Multidisciplinary Committee, Feb. 2000; Utah State Bar Multidisciplinary Task Force Report, Nov. 2000; Report of the Joint Comm'n of the Virginia State Bar and Virginia Bar Ass'n on Multidisciplinary Practice (MDP), Oct. 2001.

71. *Id.* Much of this is summarized in the MDP Commission Reporter's Notes submitted along with the 1999 Recommendation to the ABA.

A. Client Demand

To the extent that it was addressed, those testifying before the MDP Commission strongly agreed that significant demand for MDPs existed and that Main Street MDPs would not present ethical problems as widespread or as serious as those presented by the Wall Street variety.⁷² In fact, the testimony stressed the improvements in counseling, cost, and client comfort that Main Street MDPs could offer over traditional law firms.⁷³ The representatives of consumer groups that testified before the MDP Commission were in favor of MDPs and the Commission itself noted that:

The testimony before the commission by consumer groups offered overwhelming support for the proposition that individual clients need integrated professional advice on any number of areas, including estate-planning, small business counseling, accounting, and regulatory compliance. In the consumer groups' collective opinion, a dual practice model cannot meet these pressing needs.⁷⁴

Some of those who testified focused on the innovative ways that smaller practices could create MDPs that offered efficient and effective one-stop shopping.⁷⁵ With a smaller MDP, clients could get all of their needs met by one firm and for less cost than if they had to seek out independent professionals to deal with each of their needs. This would be true for individual clients as well as small businesses.⁷⁶

Witnesses offered substantial testimony before the MDP Commission about client demand for one-stop shopping,⁷⁷ particularly future demand once consumers became aware that they could go to a coordinated group of professionals to, for example, buy a home, build a home, plan their estate, adopt a child, or start a

72. Statement of Neil Cochran, Chairman, Dundas & Wilson, to ABA Comm'n on Multidisciplinary Practice (Feb. 4, 1999), *available at* <http://www.abanet.org/cpr/cochran1.html> (on file with the University of Michigan Journal of Law Reform); Terry, *supra* note 5, at 882–83.

73. *See, e.g.*, Cochran, *supra* note 72; Daly, *supra* note 2.

74. *Appendix C*, *supra* note 25, at 6–8.

75. *See, e.g.*, Summary of the Testimony of M. Elizabeth Wall, Group Director of Legal and Regulatory Affairs, Cable & Wireless PLC, to ABA Comm'n on Multidisciplinary Practice, *available at* <http://www.abanet.org/cpr/wall1198.html> (on file with the University of Michigan Journal of Law Reform).

76. Haddon, *supra* note 3, at 516.

77. Dzienkowski, *supra* note 58.

small business.⁷⁸ MDPs could offer more efficient and complete service at lower overall cost to the consumer, undoubtedly something for which there is great demand.⁷⁹ Professor Daly summed up the range of possibilities:

An MDP will allow the Main Street lawyer to offer the small business client 'one-stop-shopping' for advice in a wide range of areas, including dispute resolution, tax, technology, business planning, environmental regulation compliance, and human resources. Individual clients will have the benefit of 'one-stop-shopping' for personal life-style decisions that necessitate legal, financial, and psychological decision-making, such as estate planning, divorce, child custody matters, and juvenile criminal charges.⁸⁰

Legal problems do not exist in a vacuum but rather in the context of other problems and complex relationships. For example, one issue that divorce lawyers sometimes face is a client who, in a rush of guilt and avoidance, wants to accept a settlement from a spouse that the lawyer is convinced the client will later regret when the dust settles, the guilt subsides, and financial reality sets in.⁸¹ If the client were sitting not only with a lawyer, but also with a financial planner and a social worker, the client would, through joint counseling about the ramifications of the decision, be more likely to do what is in her own long-term best interest. Lawyers, for the most part, simply are not trained to offer the kind of effective and compassionate advice that is necessary in such circumstances, even though some may succeed on occasion. Under current rules, if the client wants counseling on the various aspects of the divorce, she must seek out three different professionals in three separate appointments, and the three advisors typically would not know what the others were counseling. The social worker, for example, might not realize that the client could get a larger settlement and would not know to address that issue.

There was very specific testimony before the Commission that highlighted the demand for MDPs in the area of disability and spe-

78. Weber, *supra* note 4.

79. Cochran, *supra* note 72; James W. Jones, *Focusing the MDP Debate: Historical and Practical Perspectives*, 72 TEMP. L. REV. 989, 993-94 (1999). See also Jim Grote, *Multidisciplinary Practices: Emerging Slowly . . . Very Slowly*, 15 J. FIN. PLANNING 52 (Apr. 1, 2002) (discussing demand from wealthy families for social workers when writing estate plans).

80. Daly, *supra* note 2, at 282.

81. See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 102 (6th ed., Aspen 2002).

cial education. Phillip Stinson, a lawyer with a four-attorney firm based in Philadelphia and Delaware that specializes in legal issues involving disabled children, testified that his advocacy on behalf of his clients would be improved if he did not have to maintain an “arm’s-length” relationship with the psychologists whose help is necessary to advocate on behalf of his clients. Because lawyers and psychologists have to work so closely in order to advocate effectively for children before school boards and administrative agencies, the ability to partner and offer integrated services would, according to this witness, improve outcomes.⁸²

Evidence of client demand for integrated services exists in the estate-planning area as well. Financial planning firms that serve affluent clients are already offering multidisciplinary services to clients, including hiring social workers to counsel wealthy families on dealing with affluence both before and after death.⁸³ Another firm that offers multidisciplinary financial services to individuals and families states on its website that part of the “team” from which the client will benefit includes an attorney:

Vogel Financial Advisors offers an array of advisory services designed to address the major areas of personal and business financial management including investment management, estate planning, risk management, and income tax and cash flow planning. Because we coordinate the efforts of the advisory team (CPA, attorney, and insurance agent) in these areas, clients benefit from an integrated, systematic approach to financial management.⁸⁴

The website fails to mention that, because of the ethical prohibition on lawyers working for non-lawyers and sharing fees, the attorney does not in fact practice as an attorney in the firm and that the firm out-sources its preparation of legal documents.⁸⁵ This arguably misleading statement on the website indicates that financial planning firms perceive client demand for coordinated legal

82. Statement of Philip Matthew Stinson, Sr. to ABA Comm’n on Multidisciplinary Practice (Oct. 9, 1999), available at <http://www.abanet.org/cpr/stinson.html> (on file with the University of Michigan Journal of Law Reform).

83. Grote, *supra* note 79, at 54. Some firms with less than fifty employee-professionals offer multidisciplinary services to wealthy clients. See, e.g., Tanager Financial Services website, at <http://www.tanagerfinancial.com>; Charles D. Haines, Inc., website, at <http://www.charlesdhaines.com>.

84. Vogel Financial Advisors website, available at <http://www.vfaonline.com/Advisors/vfaonline> (on file with the University of Michigan Journal of Law Reform).

85. Grote, *supra* note 79.

and financial advice. The founder of this firm, and others like it, maintain that their creation and success are due to client demand for mixed services.⁸⁶

The demand for this type of service in the estate-planning area is so significant that in June 2000, two lawyers who specialize in estate planning founded the Academy of Multidisciplinary Practice. Its purpose is to offer information and support to professionals in the estate-planning field, including lawyers, who want to collaborate with other professionals to offer integrated estate-planning services to clients. Through its website, it offers educational courses and tools accredited by the Estate and Wealth Strategies Institute at Michigan State University.⁸⁷ This group focuses on helping estate-planning professionals collaborate within the confines of the legal ethics rules that prohibit fee sharing. They offer advice, for example, on how lawyers can collaborate with insurance professionals to offer integrated financial and estate plans to clients without sharing fees or otherwise violating state ethics rules.⁸⁸

In addition to providing more effective and efficient services through MDPs, evidence presented to the MDP Commission indicated that the MDP form would be less intimidating to potential clients and might lead more people with legal problems to seek appropriate help. The Commission itself noted that MDPs might be more “user-friendly” in part because one might initially go to an MDP for non-legal reasons but then have easy access to a lawyer when the legal aspect of a problem became apparent.⁸⁹ Professors Harris and Foran argue that MDPs can help deal with a lack of information:

[A]nother important barrier to middle-class access to legal services [is] lack of information. Unlike high-wealth individuals and corporations, middle-class consumers often simply do not recognize their legal needs or, if recognized, do not know how to go about meeting them.⁹⁰

86. *Id.*

87. See The Academy of Multidisciplinary Practice website, available at <http://www.MDPacademy.com>.

88. Renno L. Peterson & David K. Cahoone, *How to Work Ethically with other Professionals*, BROKER WORLD, Sept. 2002.

89. Statement of Theodore Debro, Chairman, Consumers for Affordable and Reliable Services of Alabama, to ABA Comm’n on Multidisciplinary Practice (Feb. 12, 2000), available at <http://www.abanet.org/cpr/debro2.html> (on file with the University of Michigan Journal of Law Reform).

90. Harris & Foran, *supra* note 7, at 802.

One consumer advocate testified before the MDP Commission that many people are intimidated by lawyers and visit a lawyer only as a last resort.⁹¹ He suggested that offering legal services in conjunction with other relevant services would recast lawyers as problem solvers rather than adversaries.⁹² Moreover, low- and moderate-income people are more likely to go to non-lawyers, such as social workers, with their problems.⁹³ If social workers could practice in Main Street MDPs, clients who initially seek out non-lawyers for help would benefit if they could receive legal advice simultaneously.⁹⁴ By offering to low- and middle-income clients the types of networks now available only to the wealthy and eliminating or reducing the intimidation factor at the same time, more people would have more of their legal needs met.⁹⁵

The point is not that MDPs would always provide services that are superior to those of law firms, but that clients, particularly low-income clients for whom it might be more cost effective to seek services in an MDP, should be permitted to choose to receive legal services through multidisciplinary practices.

Creating a practice in which the participants develop a process and a culture for working together has its own distinct value. This explains why the contract model, whereby a law firm contracts with another professional firm to offer ad hoc, coordinated, but non-exclusive services to clients, is inadequate.⁹⁶ In working together on a client matter, the lawyer would have to be very careful about revealing confidences and would need consent for any such revelations.⁹⁷ Perhaps most importantly, as Professor Dzienkowski stated in his testimony before the MDP Commission, the quality of advice a client could get from a true “team” is likely to be far supe-

91. Debro, *supra* note 89.

92. *Id.*

93. *Id.*

94. *Id.*

95. Weber, *supra* note 4. Weber noted, for example, that about half of the adults in this country do not have written wills. *See also* Oral Testimony of Wayne Moore, Director of Legal Advocacy Group American Ass’n for Retired Persons, to ABA Comm’n on Multidisciplinary Practice (Mar. 11, 1999), *available at* <http://www.abanet.org/cpr/moore1.html> (discussing surveys that show the majority of low and moderate income people who could benefit from a lawyer do not use one) (on file with the University of Michigan Journal of Law Reform); Debro, *supra* note 89 (citing statistics indicating that low and moderate income people do not seek out lawyers when they should); Haddon, *supra* note 3, at 520.

96. New York adopted a rule in 2001 that permits strategic alliances allowing lawyers and non-lawyers to jointly market and make referrals to each other. New York Code of Prof’l Responsibility DR 1-107 [1200.5-c] (2002).

97. Wolfram, *supra* note 12, at 967.

rior than from an ad hoc affiliation.⁹⁸ In a team setting, the non-lawyers would educate the lawyers about their fields, whether it be financial planning or social work:

[A] common partnership fosters a shared culture and produces a consistently high work product with uniform attention to professional standards. One firm creates a fabric of mutual dependence, teamwork, and collaborative effort, rather than an ad hoc approach to client problems.⁹⁹

B. Lawyer Demand

In addition to client demand, there is evidence of demand for MDPs by lawyers who practice as solo practitioners and at small firms. The fact that financial advisors and accountants can partner and give advice that would be considered legal advice if given by a lawyer has led many lawyers to feel at a competitive disadvantage.¹⁰⁰ The proliferation of financial firms that bundle financial and estate-planning services lends credence to these concerns.¹⁰¹ Even without competition from such firms, the opportunity to expand and improve client service accounts for much of the demand by lawyers for MDPs.¹⁰² This business concern is coupled with an understanding that counseling clients on non-legal matters can potentially lead to problems. For example, testimony before the MDP Commission suggested that, because of the complexity of many clients' legal problems, particularly the elderly, well inten-

98. Dzienkowski, *supra* note 58.

99. *Id.* See also Oral Testimony of Roger Page, Nat'l Director of Merger and Acquisition Services and of the Washington Nat'l Tax Practice, Deloitte & Touche, LLP, to ABA Comm'n on Multidisciplinary Practice (Feb. 4, 1999), available at <http://www.abanet.org/cpr/page2.html> (on file with the University of Michigan Journal of Law Reform). See also Wolf-ram, *supra* note 12, at 964–66 (describing how current ancillary business options are not adequate).

100. Written Testimony of Linda Shely, Ethics Counsel, State Bar of Ariz., to ABA Comm'n on Multidisciplinary Practice, available at <http://www.abanet.org/cpr/shely2.html> (on file with the University of Michigan Journal of Law Reform). Others have objected to MDPs because of the potential effects on small firms. For example, Robert L. Ostertag, a past president of the New York State Bar who was involved with the ABA's General Practice, Solo and Small Firm Practitioners Section, testified against Main Street MDPs, fearing they would be "gobbled up" by the large, one stop-shopping, mega-firms that would develop. He analogized this phenomenon to the large chain bookstores that have put small booksellers out of business. See Ostertag, *supra* note 9. This objection, however, would be satisfied by the size limit on the MDPs proposed *infra* section III.

101. See *supra* notes 83–88 and accompanying text.

102. Haddon, *supra* note 3, at 516.

tioned lawyers risk offering misguided, non-legal advice that is not in their clients' best interests.¹⁰³

Another condition that might be driving demand by solo and small firm practitioners for MDPs is the issue of job satisfaction. Professors Trubek and Farnham, in their discussion of social justice collaboratives, note the dissatisfaction among lawyers with the systems in which they work.¹⁰⁴ Professor Haddon, who sat on the MDP Commission, reports that many lawyers who have gone to accounting firms to "practice tax" preferred the "supportive interdisciplinary environment" of those firms, where individual professionals were not isolated in their practice areas but were required to interact in serving their clients.¹⁰⁵ Because many lawyers have a background in the social sciences, it is entirely plausible that those lawyers would have a basic understanding of their own limitations in advising their clients and would gain satisfaction by practicing alongside other professionals.¹⁰⁶

C. Public Interest Practice and Law School Clinics

Even if significant demand for Main Street MDPs by lawyers and clients alike does exist, the question remains whether MDPs are practicable. One way to measure the practicability of Main Street MDPs is to look at organizations that already offer multidisciplinary services of which legal advice is one element. Although the accounting firms that have hired lawyers to "practice tax" are an example, that type of practice has few similarities to how Main Street MDPs would function. A closer analogy is found on the other end of the spectrum. There are MDPs that already exist and provide insight into the value and practicability of Main Street MDPs.

103. *Id.* at 529.

104. LOUISE G. TRUBEK & JENNIFER J. FARNHAM, HOW TO CREATE AND SUSTAIN A SUCCESSFUL SOCIAL JUSTICE COLLABORATIVE, INNOVATIVE PRACTICES TO EMPOWER PEOPLE OF LOW AND MODERATE INCOME, A GUIDEBOOK FOR LAWYERS AND NONLAWYERS, 5 (on file with the University of Michigan Journal of Law Reform) [hereinafter TRUBEK & FARNHAM, GUIDEBOOK].

105. Haddon, *supra* note 3, at 516.

106. The most typical undergraduate majors for incoming law students in 2001 were, in descending order, Political Science, English, Psychology, and Economics. Conversation with Robert Carr, Senior Statistician, Law School Admission Counsel, Oct. 3, 2002 (notes on file with author).

Scattered around the United States are non-profit community organizations that offer legal assistance as one of their services. Some law school clinics have partnered with community groups or other academic departments to offer multidisciplinary services to low-income and poor clients.¹⁰⁷ Professors Trubek and Farnham termed these partnerships “social justice collaboratives” and explained that such collaboration “generally begins either with the idea that issues outside the legal system are important for resolving legal issues or with the idea that a social program requires legal input.”¹⁰⁸ These organizations have been virtually invisible in the MDP debate.¹⁰⁹ Whether these groups are violating Model Rule 5.4 is an open question. Some of the language of Model Rule 5.4 is addressed to lawyers practicing for profit, and experts disagree on the extent to which non-profits should be exempt from its prohibitions.¹¹⁰ Professor Brustin has made a cogent and persuasive argument that this ambiguity in the rules should be clarified, and that non-profit MDPs should be permitted under the ethics rules and state laws governing unauthorized practice of law.¹¹¹ The important point here is that non-profit MDPs have demonstrated ethical viability and practical benefits which lends support to the viability of Main Street MDPs.¹¹²

Professor Brustin recently described how non-profit, multidisciplinary practices benefit low-income clients.¹¹³ Proponents of Main Street MDPs suggest similar benefits would occur if MDPs were allowed. One benefit is simply that these organizations are responsive to the needs of their clients and are very successful at helping their clients. Professor Brustin describes the complexity of the problems of the poor and makes a cogent argument for why one-stop shopping provides these clients with services that are otherwise difficult to obtain. Low-income clients often lack the knowledge, time, and money to go to different agencies for assistance.¹¹⁴ Moreover, their problems are often such that they simultaneously involve financial, social, and legal aspects that are

107. Brustin, *supra* note 55, at 796.

108. TRUBEK & FARNHAM, *GUIDEBOOK*, *supra* note 104, at 4.

109. Brustin, *supra* note 55, at 819–20.

110. *Id.* at 803–07.

111. *Id.*

112. “Issues of collaboration for social justice groups and business consultancies have some similarity. The main idea behind both of them is that legal problems cannot be effectively addressed without also addressing nonlegal issues.” TRUBEK & FARNHAM, *GUIDEBOOK*, *supra* note 104, at 4.

113. Brustin, *supra* note 55.

114. This may sometimes be the case not because the cost of accessing other services is prohibitive, but because it is perceived as such. *See* Debro, *supra* note 89.

better resolved with conscious reference to each other rather than separately.¹¹⁵ While this is often the case, clients are not always able to recognize the legal aspects of their problems, or they may go to the lawyer not realizing that they need other services as well. Professor Brustin gives the example of a client who goes to a lawyer for a restraining order because of domestic violence. If the lawyer is practicing within a community center, the client can easily obtain the counseling and financial advice she might need.¹¹⁶ In the context of the child welfare system, the lack of integration can discourage clients:

One parent described her perception of an apparent lack of understanding and collaboration between the various parts of the child welfare system upon which she was dependent. Her legal and services problems were very integrated, and yet from this parent's perspective, the professionals involved with these parts of the system seemed to operate in isolation from each other.¹¹⁷

Non-profit MDPs can also benefit the lawyers and other professionals who provide the service. Trubek and Farnham found that lawyers serving low- and moderate-income clients were often overwhelmed by those clients' non-legal problems and felt ineffective in resolving them.¹¹⁸

Non-profit centers that offer legal as well as other services are not the only entities already acting as MDPs. Some district attorneys offices use social workers and doctors as part of a team in dealing with some situations, such as those involving children who enter the system because of child abuse.¹¹⁹ Some jurisdictions have developed Child Advocacy Centers and other types of family treatment systems that involve lawyers and other professionals to deal with child abuse and domestic violence issues in a more holistic and less adversarial way.¹²⁰

Another type of current MDP practice is law school clinics. Around the country, a handful of law school clinics are forming

115. Brustin, *supra* note 55, at 792-93.

116. *Id.* at 793. *See also* 2 INTERDISCIPLINARY REPORT ON AT-RISK CHILDREN & FAMILIES 18 (May/June 1999).

117. Ann Moynihan et al., *Achieving Justice: Parents and the Child Welfare System: Foreword*, 70 *FORDHAM L. REV.* 287, 331 (2002).

118. TRUBEK & FARNHAM, *GUIDEBOOK*, *supra* note 104, at 8.

119. Debro, *supra* note 89.

120. 2 INTERDISCIPLINARY REPORT ON AT-RISK CHILDREN & FAMILIES 129 (May/June 1999).

partnerships with other university departments to offer services to clients. For example, Fordham University sponsors the Interdisciplinary Center for Family & Child Advocacy. In the clinic, law students, social work students, and psychology students work together to serve clients in the areas of domestic violence, child abuse/neglect, special education, and disability.¹²¹

The HIV/AIDS Law Project, one of the clinical programs at the University of California at Berkeley (Boalt Hall) Law School, has become part of a network that serves HIV infected, low-income women. The Family Care Network,¹²² housed at a children's hospital, offers medical care, social services, and legal services to women who typically enter the Network because of the medical needs of their children. Through that initial contact, the Network offers these women medical examinations and treatment, and encourages them to speak with a lawyer who analyzes the client's legal situation.¹²³ The types of legal issues often identified at the assessment interview include government aid to which the client was not aware she was entitled and the need for will drafting, powers of attorney and other estate-planning-related services.¹²⁴ These clients would never seek out legal services on their own, either because they do not realize the legal aspects of their problems or because they feel intimidated and disempowered.¹²⁵ But because these clients do seek out some services, particularly medical services for their children, the multidisciplinary nature of the agency helps them recognize and receive the comprehensive services that they need.¹²⁶

Not all law school clinics focus on the family and medical needs of low-income clients. The George Washington University Law School operates a clinic that is part of the wider community economic development movement, which seeks to improve low-income communities through the growth of small businesses by members of those communities.¹²⁷ The Small Business Clinic pro-

121. See Interdisciplinary Center for Family & Child Advocacy website, at <http://law.fordham.edu/hum/ce-fcgra.htm>.

122. For a description of the Network, see *id.*

123. Jeffrey Selbin & Mark Del Monte, *A Waiting Room of Their Own: The Family Care Network as a Model for Providing Gender-Specific Legal Services to Women with HIV*, 5 DUKE J. GENDER L. & POL'Y 103, 124-25 (1998).

124. *Id.* at 125. Sometimes lawyers at the Center are able to identify more pressing legal needs, such as impending evictions, which are often either the result of the failure of the clients to seek the cash benefits to which they are entitled, or simply discrimination. *Id.*

125. See *Interdisciplinary Graduate Education*, *supra* note 121.

126. *Id.*

127. See Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 196 n.2 (1997);

vides free start-up legal services to Washington, D.C., area entrepreneurs, nonprofit groups, individual artists and arts organizations.¹²⁸ The clinic uses students from the business and engineering schools as well as the law school. These students work together in teams to address issues ranging from trademark registration and business models to social cost analysis, production feasibility, and manufacturing operations.

These clinics (and others around the nation)¹²⁹ offer further evidence of the usefulness of, and potential demand for, Main Street MDPs. They demonstrate that it is possible for professionals from different fields to work together to provide comprehensive legal and non-legal advice to clients, and they demonstrate the effectiveness of that approach. The Berkeley Clinic, for example, provided legal services to more HIV-infected women during the first six months after it joined the Family Care Network than in any comparable period in the Clinic's previous seven-years.¹³⁰

These clinics and community-based service organizations, and their lawyers in particular, know very well the potential ethical risks created by their form of practice. They have adopted practices and procedures intended to prevent the realization of these risks. The Family Care Network shares client information among its professionals only if it gets consent from the clients, although it acknowledges that such consent may not be entirely voluntary because of lack of other choices that the client has.¹³¹

In a law school clinic at the University of Denver that includes student social workers, an elaborate memorandum is circulated to the law students. The memorandum explains that lawyers and social workers have different duties of confidentiality, and instructs the students on how to maintain confidentiality if they suspect one of their clients of child abuse.¹³² It explains that the student lawyer interviewing the client must get consent for the lawyer to share any information with a social worker. Before getting consent, the student lawyer must explain the confidentiality rules and the benefits and risks of working with a social worker. The student lawyer must tell the client that the social worker is bound by confidentiality

Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for People*, 7 CLINICAL L. REV. 227, 250–55 (2000).

128. Susan R. Jones, *Current Issues in the Changing Roles and Practices of Community Economic Development Lawyers*, 2002 WIS. L. REV. 437, 452.

129. See generally Trubek & Farnham, *supra* note 127.

130. Selbin & Del Monte, *supra* note 123, at 127.

131. *Id.* at 130.

132. See Memorandum to All SLO Employees, Student Lawyers, and Social Work Interns from Jacqueline St. Joan, in TRUBEK & FARNHAM, GUIDEBOOK, *supra* note 104, Appendix 2.

rules as well, except if she suspects child abuse, which is broadly defined.¹³³ Social workers must report suspected child abuse in Colorado, where this clinic is located. If the student lawyer subsequently learns information from which one might suspect child abuse, the student is required to build a “confidentiality wall.” The student must create a private file about that information, keep it out of the main file where a non-lawyer might find it, and not speak about the abuse to the social worker.¹³⁴

Fordham’s Interdisciplinary Center for Family & Child Advocacy also addresses the ethical issues involved in its practice.¹³⁵ Social workers in the clinic are not mandatory reporters of abuse, so the direct conflict with the lawyer’s duty of confidentiality is avoided.¹³⁶ The absence of a mandatory reporting requirement, however, does not avoid the ethical conundrum in which a social worker could find herself if she suspected that one of the clinic’s clients was an abuser. Social workers have their own code of ethics that encourages some action be taken when such a suspicion arises.¹³⁷ Research has found that successful collaboration in these circumstances requires that both the social workers and the lawyers clarify their roles, identify the appropriate tasks of each professional, and determine in advance how they are going to handle difficult situations.¹³⁸ Lawyers and social workers must work together to understand and respect the different approaches that they have to resolving clients’ problems. At the Fordham Clinic, for example, social work students act only on aspects of the clients’ legal cases and do not provide “direct” social services such as individual family therapy, parenting skills, etc.¹³⁹

The need to recognize and institute procedures for dealing with ethical issues as they arise was a central conclusion of Trubek and

133. See COLO. REV. STAT. § 19-1-103(1)(a), reprinted in TRUBEK & FARNHAM, GUIDEBOOK, *supra* note 104, Appendix 2, at 56.

134. TRUBEK & FARNHAM, GUIDEBOOK, *supra* note 104, Appendix 2, at 55–57.

135. INTERDISCIPLINARY CENTER FOR FAMILY & CHILD ADVOCACY, ANNUAL REPORT TO THE DEANS 6 (Apr.–May 2002) (on file with author).

136. Beginning in 2004, however, social workers will become mandated reporters in New York. Ann Moynihan, Memorandum: Rationale on Law/Social Work Collaborations and the Mandatory Reporting Law in New York (on file with author) [hereinafter Moynihan].

137. Nat’l Ass’n of Social Workers, Code of Ethics, § 1.07(c), available at <http://www.socialworkers.org/pubs/code/code.asp> (“The general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person.”) (on file with the University of Michigan Journal of Law Reform).

138. See 2 INTERDISCIPLINARY REPORT ON AT-RISK CHILDREN & FAMILIES 65 (Nov./Dec. 1999).

139. Moynihan, *supra* note 136.

Farnham, who studied social justice collaboratives around the country. They recommend determining exactly what rules govern each profession, and then setting up a protocol for dealing with issues as they arise. For example, on the issue of confidentiality, there may be institutional structures, such as making some of the collaborators employees of others, that would preserve attorney-client privilege and confidentiality.¹⁴⁰

Trubek & Farnham also noted some of the difficulties that professionals encounter doing interdisciplinary work. In discussing a collaborative in Chicago, the authors wrote:

Fostering an understanding across professions required extensive meetings and discussion. In the end, the collaborators recognized that each profession's outlook toward the client and the family was not going to be identical, despite sharing an obligation to the client. Nonetheless, they could work together for a positive client outcome.¹⁴¹

Non-profit MDPs provide evidence supporting Main Street MDPs in two distinct ways. First, the collaborative nature of the services appear to be very beneficial to lawyers and clients alike, and second, the ethical risks have not proven grave enough to interfere with the functioning of these practices. These social justice collaboratives are not perfectly analogous to Main Street MDPs, however, because they are run as non-profits, and they tend to be highly specialized in fields involving family relations and medical issues. Moreover, these collaboratives may be the only choice for the particular group of clients whom they serve because those clients do not have the option (or may not know of the option) of seeing different professionals individually for their needs.

D. Ethical & Professional Considerations

The fact that potential demand for Main Street MDPs exists, and non-profit MDPs appear to function effectively, does not completely determine whether for-profit Main Street MDPs would adhere to standards of ethical practice and further the interests of lawyers and clients alike. The testimony of lawyers, the commen-

140. TRUBEK & FARNHAM, *GUIDEBOOK*, *supra* note 104.

141. Trubek & Farnham, *supra* note 127, at 260.

tary of scholars, and the examples of public interest MDPs do, however, indicate that Main Street MDPs would promote the types of values that should be at the core of law practice while adhering to the ethical rules.

The MDP Commission itself, in its final recommendations to the ABA House of Delegates in 2000, set a high bar for ethical practice. Like the ABA House of Delegates' resolution,¹⁴² the MDP Commission identified the "core values" of the legal profession as "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* obligation."¹⁴³ Little evidence suggests that Main Street MDPs would constitute a threat to the core values identified by the MDP Commission or the House of Delegates. On the contrary, while preserving the values of confidentiality, independent judgment, and loyalty through conflict-free representation, MDPs may well promote other values that many contend should be held dearly by lawyers. As Harris & Foran put it:

[T]he ethical prohibition on non-lawyer ownership of legal service providers is defended as necessary to protect the 'core values' of the profession and preserve the exercise of independent professional judgment on behalf of clients. If the effect of that ethical rule is, however, that a broad class of Americans is unable to get needed legal services, one must ask on whose behalf is that independent professional judgment being exercised? The answer increasingly seems to be large commercial interests that are generally well informed and well situated to command the independence and loyalty of the lawyers they employ in any event.¹⁴⁴

Although the United States has the highest per capita percentage of lawyers in the world, many ordinary Americans have unmet legal needs.¹⁴⁵ One study conducted in 1994 found that "almost two-thirds of moderate-income Americans with legal needs in 1992 received no professional assistance."¹⁴⁶ The testimony before the MDP Commission, and the ruminations of commentators both suggest that low- and moderate-income people would be more comfortable visiting an MDP that includes a lawyer than seeking

142. See *supra* note 15 and accompanying text.

143. *2000 Report*, *supra* note 34 (emphasis in original).

144. Harris & Foran, *supra* note 7, at 776, 835.

145. Debro, *supra* note 89; Harris & Foran, *supra* note 7, at 790.

146. Harris & Foran, *supra* note 7, at 792.

out a lawyer in a traditional practice.¹⁴⁷ Meeting the legal needs of Americans is an important value of the profession, and was one of the rationales for upholding prepaid legal services plans, another form of practice implicating non-lawyers which the organized bar initially opposed.¹⁴⁸ Despite the large number of lawyers in this nation, many people have unmet legal needs. That fact underlies the recognized, if not mandatory, duty on every lawyer to do pro bono work.¹⁴⁹ It is noteworthy that one of the unsubstantiated objections concerning MDPs was that MDPs might not support their own lawyers' professional duty to do pro bono work. Yet Main Street MDPs, like pro bono work, enable people who are not currently being served to obtain legal services.¹⁵⁰

Another oft-mentioned objection to MDPs is the risk that non-lawyers in the firm would exert pressure on the lawyers to forego their duty of independent professional judgment when such judgment might have negative financial repercussions for the firm. One solution to that concern is for MDPs to have separate legal departments, supervised entirely by lawyers, responsible for all decisions relating to those lawyers' employment.¹⁵¹ The MDP Commission endorsed this idea for "large-size" MDPs.¹⁵² The result of this for Main Street MDPs, however, would be to isolate the lawyers so that the client who seeks the services of non-lawyers and lawyers, still ends up getting advice from two professionals separately, even though they are in the same MDP.¹⁵³ This would defeat much of the purpose of the MDP, which is to address the client's needs in a coordinated way.

A better way to consider the issue of independent judgment is to recognize the threats to its existence in traditional firms. Private law firms are for-profit businesses and the pressures that this cre-

147. *Id.*

148. *See* *United Trans. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *United Mine Workers of America, Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967).

149. MODEL RULES OF PROF'L CONDUCT R. 6.1, comment 1 states: "Every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer."

150. Dzienkowski & Peroni, *supra* note 16, at 126-27 ("Low- and middle-income individuals and small businesses, who are excellent candidates for receiving multidisciplinary services, are likely not to obtain professional legal and non-legal services in the ordering of their personal and business matters. . . . The public deserves the opportunity to receive services from such providers, and society is likely to be worse off if these clients do not receive multidisciplinary services.")

151. *2000 Report*, *supra* note 34.

152. *Id.*

153. Brustin, *supra* note 55, at 962.

ates are substantial. Financial pressures can lead to various types of conduct that interfere with lawyers' independent judgment, including billing fraud,¹⁵⁴ drug and alcohol abuse,¹⁵⁵ and mistakes resulting from overwork and stress.¹⁵⁶ Several current forms of permitted practice, such as in-house counsel and lawyers employed by insurance companies, place the lawyer in a situation where the financial interests of third-parties have the potential to affect the lawyer's independent judgment.¹⁵⁷ Contingency fees and the acquisition of an interest in a client's business are common payment schemes for lawyers that carry a risk of interfering with independent judgment.¹⁵⁸ The relevant questions for the Main Street MDP debate are whether the pressure on lawyers practicing in small groups with non-lawyers would be more significant than it already is,¹⁵⁹ and if so, whether the benefits are substantial enough to outweigh the risks.

Another potential threat to the independent judgment of lawyers that might arise in Main Street MDPs is the pressure of one member to refer, and then not contradict, other members. If a client went to an MDP to speak with a lawyer about a divorce, what would be the process by which that lawyer decides whether to suggest that the client invite the social worker to participate in their discussion? The MDP might have an incentive to include another professional in order to raise the fee. Similarly, if a lawyer and a financial planner were advising the client on her portfolio, and the lawyer disagreed with the investment advice, would the lawyer feel pressure not to voice that disagreement? The incentive to keep the peace and continue the representation might override the lawyer's independent judgment. One solution to this, suggested below, is to

154. Lisa Lehrman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990).

155. Rick B. Allan, *Alcoholism, Drug Abuse, and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265 (1997).

156. John A. Edington, *Managing Lawyers' Risks at the Millennium*, 73 TUL. L. REV. 1987, 1994 n.24 (1990).

157. Professor Terry calls the pressure on lawyers employed by third-party payor insurance companies "tremendous." Terry, *supra* note 5, at 928.

158. Written Remarks of Stefan F. Tucker, Chair, ABA Section of Taxation, to ABA Comm'n on Multidisciplinary Practice (Feb. 4, 1999), available at <http://www.abanet.org/cpr/tucker1.html> (on file with the University of Michigan Journal of Law Reform). One of the most important ways lawyers are currently protected from what might otherwise be substantial interference with their professional judgment is by the current rule against passive investment in law firms. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2002). Professor Dzienkowski testified before the MPD Commission that the prohibition of passive investment should continue with MDPs as a way of protecting independent judgment. Non-lawyers are more likely to interfere with judgment to benefit the economic interests of the firm if they have investors to whom they answer. Dzienkowski, *supra* note 58. The prohibition is substantially justified, and any rule allowing for Main Street MDPs should continue it.

159. See Jones, *supra* note 79, at 996.

prohibit anyone in the MDP from selling products to clients, such as securities, life insurance, or the services of a broker, for which anyone in the MDP receives a commission.¹⁶⁰

The issue is not how to prevent these pressures entirely, but how to ensure that lawyers are capable of carrying out their ethical responsibilities when these pressures do arise. If we assume lawyers are able to retain their independent judgment and focus on the best interests of their clients under current rules, which allow for the various pressures described above, there is little reason to think that lawyers will suddenly buckle under the pressure exerted by a non-lawyer colleague.

The best evidence from non-profit practice groups demonstrates significant benefits from Main Street MDPs. Yet, because these practices are non-profit and generally do not subject their lawyers to financial pressures found in private firms, one cannot draw clear conclusions about the effect that working in a Main Street MDP would have on the independent judgment of its lawyers. Given the likely benefits of these practices, however, and the fact that lawyers already have experience dealing with threats to their independence, the non-profit practice experience further supports the case for experimentation.

Interestingly, reported ethical problems concerning confidentiality in the non-profit, MDP context focuses almost exclusively on the reporting obligations of social workers.¹⁶¹ These problems are dealt with by seeking informed consent from clients, and instructing the professionals about how to handle the situation as it arises. Lawyers practicing in small private MDPs would presumably see fewer clients where child abuse would be an issue than do clinics that concentrate on a particular population.

Moreover, perhaps unlike many of the clients of non-profit MDPs, clients of Main Street MDPs could freely decide whether the risk that the structure of the MDP might result in the loss of the attorney-client privilege or confidentiality is worth the potential benefit from seeking services through an MDP. These potential clients, as paying clients, would be unlike many non-profit MDP clients and could choose to go to traditional law firms instead. Thus, the bedrock rule of Main Street MDPs should be absolute transparency about confidentiality issues, coupled with a full explanation of any consent or waiver forms that clients are asked to sign.

160. See *infra* notes 169–172 and accompanying text.

161. Trubek & Farnham, *supra* note 127, at 241, 249.

Conflicts of interest concerned many of those who studied this issue and testified before the MDP Commission because of the sheer size of the large accounting firms and what many assumed would be the size of law firms once they took on non-lawyer partners. A small MDP could deal with conflicts of interest in the same way they already handle them.

As with confidentiality, small-scale, private MDPs are unlikely to encounter frequently the types of serious conflicts issues that opponents fear. No one has suggested that practicing in an MDP would change the ethical obligations, including the duty to avoid conflicts of interest, to which lawyers must adhere. The MDP Commission recommended that, for conflicts purposes, every client of a lawyer in an MDP is a client of all of the lawyers in the MDP, as the rule currently stands for law firms.¹⁶² It would make sense to extend that rule to non-lawyers in a Main Street MDP. This would mean, for example, that the same firm probably could not represent a husband in a divorce proceeding when the wife has sought counseling services from the firm.

Conflict of interest issues are more likely to arise in large MDPs, just as they arise more frequently in large law firms. Even in the public interest field, a large firm will experience more conflicts of interest than a small firm. Trubek and Farnham describe a partner at a large Wisconsin law firm who does a lot of work with other professionals on community economic development for non-profit clients. The biggest ethical problems for this partner are conflicts between his clients and the clients of other partners of his firm.¹⁶³ The key for this lawyer is transparency and explaining to his clients the conflicts rules and the fact that he may be required to withdraw.

The examples of public interest MDPs suggest that lawyers practicing in private, Main Street MDPs could face specific and identifiable ethical dilemmas, including confidentiality issues and conflicts of interest. These examples also suggest a less well defined, although likely more common problem of the clashing of professional cultures. For MDPs to work well, lawyers must understand their role not as central, but as “one of many important voices.”¹⁶⁴ Trubek and Farnham note that to function in a social justice collaborative, lawyers have to unlearn some of what they learn in law school. Different professional mores, particularly those in the “helping” professions like social work, require “going be-

162. *1999 Report*, *supra* note 1, at 6.

163. Trubek & Farnham, *supra* note 127, at 256.

164. Selbin & Del Monte, *supra* note 123, at 128.

yond helping clients to assert legal rights to thinking about how to improve clients' lives by using law in combination with other types of expertise."¹⁶⁵ Witnesses testified before the MDP Commission about the desire of small firm and solo practitioners to partner with non-lawyers in order to serve their clients more effectively.¹⁶⁶ This was particularly true of lawyers in the family law and estate-planning areas.¹⁶⁷ Practitioners in social justice collaboratives and other types of non-profit MDPs also echoed this desire.¹⁶⁸ This indicates that lawyers might be willing to adjust their professional attitudes to pursue what they perceive as a more productive and satisfying practice.

PART III

Having highlighted the potential benefits and risks of Main Street MDPs, the challenge is to carve out a rule, an exception to Model Rule 5.4, which would allow Main Street MDPs only. This requires defining a Main Street MDP and then incorporating whatever precautions are deemed necessary to address the most serious and probable risks with that form of practice into the rule.

Although simply limiting the number of lawyers and non-lawyer professionals in an MDP avoids many of the potential threats to core values, a rule permitting Main Street MDPs still must address other issues. A model rule should include an explanation of the need for full disclosure about the nature of the MDP and the risks it involves as well as a requirement that the MDP register with the state court or bar. Although the MDP Commission recommended this only for MDPs not controlled by lawyers, this Article argues that all MDPs should register with the state's highest court. Registration would facilitate data collection about MDPs and allow for informed assessment of their effectiveness. It would also highlight the risks involved for the members of the MDP and perhaps remind them of their ethical responsibilities.

Other structural rules would help protect the duty of independent judgment. First, the prohibition against passive investment

165. TRUBEK & FARNHAM, *GUIDEBOOK supra* note 104, at 8.

166. *See id.*

167. *See id.*

168. Trubek & Farnham, *supra* note 127, at 241.

should apply to MDPs.¹⁶⁹ Just as with law firms, the prospect of lawyers or non-lawyers answering to outside investors poses a substantial risk to the fiduciary relationship of lawyer and client.¹⁷⁰ Second, the rule should state that neither lawyers nor non-lawyers in the MDP could sell products to clients for which anyone in the MDP would receive a commission. Lawyers are currently discouraged from entering into business transactions with clients because of the risks self-interested business transactions pose to a lawyer's fiduciary duties to clients.¹⁷¹ The risks would be essentially the same if it were not the lawyer, but the lawyer's partner or associate offering such products. The commissions from the products, such as commissions received by insurance agents and securities dealers, could distort both the legal and non-legal advice that the client receives, since the seller of the product and anyone who would also profit by its sale have personal financial incentives that may not coincide with the client's best interests. Allowing lawyers to directly associate their legal advice with the sale of products from which they would profit creates too great of a risk.

This same rationale underlies the rule that lawyers may open "law-related" businesses and offer services to their clients if they keep those businesses separate. Lawyers who have "ancillary businesses" selling insurance, securities, or real estate, for example, must make clear to their clients that the protections of the lawyer-client relationship do not apply when they are serving in a non-lawyer capacity.¹⁷² It is worth noting that "law-related" services are considered ethical if lawyers abide by the transparency rules. Ancillary businesses by lawyers have been steadily growing in popularity due in large part to lawyer recognition of client demand for more comprehensive services.¹⁷³ Prohibiting MDPs from selling products to their clients would make members of MDPs less likely to be influenced by personal financial gain than lawyers practicing in traditional firms who also had a stake in an ancillary business. Lawyers involved in ancillary businesses, even if they follow the

169. Professor Dzienkowski proposed prohibiting passive investment in MDPs as a way of protecting independent judgment. Dzienkowski, *supra* note 58. He argued that this makes it harder for non-lawyers to interfere with judgment to benefit the economic interests of the firm. *Id.*

170. *See supra* note 158.

171. *See* MODEL RULE OF PROF'L CONDUCT 1.8(a) cmt. 1 (2002): "A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with the client." *See also* Daly, *supra* note 2, at 242.

172. MODEL RULES OF PROF'L CONDUCT 5.7(a)(2) (2002).

173. Robert W. Denney, *Branching Out: Lawyers are Diversifying and Getting into Ancillary Businesses: Is It Good or Bad for the Profession?*, PENN. LAW., Dec. 2000, at 34.

transparency requirements of Model Rule 5.7, are still at risk of allowing their personal financial interests to influence their advice when their law clients become clients of the ancillary business as well.¹⁷⁴

Limiting MDPs' ability to collect commissions by selling law-related products such as securities, insurance or real estate, would limit the types of MDPs that could be formed. A securities firm, insurance agent or real estate broker probably would not be interested in joining a firm that prohibited commissions. But this only reinforces the point of the proposed rule, to commence the MDP experiment on a small scale with firms that pose the fewest risks to ethical practice.

The MDP Commission addressed many of these issues in its recommendations. The Commission, in both its 1999 and 2000 reports, set out the principles under which a rule allowing MDPs should be written, without drafting a model rule or rewriting Rule 5.4.¹⁷⁵ The 2000 recommendations stated:

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 non-lawyer professionals in a practice that delivers both legal and non-legal professional services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services. "Non-lawyer 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.

174. See Wolfram, *supra* note 12, at 964-66 (describing how current ancillary business options are not adequate).

175. See *2000 Report*, *supra* note 34; *1999 Report*, *supra* note 1.

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 non-lawyers 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.¹⁷⁶

To limit this recommendation to the establishment of Main Street MDPs, the following principles might be added:

6. Firms engaging in multidisciplinary practice may have no more than 30 professional (i.e. non-support staff) members at any time.¹⁷⁷
7. Before any client engages a lawyer who practices in the MDP, the lawyer must obtain the client's informed consent, in writing.¹⁷⁸ As part of obtaining informed consent, the lawyer must explain to the client the nature of the MDP and any risks to the ordinary attorney-client relationship present in the MDP that would not be present if the client engaged a lawyer practicing alone or only with other lawyers.
8. As a condition of permitting a lawyer to engage in the practice of law in an MDP, the MDP is required to register 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.¹⁷⁹
9. None of the lawyers or non-lawyer professionals who practice in the MDP shall sell products to clients for which any lawyer or non-lawyer professional in the MDP receives a commission.

176. See 2000 Report, *supra* note 34.

177. See *infra* note 183 and accompanying text.

178. The recent revisions to the Model Rules introduce the concept of "informed consent," which is defined as "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." MODEL RULES OF PROF'L CONDUCT 1.0(e) (2002). This concept should be incorporated into the transparency requirements of the MDP.

179. See 1999 REPORT, *supra* note 1, at Recommendation 14.

CONCLUSION

Despite all of the debate about MDPs, few have considered the possibility of creating different MDP rules for different types of MDPs. Professor Terry acknowledged that the larger the MDP, the less influence the lawyer will have and the more tempting it will be to violate ethics rules, and that this distinction is the “closest [she] can find to a principled basis for distinguishing the MDP practice.”¹⁸⁰ Nevertheless, Terry rejected different rules for different MDPs because of the difficulty in drawing the lines that would define Main Street MDPs and exclude larger firms.¹⁸¹ She also pointed to witnesses before the MDP Commission who “urged the Commission not to fragment the bar,” which she contended might happen if only small MDPs were allowed.¹⁸²

The solution to the line-drawing problem is simply to draw lines. Lines are drawn all the time in the law despite knowledge that the result will be some over-inclusiveness and some under-inclusiveness.¹⁸³ There is no magic in the number ‘30’ and it is, by necessity, somewhat random. This number seems small enough to avoid major conflict problems, while large enough so as not to limit Main Street MDPs only to the smallest firms. Size limitations appear effective in minimizing the ethical risks that MDPs pose, particularly the risk of conflicts of interest, independent judgment, and loss of confidentiality. Progress and success tends to be associated with bigger and better, so it might be considered naïve to suggest that MDPs should not be permitted to grow beyond a certain point, but it might be exactly such a prohibition that will guarantee their success both ethically and financially.

The more practical problem is whether state bar associations, which typically suggest rules to their state supreme court for adoption, would be able to agree on where the line should be. Large firms, which would not be permitted to practice as MDPs, might not relish the competition from new MDPs that might be able to offer more services at a lower cost. The legal landscape in a particular state will substantially affect whether the proposed rule is passed. It might be easier for such a rule to pass in smaller, less urban states, where most lawyers practice in small settings, than in

180. Terry, *supra* note 5, at 929.

181. *Id.*

182. *Id.* at 930.

183. See generally Joseph Tussman & Jacobus ten Broek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

New York, where Wall Street firms dominate. On the other hand, it may be that the sheer number of lawyers and forms of practice in a state like California would make such an experiment non-threatening to traditional firms. The larger firms might not feel threatened by, or have any other reason to object to, Main Street MDPs with whom they do not consider themselves in competition.

The fragmentation objection is not as easy to pin down. Very few of those testifying before the MDP Commission considered the possibility of different rules for different size firms. Some offered testimony that any rule allowing MDPs should focus on the ethics of individual lawyers, not the type of MDP.¹⁸⁴ Others who testified assumed that a rule permitting MDPs would apply to all MDPs,¹⁸⁵ although some testimony suggested that even with one set of rules, disclosure levels might vary, depending on the sophistication of the client.¹⁸⁶

Limitations on the size of MDPs would not address all of the issues. Complete transparency would still be necessary, particularly about the fact that the client was free to remain with one of the professionals even if she wanted to go elsewhere for the other services. A client who goes to an MDP consisting of a lawyer, social worker, and financial planner for the purposes of writing a will, would need to be told that she could use all or just some of the services offered and was free to go elsewhere for any of those services. That is, one-stop-shopping is entirely by the choice of the client. The fear that the lawyer will inappropriately steer the client toward incompetent non-lawyers in the firm is no more threatening than the current situation, where lawyers routinely assign matters for which they have been hired to other partners or associates in a firm, or refer matters out to other firms. Competence would be the concern of the whole MDP, just as it is currently the concern of the whole law firm.

It is difficult to see the harm that could be done by allowing the formation of small firms that offer integrated multidisciplinary ser-

184. Statement of Kathryn A. Oberly, Vice Chair and General Counsel, Ernst & Young, L.L.P., to ABA Comm'n on Multidisciplinary Practice, at 3 (Feb. 4, 1999), *available at* <http://www.abanet.org/cpr/oberly1.html> (on file with the University of Michigan Journal of Law Reform); Oral Testimony of Irwin L. Treiger & William J. Lipton, co-chairs of the National Conference of Lawyers and Certified Public Accountants, to ABA Comm'n on Multidisciplinary Practice, *available at* <http://www.abanet.org/cpr/aicpa.html> [hereinafter Treiger & Lipton] (on file with the University of Michigan Journal of Law Reform).

185. Written Testimony of Lawrence J. Fox to ABA Comm'n on Multidisciplinary Practice, *available at* <http://www.abanet.org/cpr/fox1.html> (on file with the University of Michigan Journal of Law Reform).

186. Treiger & Lipton, *supra* note 184.

vices to clients. Small MDPs would test client demand,¹⁸⁷ lawyer demand, and the possibility of preserving core values in this setting. Were the experiment successful, it would provide empirical evidence from which rules could be formulated for larger MDPs and their success could be predicted. Or, the experience might indicate that the ethical risks of MDPs outweigh their benefits. As the law and ethics rules stand now, wealthy clients and corporations can receive services that are quite close to what they would get if MDPs were allowed. Attorneys are currently employed by large accounting firms that advise corporations as well as by smaller financial firms that advise wealthy individuals.¹⁸⁸ Although they claim not to be giving legal advice, these firms have been tremendously successful in responding to client demand for integrated services by skirting the ethical prohibitions on fee sharing and partnering with non-lawyers. The current prohibition on MDPs only hurts lower- to middle-income individuals who do not have access to larger, expensive firms, but have an equal or greater need for comprehensive services.¹⁸⁹

The benefits of one-stop-shopping, coordinated advice, and economic efficiency apply to Wall Street and Main Street firms alike. The ethical risks involved in the former, however, are much more substantial and serious than in the latter.

As with any experiment, this one could fail. Main Street MDPs might be more trouble than they are worth. The possible reasons for such an outcome are numerous: it might be difficult to attract other professionals to work with lawyers; the combination of professionals working together may not work because of a clash of custom and practice or because of the difficulty of arriving at an acceptable financial arrangement. There might be many lawyers who, for financial, ethical, or personal reasons, would have no interest in partnering with other professionals, just as there will be clients who just want to see a lawyer. Yet the data from non-profit legal services providers indicates that, in many situations, clients and lawyers alike believe that service is improved through multidis-

187. See Weber, *supra* note 4 (claiming that, once consumers became aware of MDPs, they would flock to them).

188. See *supra* notes 83–88 and accompanying text.

189. See Written Remarks of James C. Turner, Executive Director, HALT, Inc., to ABA Comm'n on Multidisciplinary Practice (Feb. 5, 1999), available at <http://www.abanet.org/cpr/turner1.html> ("Today, cost and complexity remain the largest barriers that prevent access to the civil justice system. Tens of millions of low- and moderate-income Americans cannot afford to hire a lawyer when they have a legal problem, and millions of others are intimidated by even the prospect of trying to deal with the system on their own.") (on file with the University of Michigan Journal of Law Reform).

ciplinary practice. The official public debate about MDPs has been going on for more than five years with empirical and normative claims being made on all sides. It is time to test those claims on a small scale.