EBBS AND TIDES AND WATER RISE — WHAT’S THE REAL CONCERN WITH MDPs?

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I. INTRODUCTION

Attorneys in this country are confronted with a potential sea change in the types of services they provide to clients and the way in which they provide them. The practice of law is increasingly multidimensional and is shaped, forcefully, by client demands. Further, to an unprecedented degree, attorneys are faced with direct competition from non-attorneys — e.g., accountants and financial planners.

The issue affects the delivery of legal services, and the integrity and quality of those services. The affected parties are not only attorneys but also their clients and the non-attorneys who are presently engaged in activities which traditionally have been considered the practice of law. The resolution of the problem will affect these three categories of persons in a variety of ways and will result in a lasting change in the manner in which law is practiced in this country. To date, attorneys have been slow to recognize the problem and are now in the process of determining whether to accede to the change or attempt to derail it by turning back the clock.

This Article examines whether the American Bar Association (ABA) should relax its current ethical rules to permit multidisciplinary practices (MDPs) in the United States. To that end, Parts I and II address the current debates over ethical rules and the significance of those rules in both law and accounting, tracing the evolution of their existence. Part III outlines the specific ethical rules that are affected by MDPs and contrasts them with similar provisions that govern accountants. Part IV suggests that there is adequate reason to, at a minimum, revisit the concept of amending the Professional Rules of Conduct to permit MDPs. Part V contains the Commission on Multidisciplinary Practice’s models, eventual proposal, and comments. Finally, Part VI proposes that the ABA should phase in the MDP concept, thereby permitting the client to seek legal and non-legal advice from the same firm while ensuring that the bar retains the requisite control to protect all parties involved.

II. BACKGROUND OF THE DIALOGUE

Commentators take differing views of the MDP problem and its solution, curiously adopting water metaphors as the vessel of expression. One maintains that “we need not shift with every wave in the ocean, [though] we must be aware

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of, and attuned to, its ebbs and flows." But should we deviate from that position when the "tides of change are . . . lapping at our shores with increased vigor?"2 Another argues that we need not react because "water finds its own level."3 Yet another finds this laissez-faire approach "utterly unrealistic," pointing out that, when left alone, "water [will go] to the lowest level."4

The focal concerns of these observers are the very nature of the practice of law, its model rules of professional responsibility, and, specifically, whether the ABA should relax those rules to accommodate consumer interest. From a historical standpoint, the concept of commercialism in the practice of law is nothing new. In fact, the ABA has struggled with the issue, in one form or another, for decades. Most recently, the issue involves the need for a free-market phenomenon referred to as an MDP.

Simply stated, an MDP is a combined effort of attorneys and other professionals, working both independently and concurrently, to meet the multifaceted needs of their clients.5 Commentators refer to MDPs as a "seamless web" of services, or "one-stop shopping."6 Though MDP arrangements often include attorneys working in partnership with a wide array of other professionals, (e.g., accountants, engineers, and financial planners), the greatest tension arises from the attorney-accountant relationship. Accordingly, that is the focus of this Article.

Identifying the present debates, proponents maintain that MDPs are necessary to meet client demand.7 They further suggest that the legal profession's restriction on MDP arrangements is an attempt to protect its current monopoly, not to protect clients.8 Opponents, on the other hand, believe that the MDP crusade is not driven by client need, as asserted, but rather by a commercialistic reaction to a current market demand. More significantly, they are concerned that MDP arrangements will increase the likelihood of practitioners violating the Model Rules of Professional Conduct (Model Rules). To date, tax attorneys at the Big Five accounting firms have managed successfully to circumvent disciplinary

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1Tax Section Chair Statement to MDP Commission, TAX NOTES TODAY (Feb. 12, 1999) (LEXIS, FEDTAX lib., TNT file, elec. cit. 99 TNT 23-55).
3Tax Section Chair Statement, supra note 1, at ¶ 32.
6Id. at ¶ 2.
8See Tax Section Chair Statement, supra note 1, at ¶ 14 (alleging that by refusing to relax the Model Rules, attorneys are "protecting their pocketbooks rather than protecting the interests of the public").
action for possible Model Rule violations by asserting they are tax advisors and, as such, are not engaged in the practice of law.

The MDP concept is not unique to the United States. In an effort to provide the above-mentioned "seamless web of services" to their non-U.S. clients, the Big Five have entered into contractual agreements with law firms in many foreign jurisdictions. With the exception of Switzerland, however, the law firms in those jurisdictions have remained independently controlled, often referred to as "captive" firms.

While, admittedly, foreign jurisdictions have varying ethical provisions governing the practice of law, it is noteworthy that many do share the ideals of our Model Rules.

This is not to imply that foreign jurisdictions are not interested in possible rule violations. Currently, Canada, Great Britain, and Australia are conducting on-going studies of the arrangements. To date, Australia is the only jurisdiction to adopt specific rules to regulate MDPs.

Two international bar associations, the International Bar Association Council (IBAC) and the Council of Bars and Law Societies of the European Nations (CCBE), have also studied the issue of multidisciplinary practice. The IBAC, though ambivalent, did articulate the need for specific MDP rules to the extent a jurisdiction permits the practice. The CCBE, on the other hand, was in vehement opposition.

In an attempt to resolve the MDP issue nationally, the ABA appointed a twelve-member Commission on Multidisciplinary Practice (Commission). In part, the ABA asked the Commission to ascertain whether the current Model Rules sufficiently carry out their intent (i.e., client protection) or, alternatively, whether they inadvertently harm clients by inhibiting attorneys' ability to respond to clients' business needs. To the extent the Commission concluded the latter, it faced the greater task of determining whether a plausible solution includes amending the Model Rules to allow two seemingly conflicting professions to operate in unison. That is, should the ABA amend the Model Rules to allow an accountant, whose primary duty to the client is objectivity, to work in partnership with an attorney, whose primary duty to the client is zealous advocacy? Given current MDP debates, it is that inconsistency, evidenced in various

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See John Gilbeaut, Squeeze Play As Accountants Edge Into The Legal Market, Lawyers May Find Themselves Not Only Blindsided By the Assault But Also Limited By Professional Rules, 84 A.B.A. J. 42, 43 (1998). But see Center for Professional Responsibility, Written Materials of Linda Galler, Hofstra University (visited Jan. 14, 2000) <http://www.abanet.org/cpr/galler.html> (arguing that ABA Informal Opinion 328 contradicts the assertion by providing that attorneys who engage in a second law-related occupation are held to the same standards as an attorney while engaged in that occupation).


See id. at ¶ 13.

See id. at ¶ 16.

See id.

See id. at ¶ 18.

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provisions of each profession's ethical rules, that creates the most tension.

III. THE ETHICAL RULES AND PROFESSIONALISM

Historically, society has reserved the term "profession" for vocations in theology, law, and medicine. Over time, however, the meaning evolved, including other occupations that require advanced education and intellectual, as opposed to physical or manual, skill. Commentators argue that the underlying principle of professionalism is the belief that a professional is not unduly influenced by fluctuations in a free market and, instead, responds to higher societal values—at times to the detriment of his or her own self-interest. As the practice of law and corresponding ethical rules evolved, that belief became a driving force.

A. The Background of the Ethical Rules Governing Attorneys

Since as early as 1875, the legal community has grappled with the issue of "business" versus "profession." In fact, it was the escalation of commercialism in legal practice, i.e., the fear that the profession was gravitating from "a branch of the administration of justice" toward a "mere money getting trade," that precipitated the initial movement toward governing bar associations. In turn, those bar associations drafted what eventually became the framework of self-governance that is in place today. Thus, in an effort to protect its coveted "professional" status, the legal community opted for self-governance and regulation. From a historical perspective, this began with the adoption of professional rules of ethics.

In 1887, the Alabama State Bar Association adopted the first formal Code of Professional Ethics in the United States. Soon thereafter, the ABA realized the significance of uniform rules and appointed a Committee to ascertain whether it, too, should adopt ethical standards for its members. The Committee concluded affirmatively, and in 1908 it drafted the Canons of Ethics. As mentioned, the impetus behind the Canon's adoption was the same that prompted the organization of bar associations—the threat of commercialism.

Subsequent to the adoption of its Canons, the ABA continued to demonstrate an interest in ethics by periodically appointing special committees to review the rules' effectiveness. Time and again, the committees identified problem areas, often recommending substantial revisions. In response, however, the ABA

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1See id. at ¶ 1.
3See id.
5HENRY S. DRINKER, LEGAL ETHICS, at 20 (reprinted 1980).
6See id.; MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 12 (1908).
7See DRINKER, supra note 19, at 23.
8See id.; 31 A.B.A. Reports 680 (1907).
9See id., supra note 19, at 24-25.
10See Monroe H. Freeman, Lawyers' Ethics in an Adversary System (1975), at 129 (Committees were appointed in 1928, 1933, 1937, 1954, and, finally, in 1964).
generally opted for smaller scale modifications and amendments.

The ABA continued with this piecemeal approach until 1964, when a special committee concluded that, if the Canons were to have any effect at all, the ABA must expand their scope and, more importantly, impose sanctions for violations. The committee based its conclusion on the "changed and changing conditions in our legal system and urbanized society." Five years later, the ABA adopted the Model Code of Professional Responsibility (Model Code). The Model Code, a substantial departure from the Canons, was divided into nine sections, each containing a Canon, Ethical Considerations, and Disciplinary Rules.

Naturally, the Code's evolution did not stop there. Subsequent changes in the legal system, including Supreme Court decisions that undermined the bar's attempts to control the profession through minimum fee schedules and restrictions on admission to practice, hastened the need for further modifications. Again, the ABA appointed a committee and assigned it the task of "rethinking" its ethical positions. Eventually, that committee drafted the Model Rules. Though the biggest change occurred from the Canons to the Model Code, it was the transition from the Model Code to the Model Rules that created the greatest controversy and resistance.

More recently, the American Law Institute (ALI) drafted the Restatement of the Law Governing Lawyers (Restatement). The ALI views the drafting, and subsequent adoption, of the Restatement as the "the next logical step" in the development of ethical standards in the legal profession. Like its other Restatements, the ALI intends the Restatement of the Law Governing Lawyers to clarify and simplify the law. Further, the ALI intends that it reflect a re-examination of the legal profession's social goals. Though it is unclear what force and effect the Restatement will carry, it is noteworthy that courts began citing to it prior to its final form.

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25See id. at 128.
26See id. at 1254.
29See Hazard, supra note 27, at 1251. The controversy apparently resulted from the profession's view of the drafting committees. Specifically, the 1969 drafting committee was "designed to be acceptable" and, to avoid controversy, did not invite outsiders to participate in the process. Conversely, the composition of the 1980 Committee was "untraditional." The committee was chaired by Robert Kutak, who was regarded by the bar as "a dangerous radical." Further, the committee's drafting process became "quasi-legislative," with interim drafts disseminated to interested parties—resulting in two counterdrafts. The current committee, the MDP Commission, seems to lie somewhere in between. Though there are no outwardly controversial members on the committee, the Commission did allow testimony from outsiders and invited comments at several open hearings. Id.
30See id. (stating the view of Professor Geoffrey Hazard, Jr., Director of the American Law Institute and reporter to the commission that drafted the 1983 Rules of Professional Conduct).
32See, e.g., In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 929 (8th Cir. 1997); Sears Roebuck & Co. v. Goldstone & Sudalter, 128 F.3d 10, 16 (1st Cir. 1997); In re Dresser Indus., 972 F.2d 540, 545 (5th Cir. 1992).
In summary, from 1908 to date, the ABA has, at a minimum, demonstrated its willingness to address change. In this, it has recognized potential problems and, in response, appointed committees to analyze the issues and propose possible solutions. Most recently, this willingness is evidenced by the appointment of the Commission on Multidisciplinary Practice. In the context of the Commission, and of multidisciplinary practice in general, it is interesting that, notwithstanding the duty to be objective, the accountant's ethical responsibilities are rarely mentioned.

B. Ethical Rules Governing Certified Public Accountants

Like attorneys, members of the accounting profession first proposed written ethical rules at the turn of the century. Unfortunately, the proposal was poorly received, and, from its inception until 1917, the accounting profession lacked meaningful ethical guidance. In 1917, however, the American Institute of Accountants (Institute) adopted eight rules of professional conduct, governing areas from competence to fees and advertising. Similar to the rules governing attorneys, the ethical committees responsible for their implementation and enforcement undertook several major overhauls over the years. In 1969, following an approach taken by the ABA, the Institute decided to restate its ethical rules as minimum standards, as opposed to the “strict letter of the law.”

Today, certified public accountants are guided by the Code of Professional Conduct (Code) of the American Institute of Certified Public Accountants (AICPA). The Code, adopted on January 12, 1988, consists of two sections—the Principles and the Rules. The AICPA further provides its members with ethical guidance through its Bylaws, Ethical Rulings, and Interpretations. Finally, as with attorneys, compliance with the established ethical standards depends upon each professional’s voluntary actions, peer and public opinion, and, when necessary, disciplinary proceedings.

At first glance, the underlying intent, as well as the historical evolution, for both governing regimes appears harmonious. In fact, the implementation of

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See Alan Cerf, Professional Responsibility of Certified Public Accountants 5-6 (1970). It should be noted that Bylaws of the American Association of Public Accountants did contain some general guidelines, e.g., expulsion if convicted of a felony.

See id. at 7.


Id. at 449.


See id. (“The Principles provide the framework for the Rules, which govern the performance of professional services by members.”).

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ethical standards in both law and accounting originated from the fear that, without action, the evils of commercialism would prevail.\textsuperscript{41} Notwithstanding this apparent symmetry, however, there is one significant distinction.

Unlike law, many rules governing accountants are drafted in a manner that recognizes the profession's potential responsibility to third parties, \textit{e.g.}, investors and creditors.\textsuperscript{42} That is, to protect the rights of third parties, there are circumstances where the governing rules require an accountant to maintain objectivity, "a distinguishing feature of the profession."\textsuperscript{43} Conversely, the rules in the legal profession are designed to protect the client. Thus, the duty owed to the client may differ dramatically depending on the profession.

IV. VARIATIONS IN PROFESSIONAL RULES GOVERNING ATTORNEYS AND ACCOUNTANTS

Most MDP opponents argue that the rules governing the conduct of attorneys and accountants are incompatible in circumstances where the two professions work in partnership. From a rudimentary viewpoint, this incompatibility may stem from the inherent differences in the structure of the prototypical law firm and the prototypical accounting firm. A law firm consists of partners and associates offering legal services to their clients. A Big Five accounting firm, on the other hand, offers a wide array of services to its clients—a mere portion of which is "legal services."\textsuperscript{44} Typically, accounting firms provide audit and attes-

\textsuperscript{41}Compare the events that lead to the legal profession's implementation of ethical standards:

\ldots [T]he leaders of the bar, realizing the deplorable conditions into which their profession was falling, as well as the growing tide of commercialism and the growing influence of those who would turn the profession from 'a branch of the administration of justice' into a 'mere money getting trade,' began the movement for the reestablishment \ldots of bar standards \ldots .

DRINKER, \textit{supra} note 19, at 20, to the events that lead to the accounting profession's implementation of ethical standards:

Display advertising, competitive bidding for audits and other forms of accounting work, the use of actual or fictitious corporate title, distribution of circular letters of solicitation and other materials, public criticism of fellow public accountants, solicitation of clients, evasion of responsibility for work performed, use of an agent to solicit clients, allowance and acceptance of brokerage or commissions by accountants, performance of work on contingent fee basis and self laudation.

Cerf, \textit{supra} note 34, at 6 (quoting JOHN CAREY, \textit{THE RISE OF THE ACCOUNTING PROFESSION} 85 (1970)).

\textsuperscript{42}See PREVITS & MIRINI, \textit{supra} note 33, at 160; see also United States v. Arthur Young & Co., 465 U.S. 805, 817, 818 (1984) (finding that "[t]he independent public accountant [certifying financial statements] owes ultimate duty to the corporation's creditors and stockholders, as well as to the investing public. This 'public watchdog' function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.").


\textsuperscript{44}See Arthur Andersen Integrated Services (visited Jan. 17, 2000) <http://www.arthurandersen.com>. Arthur Andersen's web site advertises services in the areas of financial statement assurance, business consulting, business risk consulting and assurance, global corporate finance, process solutions, tax services, and knowledge products. Further, the firm advertises legal services—though the web site clearly notes that such services are not provided in the United States.
tation functions as well as consulting, which includes tax practice. The tax practice aspect of the accounting firms' services is significant to the current arguments that the professional rules of conduct for attorneys and accountants are incompatible. Specifically, the accounting firms' right to offer tax practice services is the bridge that accountants use to link consulting and the practice of law.

The tax practice bridge has precipitated the current mass hiring of attorneys by the Big Five accounting firms. One commentator fears that, if allowed to continue, this trend will ultimately place the "legal system's values" in a "state of prospective jeopardy." That is, opponents fear that the allowance of MDPs will result in the absorption of law firms by accounting firms. Because attorneys will then be under the control of accountants, who are "unfettered and unimpressed by the legal profession's standards of professional conduct," the legal system's values will erode.

Among the most important values to the legal profession are competence, confidentiality, loyalty, and, most commonly noted, independence. The following section analyzes the rules of professional conduct governing both attorneys and accountants that were intended to preserve the above-mentioned values. Specifically, the analysis will focus on the incompatibility in those rules, as well as the possible risk to these values, if attorneys are permitted to practice in partnership with accountants.

A. Rules Governing Competence

Rule 1.1 of the Model Rules provides that an attorney "shall provide competent representation to a client." The comments to the rule explain that prior experience is not required to meet this standard. Rather, an attorney can attain the requisite competence through, among other things, association with an experienced attorney, reasonable preparation, or a thorough analysis of the facts and legal elements of the issue involved.

For all intents and purposes, Rule 201 of the AICPA Code of Professional Conduct mirrors the "competence" requirement above. That is, the rule requires the accountant to either possess the required level of competence prior to perfor-

\[ \text{See Gilbeaut, supra note 9, at 44 (quoting Roger Page, national tax practice director at Deloitte & Touche, as saying the firm's tax practice has grown about 30% a year which has, in turn, prompted the increase in the firm's hiring of attorneys).} \]

\[ \text{Wolfman Testimony Before ABA Multidisciplinary Commission, TAX NOTES TODAY (Mar. 12, 1999) (LEXIS, FEDTAX lib., TNT file, elec. cit. 99 TNT 53-20).} \]

\[ \text{Id. at ¶ 11.} \]

\[ \text{See id.} \]

\[ \text{See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1. In general, the Restatement is consistent with the Model Rules. The Restatement, applying tort law principles, provides that a "competent" attorney is one with "the skill and knowledge normally possessed by members of that profession or trade in good standing." As in tort law, the test hinges on the "reasonableness" of the situation. Thus, as illustrated in the corresponding comments to the rule, it may be reasonable for an informed client to agree to conditions on services that may not otherwise be in his or her best interest, e.g., limitation to a small budget or representation outside the expertise of the attorney. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 cmt. b, d (Tentative Draft No. 8, 1997).} \]

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mance or, when necessary, acquire it during the course of performance. Analogous to the Model Rule 1.1 Comments, the AICPA Interpretation of Rule 201 clearly provides that the latter is a "normal part of the performance of professional services." Given this, one could logically conclude that permitting attorneys and accountants to provide their services through a single enterprise would not compromise the ethical standard of competence.

At least one commentator disagrees. In a letter to the MDP Commission, Professor Bernard Wolfman articulated his strong belief that attorneys, particularly tax attorneys working in the accounting firms, do not have sufficient links to "legal personnel resources." Consequently, the MDP attorney cannot sufficiently maintain the continuing legal education derived from a working relationship with other firm attorneys who specialize in fields outside tax. Professor Wolfman concludes that the mass production of "stock" products and the Peoplefeeders case support his assertion that there is a serious competence issue within the current structure of accounting firms.

According to Wolfman, "stock" products, or mass-produced financial products for which the "10th client (buyer) will pay as much as the 1st," are inherently problematic because the design is not client-specific. Instead, the seller bases its approach on a "one-shoe-fits-all mentality." Recently, Forbes Magazine published an article that lends credence to this claim. The Forbes article described Deloitte & Touche's (Deloitte) marketing scheme for a corporate tax shelter, which included "cold-call pitches, to thousands of companies." Forbes also published the following introductory paragraph, taken verbatim from two different letters sent by the accounting firm:

Dear:

As we discussed, set forth below are the details of our proposal to recommend and implement our tax strategy to eliminate Federal and state Income taxes associated with [the company's] income for up to five (5) years ("the Strategy").

As an incentive, Deloitte promised to back its "strategy" through audit, but not litigation. Further, it guaranteed a partial refund of fees if back taxes were owed.

50See Wolfman Testimony, supra note 46, at ¶ 13.
51Id.
52See id.
54See Wolfman Testimony, supra note 46, at ¶ 15.
55Id.
56Id.
58Id. at 198.
59See id.
Without question, this arrangement is troubling. However, it is difficult to maintain that this type of incompetence, if that is indeed the case, is limited to accounting firms or multidisciplinary practices. Law firms also struggle to gain clients in the financial products market.\(^{60}\) Seemingly, the bigger MDP concern is the potential conflict of interest within Deloitte—including free representation at audit if challenged and the partial refund of fees if the government prevails.

Wolfman’s reference to the *Peoplefeeders* case can be similarly analyzed. In *Peoplefeeders*, the Tax Court addressed the issue of bad debt deductions taken by the taxpayer. Professor Wolfman was particularly troubled because the same accounting firm, Arthur Andersen, provided tax advice, prepared the taxpayer’s consolidated return, and represented it at audit and in the Tax Court.\(^{61}\) He questioned whether it was “incompetence that led to paper and money shuffling and the arguments to support them [or whether it was incompetence that] led the accounting firm and its lawyers to take the case to court?”\(^{62}\)

Again, neither situation is unique to multidisciplinary practice. Assume, for purposes of this argument, that Arthur Andersen’s advisors demonstrated a lack of competence either when they advised *Peoplefeeders* or when they agreed to file the Tax Court petition. Unfortunately, in the context of “competence,” the same outcome could have resulted whether the attorneys were partners in Arthur Andersen or a traditional law firm. In summary, the rules requiring competence are similar for both accountants and attorneys. Accordingly, it is difficult to support the claim that an attorney is any less competent simply because he or she practices in an MDP.

### B. Rules Governing Confidentiality

With regard to confidentiality, Model Rule 1.6 provides that an attorney “shall not reveal information relating to representation of a client unless the client consents after consultation.” Absent client consent, Rule 1.6 actually prohibits the attorney from disclosing the information except in very limited circumstances.\(^{63}\) Those limited circumstances include situations where: 1) the attorney reasonably believes disclosure is necessary to prevent the client from committing a crime that is likely to result in substantial bodily injury or 2) disclosure is necessary for the attorney to defend a claim of misrepresentation.\(^{64}\)

AICPA Rule 301 similarly prohibits its members from disclosing confidential client information without consent. The difference, however, is that the rule contains an express provision that it does not apply to subpoenas or court or-
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ders. Further, practitioners should "not . . . construe [the rule] to relieve a member from his or her professional obligations under Rules 202 and 203." Significant, here, is the Rule 203 requirement that an accountant may not express an opinion that a company's financial statements conform with generally accepted accounting principles (GAAP) if the statements contain a departure, unless the accountant describes the departure, its approximate effects, and the reason the departure does not result in a misleading statement. An example of a justifiable departure from the generally accepted rule might include the "evolution of a new form of business transaction.

MDP proponents argue that the confidentiality rules among accountants and attorneys are similar. First, they assert that AICPA Rule 301 never requires disclosure of confidential information by accountants attesting to financial statements. Second, they assert that, to the extent the rules do differ, Congress's recent amendment to section 7525 "closes the gap.

1. Disclosure of Information by Accountants

Commentators have asserted that the client, not the CPA, has ultimate control over the disclosure of confidential information when the CPA determines that the financial statements have not been prepared in accordance with GAAP. That is, "the CPA must not disclose [the] confidential information himself, but must inform the client he will have to resign or issue a qualified statement unless the client discloses the information so that the statement is accurate." This distinction is hairsplitting. It is irrelevant whether the accountant discloses the information or withdraws, which, in effect, places the world on notice that there is an unresolvable problem. In the end, the client needs the attestation. Therefore, the confidential information will, eventually, be disclosed. More importantly, the argument disregards a striking aspect of the rules—a court's subpoena power over the accountant.

Expressly stated in AICPA Rule 301, the duty to maintain client confidences terminates upon the CPA's receipt of a court order. Assume the client, above, refuses to disclose the information and the CPA withdraws representation. If law enforcement later charges the client with a crime relating to that same information, it can compel the CPA, pursuant to a court's subpoena power, to disclose the information. On the contrary, it could not compel the attorney, who obtained

67 Id.
69 Id.
71 Page, supra note 70, at ¶ 5.
identical information in the course of legal representation, to do the same. In fact, absent reasonable indicia that the client intended to commit a crime that could cause death or serious bodily injury to another, Model Rule 1.6 categorically prohibits it. This holds true even if the attorney, like the accountant in the example, has withdrawn representation. For the client, this may become a critical distinction.

2. Tax Practitioner's Privilege Under Section 7525

Proponents similarly maintain that, to the extent there is a distinction in the confidentiality rules governing attorneys and accountants, Congress diminished it with the enactment of the new tax practitioner-client privilege. Others take this posture one step further and assert that the privilege rises to the level of congressional acquiescence to MDPs. Perhaps so, though one could also argue it was merely a backlash on the Service for its alleged taxpayer abuse.

Notwithstanding the debate over congressional intent, practitioners in an MDP may find that the new tax practitioner privilege creates as many problems as it solves. First, Congress limited the privilege to federal “tax advice,” specifically excluding criminal proceedings and written communications between practitioners who directly or indirectly promote tax shelters. Second, like the attorney-client privilege, a client may waive the tax practitioner-client privilege with or without knowledge or intention thereof.

For practitioners in an MDP, the underlying problem with the newly created privilege circles back to the inherent difference in the practice of accounting and the practice of law, i.e., the duty of independence versus the duty of zealous advocacy. To illustrate, assume an MDP client recently filed a petition in the
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Tax Court and is now seeking outside financing. Assume, further, that an MDP accountant is involved in the client's tax controversy and, consequently, has obtained confidential client information. When asked by outside lenders to certify the client's financial statements, the accountant cannot assert the privilege.\(^{80}\)

An MDP would face similar problems when it certifies financial statements and provides tax planning for the same publicly traded entity.\(^{81}\) In summary, although it is a welcome advancement for non-attorney tax advisors, the newly created privilege lacks the requisite teeth to place on par the confidentiality requirements of the accountant and the attorney.\(^{82}\) Thus, given the current MDP debates, this is a valid area for concern.

C. Rules Governing Conflicts of Interest (Loyalty)

Model Rule 1.7 provides that an attorney shall not represent a client if the representation may be materially limited by the attorney's responsibilities to another client, third party, or by the attorney's own interests unless: 1) the attorney reasonably believes the representation will not be adversely affected, and 2) the client consents after appropriate consultation. Notwithstanding the exception, the comments to Rule 1.7 caution that "when a disinterested lawyer could conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."\(^{83}\) Finally, when determining whether a potential conflict exists, the Model Rules require firm-wide imputation.\(^{84}\)

Similar to Rule 1.7, AICPA Rule 102 provides that, without adequate disclosure and client consent, an accountant may not perform a professional service for a client that could be construed as biased. The significant difference between the two rules is the express language in the AICPA Interpretation that a client may never eliminate or limit an accountant's duties under Rule 101 by providing

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\(^{80}\)See id. (citing The CPA Tax Practice Privilege—Less Than Meets the Eye, Tax Notes Today (Oct. 30, 1997) (LEXIS, FEDTAX lib., TNT file, elec. cit. 97 TNT 210-55)).

\(^{81}\)See Wilson, supra note 78, at 333; see also S. REP. No. 105-174, at 71 (1998) (“The ability of any regulatory body, including the Securities and Exchange Commission (SEC) [sic] to gain or compel information is unchanged by this provision.”).

\(^{82}\)This is especially true because section 7525(a)(2) explicitly provides that the privilege does not extend to criminal proceedings.

\(^{83}\)MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7. The Restatement contains similar provisions, though the drafters elaborate, further, on proper consent. Specifically, an attorney who does not "personally" inform the client assumes the risk that the client is inadequately informed. Consequently, the consent may be invalid. See RESTATMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 202, 216 (Proposed Final No. 1, 1996).

\(^{84}\)See Wolfman Testimony, supra note 46, at ¶ 18. Significantly, the Restatement, like the AICPA rules, allows a firm to put up "fire walls" to avoid imputation. That is, the attorney or accountant with information from representation of Client 1, that may conflict with the firm's representation of Client 2, is simply shielded (in terms of the representation and monetary compensation) from the firm's representation of Client 2. When properly executed, the Restatement's imputation rules will not prohibit the firm's representation of both Clients 1 and 2. Model Rule 1.10, however, does not provide for firewalls.

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consent. Rule 101 requires independence when an accountant performs certain functions, e.g., audits and financial statement attestation. Further, unlike the Model Rules, the AICPA rules do not impute potential conflicts firm-wide. Rather, "it is the individual [accountant] who owes the duty of loyalty." Accordingly, when two accountants in the same firm are performing services for different clients that fall outside the purviews of Rule 101, e.g., consulting, and there is a conflict, the informed client can simply consent and both accountants may continue to represent their respective clients.

Significant to the "conflict" issue, the Securities Exchange Commission (SEC) recently authored a letter stating "it would consider an [accounting] firm's independence from an SEC registrant to be impaired if that firm also provides legal advice to the registrant." This alone poses a sizable problem for MDPs. Further, to the extent an MDP establishes a litigation practice, the problem may compound. The implementation of a litigation practice will increase the likelihood that the firm must decline representation due to third party conflicts including, among others, duties to the partnership and partners. Thus, the fundamental rationale for the MDP arrangement, i.e., the ability to provide the client "one-stop shopping," is undermined.

1. Attorneys' Duty to the Partnership

Every partner has a fiduciary duty to the partnership. Inherent in that duty "is the obligation to conduct partnership affairs in such a manner as to avoid . . . damage to partnership interests." Thus, the attorney has the duty to protect both the client's and the firm's interests. At times, these duties conflict.

For example, refer to the Deloitte marketing scheme described above. Undoubtedly, a prudent attorney, advising a client challenged by the Service for its use of Deloitte's product, would question whether the shelter was ill-conceived. If so, the prudent attorney would further question whether the better approach would be to seek reimbursement of ensuing penalties and interest from the "promoter," Deloitte. However, because Deloitte has mass-marketed the product, and the Service is likely to challenge each shelter it discovers, the attorney at Deloitte is unlikely to suggest anything beyond the company's "guarantee."

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87 See id.
91 See Novak & Saunders, supra note 57, at 198.
92 Assuming that the shelter was, indeed, ill-conceived.
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Admittedly, this is a problem. Yet, analogous to the conclusions for the "incompetence" assertions, above, the scenario is not unique to MDPs. As mentioned, law firms also sell these types of products and, quite possibly, make similar claims. The more compelling problem is that MDPs create additional ethical dilemmas for attorneys—especially when the potential conflict relates to a fellow partner.

2. Attorneys' Duty to Other Partners

There is no dispute that partners have a fiduciary duty to act in "utmost good faith and with integrity in the dealings with one another in partnership affairs." Courts have construed this duty to mean that "every partner is bound to act in a manner not to obtain any advantage over [a] copartner in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind." Moreover, it includes "the obligation to conduct partnership affairs in such a manner to avoid damage to another partner's interest."

Thus, when the taxpayer in Peoplefeeders asked Arthur Andersen's advisors what options it had when it received its deficiency notice, its advisors, at least theoretically, faced an ethical dilemma. They could defend the firm's prior position, which might harm the client yet benefit the firm's partners, by generating additional fees. Conversely, they could decline representation, which, in effect, gives the taxpayer notice that it may have a potential claim against the firm and, thus, results in a possible loss to the co-partners.

Again, a cogent argument can be made that this conflict currently exists in traditional law firms. In fact, few would dispute it. The problem with MDPs, however, is the increased likelihood of conflicts when attorneys are forced to defend their accountant-partner's position in the course of their client's representation. Further, the increase in these types of conflicts is not limited to the litigation realm. Given the varying ethical standards for signatory return-preparers and tax advisors, practitioners in MDPs are similarly susceptible to conflict when providing tax advice.

3. Return-Signing CPAs and Advising Attorneys' Duty to the "System"

Notwithstanding the professions' ethical guidance and the Internal Revenue Code's penalty provisions, tax advisors are also bound by Circular 230. Specifically, Circular 230 governs the behavior of attorneys, CPAs, and enrolled agents who practice before the Treasury, including the Service. Historically, the Cir-
cular provided little guidance to the tax attorney grappling with ethics and client advice. The 1994 amendments clarified the issue, however, by providing that return advice may not be rendered unless "the practitioner determines the position satisfies the realistic possibility standard; or the position is not frivolous and the practitioner advises the client of any opportunity . . . for disclosure." 99

The same is not true for return-signing CPAs. Specifically, Circular 230 requires the signatory return-signer to ensure that, to the extent an unfrivolous position fails to meet the realistic possibility standard, the client actually discloses it. 100 The difference is significant because a Circular 230 violation can lead to suspension or disbarment from practice before the Service. 101 More drastic, however, is the Circular's "guilt by association" provision which precludes an otherwise eligible individual from practicing before the Service when she remains associated in practice with a disbarred person. 102 That is, through continued association, the disbarred practitioner's partners are similarly disbarred. 103

Here, it is possible that a tax attorney in an MDP may advise a particular tax position without violating Circular 230, yet the return-preparer in the same firm may not sign the return: Undoubtedly, this could lead to confusion, if not conflict, among the advising attorney, the return-signing accountant, and the client. Distinguishing this situation from practitioners in law firms, accountants routinely sign tax returns. Therefore, unlike many of the alleged MDP conflicts that, upon closer review, apply equally to law firms, this conflict may be much more prevalent in the MDP environment. 104

C. Independence (Fee Sharing)

Finally, and most frequently, opponents assert that MDP attorneys violate the rule that prohibits fee-sharing. Recodifying a 1928 addition to the 1908 Canons, Model Rule 5.4 explicitly provides that, except in limited circumstances, "a lawyer or law firm shall not share legal fees with a nonlawyer." The purpose for the prohibition, as explained in the comments, "[is] to protect the lawyer's professional independence of judgment." 105 Here, unlike the rule variations out-
lined above, there is no counter-argument that attorneys practicing in law firms face similar issues.106 The AICPA, on the other hand, does not mandate a blanket prohibition on accountants and non-accountants sharing fees. Interestingly, however, it does require accountants performing financial statement certifications and attestations to maintain “a majority of the ownership of the firm in terms of financial interests and voting rights.”107 Further, non-CPA owners “have to abide by the AICPA Code of Professional Conduct” and, to assure that they do, AICPA members may be held responsible for acts of the non-CPA owners.108

Given the above, the fee-sharing rules for both accountants and attorneys are unmistakably irreconcilable. Regardless, MDP proponents point to the allowance of ancillary practices for attorneys, as well as the “D.C. Rule,” to support the repeal of Rule 5.4.109 Curiously, the same proponents fail to suggest that the AICPA similarly repeal its rule requiring certain accountants to maintain both financial and management control.110

1. Ancillary Businesses

Though the ABA has a long history of prohibiting affiliations between attorneys and non-attorneys, it acceded to affiliations, at least in part, with the adoption of the ancillary practice Rule 5.7.111 Model Rule 5.7 explicitly allows law firms to provide services that are ancillary to the practice of law. More important, the rule provides that attorneys performing such ancillary services are subject to the provisions of the Model Rules. In permitting this, the ABA departed from a sixty-year position that required attorneys to choose between practicing law or some other related field, e.g., accounting, real estate, etc.112

106The Restatement’s comments, mirroring Model Rule 5.4’s intent, provide that “a person entitled to share a lawyer’s fees is likely to attempt to influence the lawyer’s activities so as to maximize those fees.” To prevent this, an attorney violating the rule may be subject to professional discipline and fee forfeiture. To that end, courts will not assist an attorney attempting to enforce such an agreement. See Restatement (Third) of the Law Governing Lawyers, § 11 cmt. b, h (Proposed Draft No. 2, April 6, 1998).
108Id.
109See National Conference of Lawyers, supra note 2, at ¶ 32.
110Significant to this, MDP opponents were quick to criticize the MDP Commission’s ultimate recommendation that provided for non-attorney controlled MDPs. Specifically, they criticized the Commission’s seeming acceptance that “our CPA brethren and sisters insist that their firms be controlled by CPAs” yet did not recognize or accept that this same independence was necessary for attorneys. See Comment Letter to the Commission on Multidisciplinary Practice, Tax Notes Today (July 30, 1999) (LEXIS, FEDTAX lib., TNT file, elec. cit. 99 TNT 146-35); Preliminary Report on the MJSBA Ad Hoc Committee on Multidisciplinary Practice, Tax Notes Today (July 16, 1999) (LEXIS, FEDTAX lib., TNT file, elec. cit. 99 TNT 151-48).
112See id. at 748.
Thus, instead of prohibiting an attorney from practicing in dual professions, the ABA decided to encompass, within its governance, certain ancillary non-legal services provided by attorneys.\textsuperscript{113}

Interestingly, the commission studying the ancillary business issue voiced concern that, ultimately, the rule would lead to the argument that attorneys and non-attorneys should be allowed to provide both legal and nonlegal services in partnership.\textsuperscript{114} However, it concluded that, at least at the time, the issue was "premature."\textsuperscript{115} Regardless, it is significant that prior to the ABA's adoption of Rule 5.7 both proponents and opponents of ancillary business practices raised the identical ethical issues that the ABA faces today: (1) the changing market has defined a need for dual services (pro); (2) attorneys should not be driven by the market but, rather, by their clients' interest in advocacy (con); and (3) dual practice arrangements will harm existing ethical rules, namely, conflicts of interest, confidentiality, and loyalty (con).

1. The D.C. Rule

To date, the District of Columbia (D.C.) is the only jurisdiction refusing to adopt the ABA's Model Rule 5.4 as drafted. Instead, the D.C. Rules of Professional Conduct permit non-attorney professionals to work in partnership with attorneys where the sole purpose of the partnership is to provide legal services.\textsuperscript{116} Further, analogous to Rule 505 governing accountants, the D.C. Rule requires that: (1) all persons with financial interests or managerial control adhere to the ethical rules; (2) attorneys with financial interests maintain responsibility for the ethical conduct of non-attorneys; and (3) the agreement be evidenced in writing.\textsuperscript{117} Unlike the AICPA rules, however, the D.C. Rule does not require that attorneys maintain controlling interests.\textsuperscript{118} Finally, neither the D.C. Rule nor AICPA Rule 505 permits non-attorneys to acquire an interest in a firm for investment purposes.\textsuperscript{119}

E. Summary of ABA/AICPA Rule Variations

In summary, when analyzing the variations in the above-mentioned ethical provisions (competence, confidentiality, conflicts, and fee-sharing) in the MDP context, the rules governing competence cause the least concern. Specifically, the competence rules for both accountants and attorneys are sufficiently similar that they provide little, if any, justification to conclude that attorneys practicing in an MDP would cause harm to the client. Further, with respect to the rules governing confidentiality and conflicts, it is difficult to assert that corresponding

\textsuperscript{112}See Model Rules of Professional Conduct Rule 5.7 (1994).

\textsuperscript{113}See Block, supra note 111, at 798.

\textsuperscript{114}See id.


\textsuperscript{116}See id. at 208-09.
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problems are limited to MDPs. However, it is equally difficult to assert that acceptance of MDPs would not, at a minimum, increase the frequency of these types of problems. Finally, irrespective of the argument that Model Rule 5.7 or the D.C. Rule supports the repeal of the ABA’s Model Rule 5.4, the fact remains that the fee-sharing rules for accountants and attorneys are dramatically at odds. Given this, the fate of MDPs lies in the ABA’s acceptance or rejection of the argument that the client’s need for “one-stop shopping” outweighs the possible harm that the rule variations may create.

V. THE NEED FOR MULTIDISCIPLINARY PRACTICES

Commentators assert that globalization has resulted in a client-driven market.180 That is, “the client drives the price, delivery and efficiency of the service.”181 Taking that assertion to the next step, MDP proponents argue that consumers outside the United States who purchase legal services through MDPs have demonstrated that the legal profession values “independence, loyalty, and confidentiality” more than the client does.182 Following free market economic theories, they maintain that the client, not self-regulation, should dictate.

The problem with this assertion is threefold. First, it assumes that the MDP practitioner fully informs the client that his or her right to zealous advocacy and confidentiality may be at risk. Second, it assumes the client truly understands the risk and, in fact, knowingly consents. Third, and possibly most important, it assumes that the circumstances are the type where disclosure and consent are appropriate—i.e., Rule 1.7 prohibits an attorney to continue representation with client consent if a disinterested attorney could conclude that the client should not agree to the representation under the circumstances.

Nonetheless, there are circumstances where an adequately informed client may opt for services through an MDP, at the possible expense of certain rights. For those circumstances, it seems that the ABA could better protect the client by requiring the attorney to be bound by the rules. As stated earlier, tax practitioners in MDPs currently maintain that they are not engaged in the practice of law. Thus, at least in theory, neither the Model Rules of Professional Conduct nor the

181 The D.C. firm Arnold and Porter lead the ancillary business pack when it acquired three ancillary businesses in the 1980s. Analogous to the current MDP debates, it argued that its clients demanded “one stop shopping.” Interestingly, however, the firm had divested its interest in all three by 1994. Though James Jones, an Arnold and Porter managing partner, admitted there had been conflicts of interest among clients of the firm and ancillary businesses, he maintained that was not the driving force behind the sales. Significantly, he never mentioned why the firm’s clients no longer “demanded” these services. See Stephanie B. Goldberg, More Than The Law: Ancillary Business Growth Continues, 78 A.B.A. J. 54 (Mar. 1992); The Pipeline, Trend Stoppers 13 No. 3 of Counsel 16 (Feb. 7, 1994).
182 See National Conference of Lawyers, supra note 2, at ¶ 15.
183 Id. at ¶ 16 (quoting Gary Garrett and Ward Bower, A Competitive Analysis of the Complex Litigation Services Market: Implications for Larger Law Firms (1995)).
182 National Conference of Lawyers, supra note 2, at ¶ 17.
Restatement of Law Governing Lawyers currently applies to attorneys providing tax services through accounting firms. By accepting at least some form of the multidisciplinary practice concept, the ABA and state bar associations would effectively expand their governing powers.23

Moreover, there is some truth to the adage that it is better to be proactive than reactive. To the extent the ABA implements a respectable alternative up-front, as opposed to waiting to see what happens vis-a-vis unauthorized-practice-of-law suits and similar allegations of unethical behavior, the more likely it can effectively safeguard the client and the profession. However, given the turmoil the MDP issue has created within the organization, it is clear that MDP proponents have an uphill battle before convincing fellow ABA members of the need to take a proactive position. For those favoring such a position, the first critical step was to gain the support of the MDP Commission.

VI. THE ABA MULTIDISCIPLINARY PRACTICE COMMISSION’S PROPOSALS

The Commission on Multidisciplinary Practice was asked to consider “the most important issue to face the legal profession this century.”124 As evidence that it intended to review a wide array of MDP possibilities, the Commission published five practice “models” and invited comments thereon. After months of written and oral testimony, the Commission published a report containing its recommendation. Though the Commission considered numerous possibilities, its recommendation did not deviate substantially from any one proposed model, i.e., it did not consider one obvious solution—relaxing the rules in incremental steps to allow adequate time for MDPs, and the legal community at large, to communicate the changes to their clients while allowing the ABA to retain sufficient control to fulfill its duty to protect the client, the public, and the profession.

A. The Commission’s Proposed MDP Models

The Commission’s first proposed model, “the Cooperative Model,” maintains the status quo.125 That is, the rules prohibit attorneys from working in partnership with non-attorneys, though attorneys may continue to work with non-attorneys under their employ or retainer. In the latter circumstance, partners or supervisory attorneys are responsible for ensuring that the non-attorneys’ professional conduct meets that required of the attorney.

The second model, “the Command and Control Model,” mirrors the D.C. Rule. As mentioned above, this rule permits an attorney to work in partnership

122Significantly, this is exactly what the ABA did when it adopted Model Rule 5.7 governing ancillary services.
123Commission on Multidisciplinary Practice, supra note 5.

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with a non-attorney if: (1) the sole purpose of the partnership is providing legal services; (2) all persons having managerial control or financial interests abide by the professional rules; and (3) those same persons take responsibility for the non-attorneys' conduct.127

Conversely, the third model, "the Ancillary Business Model," mirrors Model Rule 5.7.128 There, the attorney is governed by the professional rules when performing law-related services. While the rule allows attorneys and non-attorneys to become partners in the ancillary business, the professionals in that business may only provide consulting, and not legal, services.

The fourth model, "the Contract Model," permits a professional services firm to contract with an independent law firm.129 This model comports with current MDP practices in foreign jurisdictions.130 Though there is room for variations of this model, the three requirements proposed by the Commission include: (1) the law firm agreeing to advertise its affiliation with the professional services firm; (2) both firms agreeing to refer clients to each other on a nonexclusive basis; and (3) the law firm contracting to purchase services from the professional services firm, e.g., rent, support staff, and information technology.

The Commission's fifth and final model permits the professional services firm and the law firm to merge completely, hence its name "The Fully Integrated Model."131 Here, the rules would permit the newly merged firm to offer both legal and non-legal services, or the coined "seamless web" of services.132 Thus, pursuant to the model, a client may retain the firm for legal, non-legal, or both legal and non-legal services pertaining to the same matter. Obviously, this model caused the greatest debate among commentators.

A. The Commission's Recommendation

In general, the Commission's recommendation followed the fifth practice model—full integration. However, recognizing its obligation to protect the MDP client's right to loyalty, confidentiality, and professional independence of judgment, the Commission opted for "a special set of regulatory undertakings to govern the MDP."133

For instance, in an effort to protect the MDP client's right to loyal representation, the Commission disregarded recommendations that firms impute conflict individually.134 Instead, the Commission proposed that MDP attorneys follow
the current rules relating to conflicts and imputation.\textsuperscript{135} Thus, for purposes of applying the conflict rules, an MDP attorney providing legal services to an MDP client must treat all MDP clients as his or her client.

Further, the Commission was "unpersuaded" that MDP attorneys would be more apt to violate the client's right to confidential representation than their counterparts in traditional law firms.\textsuperscript{136} Nevertheless, it did recommend that the ABA add language to the existing rules that "reminds" MDP attorneys to ensure that non-attorneys assisting with legal services understand "their obligation to maintain confidential client information."\textsuperscript{137} Additionally, it proposed that the rule require attorneys in MDPs to clearly articulate to their clients seeking non-legal services that communications associated with those non-legal services are not privileged. The Commission deferred any discussion on how to address the inherent conflict between the CPA's duty to disclose information while performing attestation functions and the attorney's duty to maintain confidences until the Independence Standards Board concludes its study.\textsuperscript{138}

To protect the MDP client's right to an attorney's independent judgment, the Commission first proposed limiting fee-sharing to the partnership.\textsuperscript{139} That is, the proposal does not permit "finder's fees" or equity investment by nonmembers.\textsuperscript{140} Further, acknowledging the differences in the ethical rules governing attorneys and CPAs, the Commission's proposal requires that all non-attorneys in an MDP, who work with or assist MDP attorneys to provide legal services, adhere to the ABA's rules of professional conduct.\textsuperscript{141}

As an additional measure to ensure adequate independence, the Commission's proposal requires the non-attorney-controlled MDP to file annually a certificate that it has met its ethical obligations with the highest court that has authority to regulate the legal profession in each jurisdiction in which the MDP engages in the practice of law.\textsuperscript{142} The proposal further provides that the court has the right, in its sole discretion, to conduct an administrative compliance audit of the MDP. All non-attorney-controlled MDPs that provide legal services in the jurisdiction will bear the audit cost through an annual filing fee.\textsuperscript{143} In summary, the Commission found a sufficient "client need" for MDPs and, although it recognized associated risks, it believed that the above-stated requirements would adequately protect both MDP clients and the public from suffering any corresponding harm.

\textsuperscript{135}See Appendix C, supra note 10, at ¶ 43.
\textsuperscript{136}Id. at ¶ 44.
\textsuperscript{137}Id.
\textsuperscript{138}See id. at ¶ 45 (The SEC advised the Commission that it had asked the Independence Standards Board to place this issue at the top of its agenda.).
\textsuperscript{139}See id. at ¶ 40.
\textsuperscript{140}See id.
\textsuperscript{141}See ABA Commission on Multidisciplinary Practice, Report on Amendments to ABA Model Rules of Professional Conduct for ABA Multidisciplinary Practice Commission, Tax Notes Today (June 8, 1999) (LEXIS, FEDTAX lib., TNT file, elec. cit. 99 TNT 110-17) (providing that this rule applies whether the assisting nonattorney provides legal or non-legal services to the client).
\textsuperscript{142}See Appendix C, supra note 10, at ¶ 38.
\textsuperscript{143}See id.
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A. Pros and Cons of the Commission's Proposal

The Commission made a valid attempt to confront the major issues raised. Most significant was the Commission's decision that, to the extent it recommended the acceptance of MDPs, it must not only recommend modifications to existing rules but also the adoption of a separate governing rule. With respect to the latter, the then-Chair of the ABA Tax Section, Stefan Tucker, had testified to the contrary. In particular, he argued that there was no need for such a rule because "multidisciplinary practices are . . . truly regulated by external forces—client and customer demands and expectations." Accordingly, he claimed, to the extent an MDP commits a wrong, it will be punished "in the form of actual damages or impaired reputation."

Mr. Tucker's marketplace approach is, at best, misplaced. Notwithstanding simple economics, e.g., the multiple-year lag time for the market to react to unethical MDP practitioners, purchasing legal services should not be analogized to the everyday consumer market. Recall the origin of the ethical rules: the gravitation of the legal profession from "a branch of the administration of justice" toward a "mere money getting trade." Fortunately, the Commission agreed.

This is not to imply that the House of Delegates should have adopted the Commission's recommendation without question. In fact, some of the principal proposals, or rationales therefor, contain significant oversights. Paramount is the proposal for court review of non-attorney-controlled MDPs.

While a commendable attempt to resolve the conceptual problem of "independence" when non-attorneys manage attorneys, the Commission's recommendation for the "highest" court's review is impracticable. Given the novelty of the MDP arrangement, it is unlikely that the states' supreme courts, or any other courts for that matter, have the time or experience to handle this type of regulation. Both proponents and opponents of MDPs readily admit that the arrangement is an extreme departure from the existing rules. Couple that with current court backlogs, i.e., criminal cases first and outdated civil cases second, and accusations of MDP violations will, unfortunately, come third.

Further, though the Commission demonstrated its concern for the courts by providing for administrative cost, the real concern is a function of time rather than cost. Thus, the likelihood that a court would invoke the language pertaining to audit, "at [its] discretion," is remote. Given this, there is a legitimate concern that the Commission's recommendation, if adopted, could become a mere "token." In sum, the regulatory scheme necessary to adequately monitor MDP practices, at least initially, far exceeds the one suggested.

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144From its own count, the Commission conducted seven days of open hearings, met in executive session six times, and analyzed the written or oral testimony of 56 witnesses prior to issuing its recommendation. See id. at ¶ 2.
145Tax Section Chair Statement, supra note 1, at ¶ 35.
146Id.
147Model Code of Professional Responsibility Canon 12 (1908).
148See Appendix C, supra note 10, at ¶ 37.
149See id. at ¶ 28.
On a positive note, the Commission recommended firm-wide imputation to protect the client's right to loyal representation. To that end, Model Rule 1.10 of the recommendation provides that imputed disqualification applies if there is a conflict between the client seeking legal assistance and any other client of the MDP—not just other clients seeking legal services.\textsuperscript{150} Though some commentators disagree,\textsuperscript{151} this is the right rule.

In his testimony to the Commission, Mr. Tucker argued that clients of multi-office practices should not suffer because "two lawyers in two different offices, who may not even know each other, are working together for the client in one matter and against the client . . . in another."\textsuperscript{152} He further asserted that, in such circumstances, the possible conflict is a non-issue because "the client is more likely to know about the situation than [the MDP] and, if the client does not object, why do the Model Rules?"\textsuperscript{153}

Is this what the legal profession aspires to—a practice where we can no longer assure our clients loyalty but, rather, depend on them to inform us whether our representation of their opponent, in another matter, is acceptable or not? This rationale is flawed for several reasons. First, the management of many businesses is decentralized. As a result, it is quite possible that a multi-branch client has no way of knowing that the MDP hired by its Seattle branch to represent it in one matter represents the opponent of its New York branch in another. Second, it assumes that the conflict is of the type a client can waive. Finally, it is one-sided to assert that, simply because a client does not initially object, the representation will not result in harm.\textsuperscript{154}

In summary, there are situations where an informed client may consent to representation that may not otherwise appear proper.\textsuperscript{155} However, notwithstanding the inability to establish proper firewalls to protect the client who consents to representation when a potential conflict exists, an MDP cannot adequately disclose a potential conflict that it is not aware of.\textsuperscript{156} To prevent this, it is

\textsuperscript{150}See Appendix A of ABA Commission on Multidisciplinary Practice Report, Tax Notes Today (June 8, 1999) (LEXIS, FEDTAX lib., TNT file, elec. cit. 99 TNT 110-20).
\textsuperscript{151}See Tax Section Chair Statement, supra note 1, at ¶ 28; PricewaterhouseCoopers' Statement, supra note 86, at ¶ 21.
\textsuperscript{152}See Tax Section Chair Statement, supra note 1, at ¶ 29.
\textsuperscript{153}See id.
\textsuperscript{154}Accounting firms commonly utilize firewalls to avoid imputation. See Wolfman Testimony, supra note 46, at ¶ 17. The problem, here, is that a proper wall cannot be established if the firm is not tracking potential conflicts.
\textsuperscript{155}Model Rules of Professional Conduct Rule 1.7.
\textsuperscript{156}See Restatement (Third) of the Law Governing Lawyers § 216 (an attorney who does not personally inform the client of potential conflicts assumes the risk that the client is inadequately informed). Further, some MDP opponents are concerned that the accounting firms will not comply with the imputation rules even when they have knowledge of the potential conflict. For example, the SEC recently censured PricewaterhouseCoopers for failure to comply with SEC regulations relating to conflicts of interest. Notwithstanding its prior violation, the Wall Street Journal reported that some partners balked at an SEC order requiring certain managerial-level employees to divest their holdings in publicly traded companies that were firm audit clients. See Karen Powell, Letter to Commission of Multidisciplinary Practice, Tax Notes Today (July 2, 1999) (LEXIS, FEDTAX lib., elec. cit. TNT 146-36).
incumbent upon each firm, whether a traditional law firm or an MDP, to track potential conflicts among all its clients.

Finally, to ensure that MDP arrangements do not lead to confidentiality problems, the Commission's proposal requires that MDP attorneys "give reasonable assurances" that non-attorneys assisting in legal services understand their duties of client confidentiality. More important, it requires MDP attorneys to articulate to their clients that their communications are not privileged when they seek non-legal services from the firm. Here, the latter is critical.

Few would argue that MDP attorney would breach their duty to maintain client confidences. Instead, the concern is that MDP non-attorneys may gain certain knowledge during the course of a legal controversy that would otherwise remain confidential but for the client's request for non-legal representation. For example, the MDP accountant who obtains confidential information while working in a tax controversy cannot assert the confidentiality privilege when attesting to the same client's financial statements. The potential for this problem is compounded by the fact that, to reduce clients' costs, accounting firms often use accountants, as opposed to attorneys, whenever possible.

While that practice may make sound business sense, it is nevertheless critical that the client understand that the corresponding communications may not be privileged. Though the Commission seems to have clearly grasped this concept, others have not. An example is reflected in the testimony of Mr. Tucker, who, at first glance, appears to understand the importance of client communication by emphasizing that "[a] lawyer should maintain communication with a client concerning the representation." He further appears to understand the importance of communication when he points out that MDPs will "not harm clients, so long as clients understand the facts." However, he later disregards the attorney's personal duty to ensure that the client understands the changes in the delivery of services, or potential problems that an MDP may create, by arguing that:

[S]uch understanding can be engendered and enhanced by appropriate public relations and media communications by the legal profession, through the American Bar Association and similar state and local groups, rather than causing each separate entity, on its own and through its own resources, to do so.

Fortunately, the Commission did not find the argument persuasive. The only way the MDP arrangement can be a success is if the MDP itself is willing to

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157 See Wilson, supra note 78, at 333 (citing The CPA Tax Practice Privilege—Less Than Meets the Eye, Tax Notes Today (Oct. 30, 1997) (LEXIS, FEDTAX lib., TNT file, elec. cit. 97 TNT 210-55)).

158 The problem is also compounded because the accountant providing tax advice is limited by section 7525. Thus, as far as confidential information goes, it may be too late before the accountant realizes an attorney is needed.

159 See Tax Section Chair Statement, supra note 1, at ¶ 32 ("Today's average consumers cannot afford legal fees . . . recognizing differing individual needs and differing demographic needs, the consumer finds what best suits his or her needs and resources.").

160 See id. at ¶ 27 (quoting the Preamble to the Rules) (emphasis in original).

161 Id. at ¶ 19.

162 Id. (emphasis added).
assure its clients that it can, and will, provide both legal and non-legal services without compromise. The unwillingness to expend time or resources to adequately inform clients or the public of changes in the practice cannot be characterized as service without compromise.

In concluding its recommendation, the Commission deferred comment on the conflicting duties of accountants performing financial statement attestations and attorneys providing legal advice to publicly-traded entities. Instead, it recommended that the ABA postpone a decision until the Independence Standards Board (ISB) completes its study on the issue.163 The problem here is that the ABA and the ISB have varying duties—the ABA’s to protect the legal profession’s clients by implementing ethical standards and the ISB’s to protect third party investors by “establishing and improving accounting principles and auditing standards.”164 Generally, these duties are mutually exclusive. Simply stated, it is not sound to base a decision relating to an attorney’s ethical obligations to his or her client on a conclusion relating to an accountant’s independence.

Finally, in adherence to the ABA’s history of monitoring its rules, the Commission’s proposal calls for annual reviews of MDP procedures and, when necessary, appropriate amendments thereto.165 Without question, subsequent monitoring of MDP rules is necessary. However, given the Commission’s proposal, it may be too late. To follow the commentators’ water metaphors, once the floodgates are opened there’s no reversing the flow.

Significantly, the House of Delegates of the ABA reviewed the Commission’s recommendation and voted not to relax the Model Rules’ prohibition on fee sharing with non-attorneys—at least for now.166 Specifically, the policy-making body of the ABA decided to “make a clear statement against allowing the delivery of legal services in MDPs pending further study.”167 Thus, the controversy continues.

VIII. THE INCREMENTAL MODEL

Given the disparate views and general conflict among members of the legal profession, the ABA’s ability to identify problems arising from MDP arrangements and, more important, its ability to adequately correct them, is a significant concern. From Professor Wolfman to then-Tax Section Chair Tucker, ABA members’ viewpoints on MDPs, and the impact they will have on the profession, are at odds. These opposing views, coupled with the unresolved issues outlined above, i.e., potential increase in conflict and confidentiality problems, provide cause for review.

163See Appendix C, supra note 10, at ¶ 45 (The SEC intends to follow the ISB’s conclusion in establishing its auditor independence regulations.).
165See Appendix C, supra note 10, at ¶ 37.
166See ABA Votes to Not Allow Fee Splitting, TAX NOTES TODAY (Aug. 11, 1999) (LEXIS, FEDTAX lib., elec. cit. 99 TNT 154-1).
167Id.

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For nearly a century, the ABA has controlled the evolution of the legal profession, and the corresponding ethical rules, in a slow and methodical manner. In an effort to successfully integrate the MDP concept with the traditional practice of law, it may make better sense to implement MDPs in incremental phases—perhaps several years apart. To the extent the ABA considers the initial phase a success, and only to this extent, it may contemplate implementation of the next.

Significant to this, the ABA has maintained for sixty years the position that attorneys working in partnership with non-attorneys to deliver legal services would harm the public and/or the profession. In 1994, it took an incremental step toward relaxing that position by allowing attorneys to work as partners with non-attorneys in offering nonlegal services that are ancillary to the attorney’s practice of law. Another “relaxation” of the rule is the next logical step.

For example, the ABA may want to restrict MDPs from developing litigation practices, at least initially. As mentioned earlier, the implementation of a litigation practice is likely to increase the frequency of conflicts and confidentiality concerns. Here, communication is the key. By delaying the implementation of a litigation practice, the MDP will have adequate time to inform all its clients of the changing business structure which, in turn, will lead to the elimination of potential conflicts. Moreover, it will give the public, as a whole, time to understand what the MDP can and, perhaps more importantly, cannot offer in terms of client confidentiality.

Through the “phasing in” of the MDP concept, the client is, at a minimum, able to obtain legal and nonlegal business advice from the same “stop.” At the same time, the ABA maintains control of the process, thereby fulfilling its duty to protect the client, the public, and the profession. To that end, the ABA must first delineate the nonlegal professional services that may participate in an MDP practice as well as what legal functions an MDP practice may offer.

Next, the ABA must develop a new plan for MDP review. As stated above, the courts do not have the means to monitor the implementation of MDPs. Rather, the ABA must appoint its own regulatory body that will fully understand the issues and concerns that relate to the practice. This is the only way that the ABA can be assured that neither the legal profession nor the MDP clients are at

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168 It is worth noting that if MDPs are allowed to implement litigation practices immediately, it will take years to adequately determine the extent of MDP conflicts where the same firm routinely provides tax advice, files the return, and litigates the position. For example, the Service may not audit a tax return filed today for up to three years. To the extent the taxpayer will litigate a challenged position, it may be another several years.

169 The Commission did not take a position on whether the ABA should restrict the types of professionals who could work in partnership with attorneys. Instead, it stated that this should be left to the individual states. It did, however, provide the following “examples” of professions it considered “related to the practice of law”—accountancy, economic forecasting, financial planning, lobbying, psychological counseling, social work, consulting, architecture and design, and tax preparation. Given the potential problem with communication to the clients and client knowledge of what an MDP can or cannot do, this should be clearly delineated by the ABA and, to the extent possible, not vary among the individual states.

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risk—especially where non-attorneys control the MDP.

Undoubtedly, many MDP proponents will argue that such a conservative approach is unwarranted. Recall, however, the problems the medical profession has faced with the advent of health management organizations (HMOs). Like the MDP in law, the HMO was designed to cut consumer costs.\(^1\) However, business realities soon consumed the medical profession, and today """"doctors throughout America . . . realize that the days of hanging out their shingles . . . are over."""" More dramatically, HMO business executives began dictating the quantity and quality of the care provided.\(^2\) The imposition of this profit-maximizing mentality, coupled with the view that managed care mistreats patients, has lead many physicians to believe that the only way to fight back is through the formation of unions. In fact, the situation has gotten so out of hand that the American Medical Association, which has long opposed physicians' unions, has recently established its own collective bargaining unit.\(^3\)

Currently, the legal profession is in a position to learn from those mistakes. To do so, however, it must take the next steps cautiously. The market indicates that, at least with respect to business planning and advice, there is a need for collaborative efforts between attorneys and non-attorneys. By incrementally implementing the MDP arrangement, the ABA can ensure that it maintains the requisite control to adequately protect all involved interests.

**IX. CONCLUSION**

The ABA has faced the issue of market influences in the practice of law for nearly a century. Time and again, it has researched the issue and responded in a deliberate and systematic manner. This time, its approach should not vary.

MDP proponents have complained that, to date, the legal profession has not adequately accommodated client need for multiple services from a single point of purchase. They further assert that the ethical rules prohibiting this arrangement are antiquated and self-serving. Opponents, on the other hand, contend that allowing multidisciplinary practices will result in the demise of the legal profession. That is, they fear that, ultimately, clients will suffer because their right to legal services that are confidential, free of conflict, and based on independent judgment will erode.

Admittedly, globalization has changed business practices. However, this doesn't mean that the ABA should readily disregard its sixty-year position that attorneys and non-attorneys should not work in partnership to provide legal services. At

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\(^2\)See Greenhouse, supra note 170, at 2. (One physician reported that the HMO Chief Financial Officer had mandated that he treat eight patients per hour, or seven and a half minutes per patient.).

\(^3\)See id. at 1.
the same time, relying on a sixty-year position, without reason, is not necessarily warranted. The ABA must strike a balance between the clients' current needs and its own.

To the extent the ABA permits multidisciplinary practices, the Commission’s recommendation contains many imperative provisions, e.g., a separate ethical governance, firm-wide imputation of conflicts, a regulatory body to govern non-attorney controlled practices, and, perhaps most important, the need for client communication. To ensure that clients are not harmed from MDP arrangements, communication is paramount.

One plausible way to achieve the requisite communication is to “phase in” the MDP concept. The ABA can delineate the scope of MDP services as well as the timeline for the implementation of additional services, if any. During the initial “phase,” the legal community can communicate to the public at large, and MDPs and MDP attorneys can communicate to their clients personally, the differences between traditional law firm services and MDP services and potential problems therein. This way, the client acquires the ability to seek legal and non-legal advice from a single firm, while at the same time, the ABA acquires the ability to properly regulate the new practice.