MULTIDIMENSIONAL PRACTICE IN A WORLD OF INVINCIBLE IGNORANCE: MDP, MJP, AND ANCILLARY BUSINESS AFTER ENRON

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It ain't what you don't know that'll kill you, it's what you know for sure that ain't so.
For every problem there is an answer that is simple, obvious, and wrong.

Both attributed to Will Rogers

I. INTRODUCTION: ENRON AND THE "DEATH OF MDP"

As lawyers' services and the manner in which those services are provided expand and change, the rules governing lawyers and legal services must respond. The forces behind the change include clients' increasing disregard for state and national boundaries; the growth in the types of services being provided by lawyers, often to include services that either historically have been provided by others or which are entirely new;[1] and the encroachment on the work of legal professionals by nonlawyers and interactive software.

The forces being brought to bear on the legal profession have resulted in three closely related trends: multidisciplinary practice (MDP), multijurisdictional practice (MJP), and ancillary business. MDP is a practice under which lawyers may share fees and join with nonlawyers to deliver both legal and nonlegal

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1. Examples of new types of professional services include advising the technology and healthcare industries with respect to interrelated legal, financial and scientific matters.

professional services. MJP is the practice of law in one jurisdiction by a person not licensed in that jurisdiction, but licensed in another jurisdiction. Finally, ancillary businesses are services provided by law firms other than the practice of law.

With the demise of Enron Corporation, those who have opposed MDP have wasted no time in claiming that their opposition has been vindicated and that the last nail has been driven into the coffin of MDP.[2] The Enron collapse does not support this conclusion.

At the risk of oversimplifying a complex set of circumstances, Enron used certain foreign partnerships to take liabilities off of its balance sheet. By effecting a complex arrangement, management effectively "pushed the envelope" with respect to the accounting rules. Enron was relying on these rules to avoid including liabilities on its balance sheet. When Enron was forced to restate its financial statements to include the liabilities that had been excluded, Enron collapsed. In an irony worthy of Shakespeare, an entry of only $5.7 million dollars resulted in a change in the capital structure of Enron of approximately $750 million, which in turn resulted in the collapse of a corporation that had been listed as the seventh largest corporation on the Fortune 500, the destruction of one of the nation's five major accounting firms[3] and two well-respected law firms, as well as losses throughout the system that may run into the billions of dollars.[4] Restatements of the financial statements of several other public companies such as WorldCom, Adelphia, and Tyco followed. In response to these economic setbacks, Congress passed the Sarbanes-Oxley Act of 2002.[5]

The press and the government have criticized both the auditors and the attorneys. Both have been subjected to congressional scrutiny and criticism, but, other than the celebrated document destruction, it is not yet clear what actions the

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2. *See, e.g.*, Brenda Sandburg, *Enron Mess Gives a Boost to MDP Foes*, THE RECORDER, Jan. 24, 2002 (citing MDP opponent Robert MacCrate as saying that the Enron scandal constitutes a "complete vindication" of his opposition to the report of the American Bar Association Commission on Multidisciplinary Practice); *see also* Robert Lennon, *MDP's Executioners*, AM. LAW., Mar. 13, 2002 (citing Tony Williams, Andersen Legal's worldwide managing partner, stating that in the United States, "the intellectual debate over the merits of MDPs has already been won" with lawyers now providing a greater range of client services); Geanne Rosenberg, *Scandal Seen as Blow to Outlook for MDP: Andersen Role a Vindication, Foe Says*, NAT'L L.J., Jan. 24, 2002; Steven C. Krane, *Rest in Peace, MDP: Let Lawyers Practice Law*, NAT'L L.J., Jan. 30, 2002 (in which the president of the New York State Bar Association argues that New York's proposal to allow strategic alliances but not multidisciplinary partnerships will prevent "an endless chain of Enrons").

3. In June 2002, Andersen LLP was convicted of a felony in connection with the destruction of documents related to the Enron matter. It ceased auditing public companies on Aug. 31, 2002.

4. *See* Floyd Norris, *Fun-House Accounting: The Distorted Numbers at Enron*, N.Y. TIMES, Dec. 14, 2001; *see also* Gretchen Morgenson, *How 287 Turned Into 7: Lessons in Fuzzy Math*, N.Y. TIMES, Jan. 20, 2002 (in which Robert F. McCullough, an authority on the electric utility industry at McCullough Research, a consulting firm in Portland, Oregon, explains reporting "notional revenue" and creative accounting techniques and "presenting a strong picture on weak fundamentals").

5. Pub. L. No. 107-204, 116 Stat. 745 (2002).

accountants or the attorneys took that were inappropriate other than failing to identify and correct the improper accounting action.

The Enron collapse suggests that the accountants' audit function might be compromised where the accountants have an excessive financial incentive to please their clients and that a law firm may not be in a position to objectively provide a second opinion with respect to its own work, especially where the conclusions will have an impact on the relations with an important client.[6] The accounting firm working for Enron was also providing it with non-audit services. In response to the financial disasters befalling Enron, Worldcom, and other public companies, the Sarbanes-Oxley Act imposed several requirements on public companies and their auditors, including a prohibition on accounting firms offering consulting services to public companies they also audit.[7]

In contrast, there has been no suggestion that the services provided by any of the law firms involved in any of the financial disasters were in violation of Rule 5.4 of the Model Rules of Professional Conduct (Model Rules).[8] In short, the

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6. *See, e.g.*, Richard A. Oppel Jr., *Lawmakers Say Enron's Lawyers Should Have Raised Concerns*, N.Y. TIMES, Mar. 15, 2002, *available at* http://www.nytimes.com/2002/03/15/business/15ENRO.html (citing comments of Congressman James C. Greenwood. Greenwood, chairman of the investigations subcommittee of the House Energy and Commerce Committee, asked why the law firm did not "pick up the phone, call these bankers and say, 'I'm supposed to protect this company from liability, and there's a lot of liability that could result from these allegations if these allegations are true,'" and, "I don't understand why you didn't feel that responsibility to Enron and its stockholders to make those calls right away and find out what was really happening."); *see also* John Schwartz, *Enron's Many Strands: The Lawyers; Troubling Questions Ahead For Enron's Law Firm*, N.Y. TIMES, Mar. 12, 2002, at C1 (noting the comment of University of Texas Law School Dean William C. Powers, Jr., that the law firm failed to provide "objective and professional advice" to Enron).

7. Section 201 of the Sarbanes-Oxley Act of 2002 amends Section 10A of the Securities Exchange Act of 1934, 15 U.S.C. 78j-1 (2002), to add subsections (g) and (h), which make it unlawful for an accounting firm providing audit services to provide any non-audit services including:

> (1) bookkeeping or other services related to the accounting records or financial statements of the audit client;
> (2) financial information systems design and implementation;
> (3) appraisal or valuation services, fairness opinions, or contribution-in-kind reports;
> (4) actuarial services;
> (5) internal audit outsourcing services;
> (6) management functions or human resources;
> (7) broker or dealer, investment adviser, or investment banking services;
> (8) legal services and expert services unrelated to the audit; and
> (9) any other service that the Board determines, by regulation, is impermissible.

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 201(g), 116 Stat. 745, 771–72 (2002).

8. Except where the context indicates otherwise, references to the Model Rules are the Model Rules of Professional Conduct as revised by the A.B.A. House of Delegates in February 2002. MODEL RULES OF PROF'L CONDUCT (2003), *available at*

Enron situation indicates that it may not make economic sense for a law firm to tie its economic well-being to an accounting firm subject to massive liabilities and that it may make sense to limit the other services that may be offered by an accounting firm providing audit services.[9]

The "lessons of Enron" for professional firms in general, and law firms in particular, are limited as of the date of this writing. Based on the allegations made in some of the articles listed above (and leaving for others the question of document retention policies) the Enron collapse *might* be the basis for the following observations:

(1) Whenever a professional firm is in a position of deriving a significant portion of its income from a single client, it will have an economic incentive to please that client. Presumably this is true regardless of whether the source of income is conventional professional services or "consulting services" which are outside the traditional notions of the professional's area of practice. While the accountant's provision of various consulting services increased the amount to be paid by Enron to the firm, the problem of economic dependence on the client turns on the amount of the fees, not the work giving rise to the fees.

(2) It may be inappropriate for a firm to provide a "second opinion" in circumstances in which there is doubt about the validity of a first opinion by the same firm or the work that the firm had done. With the comfort of hindsight, this rule seems axiomatic, but in the real world it is not uncommon to go back to a professional who has performed work or rendered an opinion on an important matter and to ask, "Are you really sure about that?" In circumstances such as those in Enron, where the professional firms providing the services were considered giants in their respective fields, it may have been appropriate to ask those firms to refocus on the work they had done to ensure that they were comfortable with the advice they had given. As is now being pointed out, for reasons of economics and reputation, a firm will be less likely to second guess its own work than a third party might be. Sometimes the inherent conflict of interest, like the one engendered by a dependence on revenue, may be appropriately disregarded by a client who understands the limitations and believes that the time and cost saved by not obtaining additional counsel which is not familiar with the transaction may outweigh the potential conflict.

(3) There is a difference between the attest function performed by certified public accountants in auditing financial statements, on the one hand, and consulting services—whether they be legal, financial, tax-related, or otherwise—performed by professionals. Because the attest function provides assurances to persons other than the client, the client's ability to evaluate a conflict from the client's point of view may not be a sufficient safeguard to assure that the interests of the third parties are being protected. The issues presented by this conflict have

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http://www.abanet.org/cpr/mrpc/mrpc_home.html (last visited Nov. 2, 2002) [hereinafter MODEL RULES].

9. *See, e.g.*, Carrie Johnson, *Vinson Role At Enron Draws Fire: Law Firm's Attorneys Criticized at Hearing*, WASH. POST, Mar. 15, 2002, at E03; Carrie Johnson, *House Panel to Question Enron's Attorneys*, WASH. POST, Mar. 14, 2002.

been considered in the past and will be argued as part of the Enron aftermath, but it is important to remember that this question goes to the function of the certified public accountant rather than to professional legal ethics. Except in the limited, and somewhat anomalous situation of opinion letters, lawyers have consistently protected themselves from having the option to make the sort of disclosure required in an audited statement.[10] If an accountant's non-audit relationship with a client compromises the attest function, it should not matter whether the consulting relationship is that of providing legal services, tax advice, or even the establishment of appropriate bookkeeping services.

(4) There are times in which a client who is receiving different but related services from different professionals may be left in the middle. While the exact responsibilities for the failures at Enron have not yet been established, there have been allegations made by the lawyers and the accountants that they were relying on the assurances of the other professionals in approving the transactions. In many circumstances, a client can find itself being "whipsawed" between two professionals, each of whom blames the other, leaving the client to bear the loss. It is exactly this problem that has been suggested as one of the benefits of an integrated professional consulting practice. Under such a regime, one firm would be answerable to the client to make sure that professionals of different disciplines were talking to each other rather than leaving the coordinating function (and the risk of failure of coordination) to the client.

(5) Finally, there is the sobering lesson that any institution can fail, regardless of its size, its venerable past, the competence of the people who comprise it, or its apparent invulnerability. It may turn out that such a sense of invulnerability was a predominant factor contributing to the failure of Enron, the possible failure of the professional firms, and what some perceive as a systemic failure going beyond Enron. It may be that this lesson is the most valuable for the legal profession and the organized bar—that it is neither so venerated nor powerful that it should not continually reevaluate what it has comfortably taken as certainties.

In any dispassionate analysis of the situation, it is important to distinguish between the necessity or advisability of having rules that prohibit certain relationships within and among professional firms and the economic advisability of such relationships. For example, a law firm may not want to risk vicarious liability by being in partnership or under common control with a consulting

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10. In August 2001, the ABA House of Delegates voted not to add a provision to Model Rule 1.6 that would have permitted disclosure in order to prevent fraud. Among the lofty client protection arguments made in the House were some that noted that such a change, while permitting a lawyer to protect the public in a situation similar to Enron's, might expose lawyers to liability for the client's fraud. For a discussion of whether the balance in favor of confidentiality and against the public interest has gone too far, see DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 106–15 (2001), which argues that if the principle of broad confidentiality is based on societal benefits, society should decide whether the benefits outweigh the losses and notes the peculiarity of a rule that permits the breach of confidences to collect an attorney's bill but not to prevent massive fraud.

firm.[11] While such concerns may be an entirely appropriate basis for a particular attorney to determine his or her professional association, they have never been the province of the rules. Lawyers are, and should be, free to enter into improvident associations so long as they are willing to bear the attendant risks.

In short, while most lawyers may take comfort in not being partners in Enron's accounting firm as this Article is written, the fact that a given accounting firm or law firm is exposed to a significant potential liability should not be the basis for a rule proscribing new relationships among professionals. In any association, regardless of whether it is the formation of an integrated professional firm or a coordinated single venture, each of the participants must evaluate the attitudes and competence of the people who will work together. Even then, there are other factors, such as the inability to discover client fraud and changes in the economy that may cause what seemed to be a beneficial transaction to become a nightmare. The innocent lawyers and accountants who will now suffer as a result of the Enron collapse will suffer because they participated in a collective endeavor, not because that endeavor was between lawyers and accountants. In other words, to the extent that we learn from Enron that there is risk in collaboration, that risk should preclude the formation of law firms to the same extent it precludes working collaboratively with other disciplines.

As a profession, we need to transcend our sense of invulnerability and give serious consideration to the changes from within and without on what we do, who we do it for, where and when we do it, how we do it, and, ultimately, why we do it. Like Enron, its accountants and its lawyers, we may not be able to control the changes going on around us, but, unlike Enron, we may be able to get past our sense of certainty to accurately understand the situation in which we find ourselves.

This Article considers the prospects for MDP, MJP, and ancillary business (collectively described in this Article as "Multidimensional Practice") in a world in which clients have varying degrees of sophistication. In particular, it considers whether aspects of multidimensional practice should be proscribed for all law firms and in all client relationships regardless of the sophistication of the client, or whether the better rule is to require the lawyer to disclose the fact of the multidimensional relationship to the client. Finally, it considers the problem of "invincible ignorance," the situation in which the client is incapable of adequately informing itself or understanding the implications of being represented by a firm engaged in Multidimensional Practice.

This Article argues that MDP, MJP, and ancillary business represent parts of a broader change in the delivery of legal service. The change is characterized by the fact that the type of professional services provided by lawyers have increasingly overlapped with those provided by nonlawyers or lawyers admitted in

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11. *See* Helen Power, *Andersen Legal Network Faces Massive Claims over Enron*, THE LAWYER, Mar. 25, 2002. Some partners in Andersen Legal, a law firm, are partners in Andersen Worldwide Partnership, which may be made subject to some of the Enron claims as a result of document shredding in London.

other jurisdictions. Recent attempts by the American Bar Association to arrest this change have been ineffective and the resolution of the issue will need to be accomplished by either the states or the marketplace. A starting point is to recognize that the most workable definition of the "practice of law" is the rendering of professional services to a person who believes that he or she is a client dealing with a lawyer. This definition of the practice of law suggests that restrictions on multidimensional practice should also be based on client understanding. In other words, as in the case of conflicts of interest and confidentiality, the sophisticated client should be able to agree to be represented by a lawyer who is not licensed in a particular jurisdiction, shares fees with a nonlawyer, or provides nonlegal services. This changes the focus of the rules limiting MDPs, MJPs and ancillary business to establishing how those who are not sophisticated are to be treated. The organized bar should devote time to thinking about this issue rather than promulgating proscriptions which are disregarded at best and impede efficient client services at worst.

Part II introduces the concepts of MDP, MJP, and ancillary business and discusses their relationship in a multidimensional practice. Part III recounts the consideration of ancillary business, MDP and MJP by the House of Delegates of the American Bar Association (House). Part IV considers how the development of rules governing multidimensional practice inform the definitions of the "practice of law" and "legal services," and suggests a definition based on the expectations of the persons dealing with the lawyer. Part V considers whether, if the activities regulated as the practice of law are based on the understanding of the client, the duties attendant to the practice of law can be modified through agreement with the client and disclosure to the client. Finally, Part VI introduces the concept of "invincible ignorance" and suggests that any system based on agreement and disclosure will need to address those who are incapable of intelligently agreeing to or comprehending limitations on the lawyer's duties.

II. MULTIDIMENSIONAL PRACTICE

In providing services to clients, many lawyers are finding it necessary or desirable to transcend traditional limitations on where professional services are performed, who is performing them, and even what those services are. As such, they necessarily come into conflict with traditional limitations on the services provided by, and structure of, law firms. These lawyers are not flouting the existing rules; they are finding ways to accommodate the structure they consider to work best, particularly where it involves providing the services that sophisticated clients want. As the discussions of multidimensional practice in the House indicated, many lawyers believe that the principal function of the rules limiting multidimensional practice is to protect licensed lawyers from competition by others. The profession, however, does not have a consensus with respect to the value and purpose of the rules.

A. Multidisciplinary Practice

There is no single definition of multidisciplinary practice. For some, the concept of MDP encompasses elements of every bad thing that has happened to the practice of law in the last three decades. The definition finally settled on by the American Bar Association Commission on Multidisciplinary Practice (MDP Commission)[12] is a useful starting point. The Commission's final report defines "multidisciplinary practice" as "a practice that delivers both legal and nonlegal professional services" in which lawyer and nonlawyer professionals share fees, provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services.[13] "Nonlawyer professionals" means "members of recognized professions or other disciplines that are governed by ethical standards."[14]

The Commission's definition of "multidisciplinary practice," which represents a compromise after the extended debates, points out several issues that arise in the context of MDP. First, the definition raises the question of what constitutes a "practice." The paradigm generally used in this context was a large accounting or consulting firm providing legal services. As the discussions continued, it became clear that a lawyer could provide legal services in a strategic alliance, so the concept of "practice" must include contractual relationships among firms as well as individual firms themselves. The fee-sharing between lawyers and nonlawyers forms the crux of the debate regarding MDPs. Model Rule 5.4 would prohibit such sharing. The Commission limited the application of the rule to "nonlawyer professionals" in order to defuse the debate about sharing fees with tow truck operators and passive investors. The concept of ethical standards was intended to limit professional status to those subject to some ethical standards. Legal fees were presumed to be fees resulting from the practice of law. Finally, under the definition, the only nonlegal services that an MDP can provide are "professional services" such as those professional services provided by accountants, certified financial planners, engineers, psychologists, psychiatric social workers, and real estate brokers.

B. Multijurisdictional Practice

Multijurisdictional practice is the practice of law in one state (Host State) by an attorney who is not licensed in the Host State but who is licensed to practice in another state (Home State). The proliferation of multistate and international transactions has made the ability to practice across state lines necessary for many attorneys. Regulatory prohibitions on such practice have largely been

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12. The proceedings of the MDP Commission may be found at AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, MULTIDISCIPLINARY PRACTICE, *at* http://www.abanet.org/cpr/multicom.html (last visited Nov. 1, 2002).

13. AM. BAR ASS'N COMMISSION ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES at Recommendation 1 (2000), *available at* http://www.abanet.org/cpr/mdpfinalrep2000.html (last visited Nov. 1, 2002) [hereinafter MDP COMMISSION REPORT 2000].

14. *Id.*

ineffective. Only when courts began denying fees to out of state attorneys did the bar begin to focus on the issue.[15] Once consideration of MJP gets beyond simply whether or not to prohibit it, the profession must face several important and complex problems. First, as with ancillary business and MDP, there must be a definition of what constitutes the practice of law. Second, any regulation of MJP must include a determination of when a Home State attorney is practicing law in a Host State. For example, if the determination of practice in a particular state is based on a concept of physical presence in the Host State, those regulating the practice of law will need to develop clear rules as to what constitutes physical presence. This determination will be challenging in an era of changing forms of delivering legal services. Finally, when a Home State attorney is practicing in a Host State, the attorney and the regulators in both states should determine what ethical rules will apply and how they will be enforced. Will the attorney be subject to Home State ethical rules, Host State ethical rules, or some combination of the two?

C. Ancillary Business

"Ancillary business" may be broadly defined as any business other than the business of providing legal services. It is difficult or impossible to define the practice of law, so defining the services encompassed within the definition of ancillary business is equally difficult. Ancillary businesses are businesses that may be conducted by nonlawyers without prosecution for unauthorized practice of law. As Model Rule 5.7(b) indicates, regulators are principally concerned with "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer."[16] Ancillary business raises several questions. Should lawyers engaged in ancillary business be subject to the Model Rules? Does the answer to that question turn on whether the ancillary business is similar to the practice of law, such as professional counseling? May a lawyer conduct an ancillary business from the same firm that is providing legal services? Does a lawyer conducting an ancillary business have a heightened duty to provide information to clients about the nature of the services and, if the services do not constitute the practice of law, does the lawyer have a duty to ensure that the client understands that limitation?

Model Rule 5.7, adopted by the ABA to set rules governing ancillary businesses, has not been widely adopted. In addition, most states have not adopted rules either forbidding or expressly permitting a law firm's provision of ancillary services. Thus, many law firms are providing a wide variety of nonlegal services and are operating ancillary businesses.[17]

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15. *See* Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998).

16. MODEL RULES, *supra* note 8, at R. 5.7(a).

17. *See* Mark Voorhees, *The Law is Not Enough*, N.Y. L.J., Mar. 13, 2000; Amanda J. Yanuklis, *New Partners: Think Differently, Specialize, and Prosper*, N.Y. L.J., Jan. 31, 2000, at S9.

MDP, MJP, and ancillary business require the profession to address several common issues. The definition of the "practice of law" is the starting point for a determination of whether certain conduct violates rules against sharing fees from legal services with nonlawyers (MDP), whether a lawyer from a Home State is practicing law in a Host State (MJP), and whether the services provided by a law firm are legal services or ancillary business. A second element that is shared by all three of the components of multidimensional practice is the need to carefully identify the harm which regulatory proscriptions seek to avoid and to compare that harm with the benefit to clients and lawyers that may result from multidimensional practice. Both the definition of the practice of law and the balancing of harm with benefit require thoughtful analysis of complex issues. The actions of the House in dealing with multidimensional practice have demonstrated that the harm done by adopting blanket proscriptions on change is generally mitigated only by the ineffectiveness of such bans.

III. MULTIDIMENSIONAL PRACTICE AND THE ABA

States, generally through their highest courts, have the ultimate authority to govern the practice of law. The American Bar Association House of Delegates, through the adoption of the Model Rules, provides guidance that the states are free to adopt if they so desire, with whatever changes they desire. As such, the ABA's positions are only as effective as they are acceptable to the states. Nonetheless, the House appears to regard itself as the final word on the practice of law in the United States, often defining the profession as it wishes it were rather than as it is. As a result, the House's actions on multidimensional practice have not been particularly effective. The House has considered MDP, MJP, and ancillary business separately, although, as noted above, there are several common threads running through them. This part recounts some of the House's considerations of these issues and some of the responses of the states.

A. Ancillary Business (1991–1994)

1. First Approach (1991)

In 1991, by a close vote, the ABA House of Delegates amended the Model Rules to prohibit lawyers and law firms from engaging in certain kinds of ancillary businesses, by enacting new Model Rule 5.7. As adopted in 1991, Model Rule 5.7 provided:

> (a) A lawyer shall not practice in a law firm which owns a controlling interest in, or operates, an entity which provides non-legal services which are ancillary to the practice of law, or otherwise provides such ancillary non-legal services, except as provided in paragraph (b).
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> (b) A lawyer may practice law in a law firm which provides non-legal services which are ancillary to the practice of law if:

> (1) The ancillary services are provided solely to clients of the law firm and are incidental to, in connection with and concurrent to, the provision of legal services by the law firm to such clients;
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> (2) Such ancillary services are provided solely by employees of the law firm itself and not by a subsidiary or other affiliate of the law firm;
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> (3) The law firm makes appropriate disclosure in writing to its clients; and
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> (4) The law firm does not hold itself out as engaging in any non-legal activities except in conjunction with the provision of legal services as provided in this rule.
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> (c) One or more lawyers who engage in the practice of law in a law firm shall neither own a controlling interest in, nor operate, an entity which provides non-legal services which are ancillary to the practice of law, nor otherwise provide such ancillary non-legal services, except that their firms may provide such services as provided in paragraph (b).
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> (d) Two or more lawyers who engage in the practice of law in separate law firms shall neither own a controlling interest in, nor operate, an entity which provides non-legal services which are ancillary to the practice of law, nor otherwise provide such ancillary non-legal services. [18]

The rule would have prohibited lawyers and law firms from owning or controlling entities offering nonlegal services and limited the provision of ancillary services as part of the practice to clients receiving legal services. Thus, a law firm could offer notary services to a real estate client but could not offer investment advisory services to non-clients. Under this regime, the Model Rules would apply to all services (including nonlegal services) provided by the firm.

2. Repeal and Study (1992)

Model Rule 5.7 was controversial when adopted by the House, and was not adopted by any state. A year later, by a 190–183 vote, the House rescinded Model Rule 5.7 and formed a Committee on Ancillary Business to study the matter further.[19]

3. Second Approach (1994)

When the Committee reported back to the House in 1994, it recommended the adoption of a rule that would not prohibit ancillary business, but

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18. MODEL RULES OF PROF'L CONDUCT R. 5.7, "Provision of Ancillary Services," was adopted on Aug. 12, 1991. Paul J. Bschorr, *Recommendation and Report to the House of Delegates*, 1991 A.B.A. LITIG. SEC. 121 [hereinafter REPORT 121].

19. MODEL RULES OF PROF'L CONDUCT R. 5.7, was rescinded on August 12, 1992. David Alan Richards, *Recommendation and Report to the House of Delegates*, 1992 A.B.A. SEC. REAL PROP. PROB. & TR. L. 10D [hereinafter REPORT 10D].

would clearly subject the operation of ancillary businesses to the Model Rules. At its February 1994 meeting, the House accepted the recommendation and adopted Model Rule 5.7. As adopted in 1994, Model Rule 5.7 ("Responsibilities Regarding Law-Related Services") provides:

> (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
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> (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
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> (2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.
>
> (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.[20]

The revised Model Rule provides an alternative, allowing a law firm to provide nonlegal services (limited by the Model Rule to services which might be performed in conjunction with and related to legal services) directly or through a controlled entity. If the services are performed through a controlled entity, they are not subject to the Model Rules if the client knows that the services being provided are not legal services. The Model Rule did not address the provision of services not related to the practice of law. The clear intent of the Model Rule is to ensure that the recipient of the services does not have a mistaken belief that the services provided do not afford the protections of the attorney-client relationship. As such, it recognizes the ability of an attorney to order his or her relationship with an informed and competent client in this area. As a result of the structure of the Model Rule, it could be read to regulate only services related to the practice of law because services unrelated to the practice of law do not involve the type of confusion about whether the client is receiving the benefit of the attorney-client relationship.

While only a few states have adopted Model Rule 5.7, several states in their ethics opinions have recognized that many firms now engage in ancillary business.[21] The experience of the ABA in moving from a flat proscription to

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20. MODEL RULES OF PROF'L CONDUCT R. 5.7(a), was adopted on Feb. 2, 1994. William G. Paul, *Recommendation and Report to the House of Delegates*, 1994 A.B.A. HOUSE OF DELEGATES COMMITTEE ON ANCILLARY BUS. 113 [hereinafter REPORT 113].

21. *See* Colo. Bar Ass'n Ethics Comm., Formal Op. 98 (Dec. 14, 1996) (although Colorado has not adopted a rule addressing ancillary business, the fact that a Colorado attorney may be engaged in such activity is recognized in Model Rule 5.7); N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.5-b (2001) (provides rules for, and limitations on,

regulation based on the knowledge and understanding of the client should have provided a good lesson on how to address the issues presented by multidimensional practice. It didn't.

B. Ancillary Business and MDP (2000)

In 2000, the House considered some aspects of ancillary business in connection with the MDP debates. The MDP Commission defined an MDP as a practice that would deliver "both legal and nonlegal professional services." As initially formulated, the MDP Commission initially defined an MDP as:

> [A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other

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ancillary businesses. New York has placed a similar proposal before the House for consideration at the 2002 Annual Meeting); Cal. Bar Ass'n, Formal Op. 141 (1995) (a lawyer or law firm could render nonlegal services to a client directly, through a nonlawyer employee, or through an entity in which the lawyer has an ownership interest, provided that the lawyer carefully complies with the Rules of Professional Conduct of the State Bar of California); Penn. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 92-45 (1992) (a law firm was not prohibited from forming a limited partnership or corporation to provide financial advisory and brokerage services); *In re* Unnamed Attorney, 645 A.2d 69 (N.H.1994) (New Hampshire version of Rule 1.15 authorized disciplinary authorities to audit financial records of title insurance company because of strong nexus between New Hampshire lawyer and company); Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipline, Op. 94-7 (1994) (an attorney or several attorneys within a law firm may own an ancillary business that provides law-related services, but must do so in a manner consistent with the Ohio Code of Professional Responsibility. The ancillary business must not engage in activities that would be prohibited as unauthorized practice of law. "It is improper for attorneys who own an ancillary business to require that customers of the business agree to legal representation by the attorneys or their law firm as a condition of engagement of the services of the ancillary business. If customers of the ancillary business need legal services, they may be informed that the attorneys can provide the legal representation, but they must also be informed of the ownership interest and encouraged to seek legal counsel of their own choice."); *see also* Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipline, Op. 90-23 (1990); Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipline Op. 88-018 (1988); Stephen R. Ripps, *Law Firm Ownership of Ancillary Businesses in Ohio—A New* Era, 27 AKRON L. REV. 1, 17 (1993) (discussing Ohio State Bar Ass'n, Formal Op. 37 (1989)); Kan. Bar Ass'n Ethics-Advisory Comm., Op. 92-04 (1992) (citing to 1991 version of Rule 5.7 and stating that a lawyer may provide title insurance services as ancillary business, provided that lawyer complies with rules of professional conduct including, but not limited to, rules on advertising, fee splitting, conflicts of interest and confidentiality); Tenn. Sup. Ct. Bd. of Prof'l Responsibility, Op. 94-F-135 (1994) (trust accounts of law-related ventures operated by lawyers subject to trust account provisions of DR 9-102); Fla. State Bar Ass'n Comm. on Professional Ethics, Op. 94-6 (1995) (law firm may operate mediation department within firm as long as mediation practice conducted in conformity with Florida Rules of Professional Conduct); S.C. Bar Ethics Advisory Comm., Op. 93-05 (1993) (law firm that provides legal services to retirement plans may own interest in, and refer clients to, ancillary business that provides services to retirement plans, if services provided do not constitute unauthorized practice of law and law firm complies with Rules 1.7 and 1.8).

> than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, including legal services, and there is a direct or indirect sharing of profits as part of the arrangement.[22]

Under the initial definition, an MDP's nonlegal activities were not limited to professional services or "law related services." This lead to much discussion of the law firm engaged in businesses such as tow truck operation or dry-cleaning. In an attempt to avoid muddying the issues surrounding MDP with those arguments, the MDP Commission redefined an MDP as "a practice that delivers both legal and nonlegal professional services," thereby limiting the ancillary activities of an MDP to "professional services." Neither of the MDP Commission's definitions of MDP limited the activities of the MDP to "law related services."[23]

At the 2000 Annual meeting, the proposal of the MDP Commission was considered and soundly defeated in the House of Delegates. Before that meeting, Reports were filed by the MDP Commission (MDP Commission Report 2000)[24] and by the New York State Bar Association headed by former ABA President Robert MacCrate (MacCrate Report).[25] Among other things, the MacCrate Report addressed ancillary business, noting that:

> Thus, lawyers have long recognized that there are circumstances in which it is advantageous to them and to their clients to provide integrated professional services on certain matters, and have taken steps over the past several years to create entities, within or under the control of their firms, to provide such services.[26]

The MacCrate Report also noted that the ABA's position on ancillary business was "ambiguous" and recommended an addition to the rule permitting ancillary business to make clear that the lawyer must not allow nonlawyer colleagues in the ancillary business to intrude upon the ability of the lawyer to exercise independent professional judgment on behalf of clients.[27]

The MDP Commission Report 2000 did not address the question of ancillary business, focusing instead on the implications of a change to Model Rule 5.4. In response to the MDP Commission Report 2000, a group of state bar

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22. AM. BAR ASS'N COMMISSION ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES (1999), *available at* http: // www. abanet. org/ cpr/ mdpfinalreport.html (last visited Nov. 1, 2002) [hereinafter MDP COMMISSION REPORT 1999].

23. *Id.*

24. MDP COMMISSION REPORT 2000, *supra* note 13.

25. N.Y. STATE BAR ASS'N SPECIAL COMM. ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS (Apr. 2000), *available at* http://www.law.cornell.edu/ethics/mdp.htm (last visited Nov. 1, 2002) [hereinafter MACCRATE REPORT].

26. *Id.* at ch. 4.

27. *Id.* (citing William B. Dunn, *Legal Ethics and Ancillary Business*, 74 MICH. BAR J. 154 (1995)).

associations developed a "consensus" anti-MDP resolution (Report 10F).[28] Report 10F largely followed the recommendations in the MacCrate Report on many items, but chose not to adopt the MacCrate Report's recommendation on ancillary business. In explaining the omission of the reference to ancillary business, the proponents of Report 10F stated:

> The Recommendation makes one significant departure from the MacCrate Report, as it originally was issued. The MacCrate Report permits ancillary businesses by lawyers and law firms, so long as safeguards are in place to prevent the ownership or control of the practice of law by nonlawyers. The question of ancillary business, however, has been widely debated. Some jurisdictions permit lawyers to offer ancillary businesses, while most do not. We do not believe that the debate over multidisciplinary practice should reopen the question of ancillary business. For that reason, we commend the safeguards proposed by the MacCrate Report to the jurisdictions that permit ancillary business, but take no position on the question of whether to permit ancillary business.[29]

In July 2000, Report 10F was adopted by the House, although it is unclear whether the adoption means that the ABA has reversed its position on ancillary business, decided to make its position neutral, or make no change at all.

C. Ancillary Business and Ethics 2000 (1999–2002)

In its submission for final approval (Ethics 2000 Report),[30] the American Bar Association Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission)[31] proposed one change to the Model Rule and an addition to the Comment to clarify that the ancillary business conducted by a law firm no longer need be conducted through a separate entity.[32] The Reporter's note[33] to the version of Model Rule 5.7 simply notes that the Model Rule now allows attorneys to provide ancillary services directly as opposed to requiring that

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28. Cheryl I. Niro, *Report by the Illinois State Bar Association, New Jersey State Bar Association, and New York State Bar Association*, 2000 ILL. ST. B. ASS'N 10F, *available at* http://www.abanet.org/cpr/mdp-report10f.html (last visited Nov. 1, 2002) [hereinafter REPORT 10F].

29. *Id.*

30. ETHICS 2000 COMMISSION, REPORT TO THE HOUSE OF DELEGATES (Aug. 2001), *available at* http://www.abanet.org/cpr/e2k-whole_report_home.html (last visited Nov. 1, 2002) [hereinafter REPORT 401]. This report was considered by the American Bar Association House of Delegates in August 2001 and February 2002, and adopted in February 2002.

31. The proceedings of the Ethics 2000 Commission may be found at AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, ETHICS 2000 COMMISSION, *at* http://www.abanet.org/cpr/ethics2k.html (last visited Nov. 1, 2002).

32. The revision to Rule 5.7 may be found at ETHICS 2000—FEBRUARY 2002 REPORT, *available at* http://www.abanet.org/cpr/e2k-57_202.html (last visited Nov. 1, 2002).

33. *Id.* at Model Rule 5.7, Reporter's Explanation of Changes, *available at* http://www.abanet.org/cpr/e2k-rule57rem.html (last visited Nov. 1, 2002).

they be performed through a separate entity as the former Model Rule 5.7 had required. An earlier version of the Reporter's Explanation of Changes issued in 1999, which did not survive to the final Ethics 2000 Report, clearly indicates the relationship of ancillary business and MDP:

> Multidisciplinary practice has already been approved by the ABA. The vehicle is Rule 5.7. The primary thing that makes Rule 5.7 multidisciplinary practice different from the phenomenon debated by the ABA in August 1999 is that Rule 5.7 entities are owned or controlled by lawyers.
>
> The version of Rule 5.4 that is before you at this meeting is intended to address the issues of both Rules 5.4 and 5.7. Rule 5.7 might be repealed if a new Rule 5.4 is adopted; certainly, if Rule 5.4 is not altered sufficiently, it would seem wise to retain present Rule 5.7. Indeed, some may prefer retaining Rule 5.7 even if a new Rule 5.4 were adopted, arguing that Rule 5.4 deals with lawyers practicing *with* nonlawyers while this rule deals in part with lawyers practicing *as* nonlawyers.
>
> Rule 5.7 has a checkered history. Not a part of the original Model Rules, a version of Rule 5.7 was adopted in August 1991 prohibiting most ancillary services. That rule was then rescinded in August 1992, only to be replaced by the present Rule in February 1994. The Rule has apparently been adopted by Indiana, Maine, Massachusetts, North Dakota, Pennsylvania and the Virgin Islands, but no other jurisdictions.
>
> Rule 5.7(b) defines "law related services" as any services that "might reasonably be performed in conjunction with and in substance are related to the provision of legal services" but that in themselves "are not prohibited as unauthorized practice of law when provided by a nonlawyer." Comment [9] gives such examples as accounting services, financial planning, economic analysis, lobbying, and medical consulting. Many lawyers might be surprised that such services are inherently "in substance . . . related to the provision of legal services," but we have the authority of Rule 5.7 to say it is so.
>
> If the above services are provided by a law firm, the lawyer rules govern provision of the services. If they are provided by a separate entity "controlled by the lawyer individually or with [nonlawyers]," lawyer rules apply unless the lawyer takes "reasonable measures to assure" that customers of the separate entity know they are not getting legal services and do not have the "protections of the lawyer-client relationship." According to Comment [2], Rule 5.7 applies to the provision of such law-related services "even when the lawyer does not provide any legal services" to the person that is to receive the client-type protection.
>
> Rule 5.7's focus on giving purchasers of services other than legal services the protections afforded clients duplicates what we propose for Rule 5.4. On the other hand, lawyers have long done more than practice law, and Rule 5.7 acknowledges the small-town

> lawyer who sells some insurance along with writing wills, as well as law firms doing mediation, and lawyers available to call up state legislators. Indeed, in the present multidisciplinary practice debate, a vote for repeal of Rule 5.7 without a change in Rule 5.4 would not be a neutral act. It might appear to close the door to a phenomenon the August debate revealed that some lawyers see as a good way to add value to the services they offer their clients.[34]

This comment was deleted from the Ethics 2000 Report, although the Ethics 2000 version of Model Rule 5.7 eliminated the requirement that an ancillary business be conducted in a separate entity while continuing the requirement that the attorney make clear that the recipient of the ancillary services does not enjoy an attorney-client relationship.

D. Multidisciplinary Practice (1998–2002)[35]

By 1998, the five largest accounting firms had developed global consulting practices that provided a variety of professional services, including, in many countries in Europe and Asia, legal services. In the United States, consulting and accounting firms had been providing services in the areas of tax, estate planning, litigation consulting, and advice on mergers and acquisitions that could be considered "legal services." The accounting and consulting firms employed thousands of lawyers throughout the world, including a large number of tax and other attorneys within the United States. The Texas State Bar unsuccessfully attempted to prevent a consulting firm from performing some services using prohibitions against the unauthorized practice of law.[36] Similarly, the Virginia Bar considered but ultimately decided not to bring an unauthorized practice complaint

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34. *See* MODEL RULES OF PROF'L CONDUCT R. 5.7 reporter's observations (Proposed Draft No. 1, Sept. 30, 1999) (on file with author).

35. This section is a condensation of several articles. *See* Robert R. Keatinge, *Report of Actions at the 1999 Midyear Meeting*, COLO. LAW., Apr. 1999, at 27; Robert R. Keatinge, *ABA Delegate's Report: ABA to Consider the Future of the Practice of Law at Its Annual Meeting*, COLO. LAW., July 1999, at 49; Robert R. Keatinge, *ABA Delegate's Report: Multidisciplinary Recommendation: An Analysis*, COLO. LAW., Aug. 1999, at 45; Robert R. Keatinge, *ABA Delegate's Report: Report of Actions at the 1999 Annual Meeting*, COLO. LAW., Oct. 1999, at 63; Robert R. Keatinge, *Multidisciplinary Practice*, COLO. LAW., July 2000, at 70; Robert R. Keatinge, *Colorado and Denver in the House: MDP Declares Heresy by the ABA House of Delegates*, COLO. LAW., Sept 2000, at 48; Robert R. Keatinge, *Business as Usual at the Midyear Meeting—With Bigger Things to Come*, COLO. LAW., Feb. 2001, at 26; Robert R. Keatinge, *While We May Accept Fire, We Are Still Opposed to the Wheel: Cognitive Dissonance At the ABA Midyear Meeting*, COLO. LAW., Apr. 2001, at 77; Robert R. Keatinge, *I Know What You Did Last Summer: House Returns to MDP and Begins Consideration of Ethics 2000*, COLO. LAW., July 2001, at 77.

36. MDP COMMISSION REPORT 2000, *supra* note 13, at app. n.46 (citing Arthur S. Hayes, *Accountants vs. Lawyers: Bean Counters Win*, NAT'L L.J., Aug. 10, 1998, at A4; Tom Herman, *A Special Summary and Forecast of Federal and State Tax Law Developments*, WALL ST. J., July 29, 1998, at A1).

against an accounting firm that was providing "corporate compliance" services to a health care provider.[37]

The firms engaged in MDP provided a variety of professional services (sometimes referred to as "one-stop shopping"), including internal coordination of professional services as disparate as accounting, engineering, counseling, and legal services. This, the firms asserted, was a response to the fact that most of clients' problems require the services of more than one type of professional. Beyond the question of unauthorized practice of law, the performance of legal services by an MDP firm gave rise to several ethical issues, the most significant of which included ownership of a firm providing legal services by nonlawyers, conflicts of interest, confidentiality, independence of judgment, and attorney-client privilege.

In August 1998, in response to these developments, ABA President Phillip Anderson appointed a commission on Multidisciplinary Practice to study MDP and the practice of services that may be considered legal services by firms fully or partially owned by nonlawyers.[38]

1. First Commission Reports and House Consideration (1999)

The Commission conducted hearings on MDP and issued a background paper for consideration of the House in January 1999. On March 9, 1999, the Commission provided the members of the House with a series of Models and Hypotheticals to aid in the discussion of alternative manners of dealing with MDP.

Among the issues presented to the House by the MDP Commission were: (1) Should Rule 5.4 be modified to permit ownership of a firm providing legal services by, and fee sharing with, nonlawyers? (2) If so, how should the rules governing confidentiality apply to the firm?[39] (3) How will the conflict of interest rules apply to the lawyers and nonlawyers in a firm providing MDP?[40] (4) How are conflicts between the ethical rules governing other professionals and those governing lawyers to be resolved? (5) What name may a firm providing legal services use? (6) Can any specific instances of harm to a client by allowing firms

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37. Comments of James M. McCauley, Ethics Counsel, Virginia State Bar, at the 25th National Conference on Professional Responsibility, June 4, 1999. *See* MDP COMMISSION REPORT 2000, *supra* note 13, at app. n.47 (citing Posting of James McCauley, Ethics Counsel, Virginia State Bar, to Washburn Legal Ethics Listserv (Nov. 4, 1999)).

38. A wealth of valuable information and many of the reports discussed here are available at the A.B.A. Center for Professional Responsibility website. *See* AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, MULTIDISCIPLINARY PRACTICE, *at* http://www.abanet.org/cpr/multicom.html (last visited Nov. 1, 2002).

39. As one example of this question, if both legal and audit services are being provided by the same firm, how can those duties be reconciled? While a lawyer has a duty of loyalty and confidentiality to a client, accountants, particularly as part of the audit function, have a duty of objectivity and disclosure. AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, CODE OF PROFESSIONAL CONDUCT § 55, art. 4, *available at* http://www.aicpa.org/about/code/article4.htm (last visited Oct. 31, 2002).

40. In an international firm with tens of thousands of employees, imputed conflicts of interest become an even greater issue than currently exists with large national law firms that employ hundreds of people.

providing MDP be identified in either the United States or a foreign jurisdiction, and, if the benefit to clients of such arrangements would outweigh the harm, what restrictions, if any, should the Commission recommend? (7) Should the restrictions follow or differ from those adopted in Rule 5.4 of the Washington, D.C., Rules of Professional Conduct?

On June 8, 1999, after ten months of study with respect to the delivery of legal services by professional services firms, the Commission released its Recommendation (1999 Recommendation) for action by the House and a Report (1999 Report) explaining the basis for its Recommendation.[41] The MDP Commission's study focused on the emergence of the MDP, which it defined as:

> [A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, including legal services, and there is a direct or indirect sharing of profits as part of the arrangement.[42]

The 1999 Recommendation suggested making several changes in the ethical rules governing the form of practice. The MDP Commission did this in an effort to balance changes in the manner in which legal services were being delivered against the interests of clients and the public and what the MDP Commission described as the "core values" of the legal profession. The "core values" included "professional independence of judgment, the protection of confidential client information, and loyalty to the client through the avoidance of conflicts of interest."[43]

The 1999 Recommendation expressly retained the rule that nonlawyers were prohibited from providing legal services, while addressing the context under which legal services would be provided.[44] It suggested the modification of Model Rule 5.4 to permit nonlawyer ownership of firms, but with several other changes intended to preserve the "core values" described above. The 1999 Recommendation also made ten proposals.

First, except as expressly authorized with respect to MDPs, lawyers would continue to be prohibited from sharing fees with nonlawyers or forming a partnership or other entity with nonlawyers if any of the activities of the partnership or other entity consist of the practice of law. Provided there were safeguards in effect, lawyers would be able to share legal fees with nonlawyers and could provide legal services through an MDP that met certain conditions set forth in the Recommendation.[45]

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41. MDP COMMISSION REPORT 1999, *supra* note 22.
42. *Id.* at Recommendation 3.
43. *Id.* at Recommendation 1.
44. *Id.* at Recommendation 4.
45. *Id.* at Recommendation 2, 3, 12.

Second, for a lawyer to be permitted to engage in the practice of law in an MDP, the MDP would have to be subject to regulation by 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.

Third, an MDP would be required to give the court a written statement undertaking that: (a) it will not directly or indirectly interfere with a lawyer's exercise of independent professional judgment on behalf of a client; (b) it will establish, maintain, enforce, and annually update and amend procedures designed to protect a lawyer's exercise of independent professional judgment on behalf of a client from interference by the MDP, any member of the MDP, or any person or entity controlled by the MDP; (c) it will establish, maintain, and enforce procedures to protect a lawyer's professional obligation to segregate client funds; (d) the members of the MDP delivering or assisting in the delivery of legal services will abide by the rules of professional conduct; (e) it will respect the unique role of the lawyer in society as an officer of the legal system, a representative of clients, and a public citizen having special responsibility for the administration of justice;[46] (f) it will certify annually to the court and each lawyer in the MDP the MDP's compliance with the requirements set forth above; (g) it will permit the court to review and conduct an administrative audit of the MDP and bear the cost of the administrative audit of MDPs through the payment of an annual certification fee;[47] and (h) an MDP that failed to comply with its written undertaking would be subject to withdrawal of its permission to deliver legal services or to other appropriate remedial measures ordered by the court.[48]

Fourth, a lawyer in an MDP who delivered legal services to the MDP's clients would be bound by the rules of professional conduct,[49] and would not be able to use a nonlawyer supervisor's resolution of a question of professional duty as an excuse for failing to comply with the rules of professional conduct.[50] In this respect, a lawyer's duties to the client would be unaffected by his or her practice in an MDP.

Fifth, an MDP would be subject to all rules of professional conduct that apply to a law firm.[51] Because at the time the Recommendation was written there were no rules of professional conduct that applied to a law firm, this rule would not impose any requirements on MDPs until such rules were adopted.

Sixth, all clients of an MDP would be treated as the lawyer's clients for purposes of imputed conflicts of interest in the same manner as if the MDP were a law firm and all employees, partners, shareholders or the like were lawyers.[52] This

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46. The MDP Commission noted that this undertaking should acknowledge that lawyers in an MDP have the same special obligation to render voluntary *pro bono publico* legal service as lawyers practicing solo or in law firms. *See id.* at Recommendation 2.

47. *Id.* at Recommendation 14.

48. *Id.* at Recommendation 15.

49. *Id.* at Recommendation 5.

50. *Id.* at Recommendation 6.

51. *Id.* at Recommendation 7.

52. *Id.* at Recommendation 8.

rule would expand the imputed disqualification rule that currently applies to law firms[53] to all clients of an MDP, even if those clients of the MDP were not provided with legal services. Such a rule would impose significant limitations on the major accounting firms' ability to provide services without appropriate conflict waivers.

Seventh, where an MDP is providing both legal and nonlegal services to a client, a lawyer would be required to make reasonable efforts to ensure that the client sufficiently understood the different obligations with respect to disclosure of client information and that the courts might treat the client's communications in connection with the legal and nonlegal services differently.[54]

Eighth, a lawyer in an MDP who delivered legal services to a client of the MDP and who worked with, or was assisted by, a nonlawyer who delivered nonlegal services in connection with the delivery of legal services to the client would be required to make reasonable efforts to ensure that the MDP had measures in effect to ensure that the nonlawyer's conduct was compatible with the professional obligations of the lawyer.[55]

Ninth, a lawyer in an MDP would not be allowed to represent to the public generally or to a specific client that services the lawyer provides are not legal services if those same services would constitute the practice of law if provided by a lawyer in a law firm. Such a representation would presumptively constitute a material misrepresentation of fact.[56]

Finally, allowing fee-sharing and ownership interest in an MDP would not change the rules of professional conduct prohibiting fee-sharing and partnership in any other respect, including the current provisions limiting the holding of equity investments in any entity or organization providing legal services.[57]

The House met in August 1999, in Atlanta, Georgia, and the 1999 Report received the most attention at the meeting. It was clear that several state bar associations adamantly opposed any change in the Rules that would appear to signal ABA acceptance of MDPs.

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53. MODEL RULES, *supra* note 8, at R. 1.10.

54. MDP COMMISSION REPORT 1999, *supra* note 22, at Recommendation 9. The specific language of the Recommendation speaks of communication to a "lawyer" and "nonlawyer" as being treated differently. It is possible that the distinction would be drawn based on the types of services being provided rather than the identity of the provider of the services.

55. *Id.* at Recommendation 10. This would impose a greater responsibility to ensure that the activities of others providing nonlegal services in connection with the lawyer's provision of legal services than currently applies where a lawyer is a member of a "team" of professionals providing various types of services for a single client.

56. *Id.* at Recommendation 11. The Report suggests that the misrepresentation may be avoided if in a specific matter it is made clear to the client, preferably in writing, that the MDP is not providing legal services and that the client should consider retaining its own counsel.

57. *Id.* at Recommendation 13.

Before the meeting, several state bar associations indicated that they believed that a final vote on the Recommendation should be deferred until the midyear meeting in Dallas. Others believed that the Recommendation should be defeated immediately. The debate, while civil, made clear that there continued to be a wide gap between those who wished to "circle the wagons" and oppose multidisciplinary practice in any form and those who recognized that MDPs already exist and would continue to proliferate. Speakers in favor of the Recommendation, in addition to Sherwin Simmons, the chair of the ABA Commission, included ABA President Philip Anderson and James Holden of the ABA Tax Section. Among those speaking in opposition were Lawrence Fox, former chair of the Ethics and Professional Responsibility Committee; Jerome Shestack, former chair of the ABA; and Ramond Mullerick, an attorney from Spain, who spoke on the European experience. The debate was conducted on the assumption that, at the conclusion of the debate, there would be a motion to defer the Recommendation.

Both sides appeared to agree that MDPs were being established throughout the world and that, in the United States, MDPs were engaging in an increasing number of areas of practice, such as tax, mergers and acquisitions, ERISA, investigations, and pre-trial preparation. These MDPs were arguing, apparently successfully, that such practice did not constitute the practice of law. Debaters also agreed that, under the existing state of affairs, because the MDPs had successfully argued that they were not practicing law, there was no effective ethical regulation of the arguably legal services provided by their lawyers.

Delegates supporting the Recommendation (or at least deferral of its final consideration) differed from those opposing the resolution on the question of the appropriate response to the development of MDPs. Those in opposition to the Recommendation argued that any change in the Rules that appeared to permit nonlawyer ownership of firms providing legal services would mark the beginning of the end of the self-regulated practice of law. They argued further that ownership of firms by nonlawyers would create an insurmountable barrier to the preservation of the independence of lawyers. Some of the speakers even suggested that their jurisdictions would actively pursue unauthorized practice of law proceedings against lawyers working within accounting firms.

Other supporters argued that as long as the issue was treated as a matter of unauthorized practice of law, there would be no attempt to provide ethical rules for such areas as tax practice in which lawyers working for accounting firms provide services that could be considered the practice of law. So long as those lawyers have to take the position that they are not engaged in the practice of law in order to avoid being accused of a violation of Model Rule 5.4, they would perforce not be covered by the ethical rules governing law practice. The supporters argued that it would be better to develop ethical rules that would apply to all individuals and firms that provide legal services, regardless of structure.

The 1999 Report attempted to address these issues. Some members of the Commission who spoke in favor of the Recommendation, which had been unanimously approved by the Commission, indicated that they initially had the same perspective as those opposing the Recommendation in the House. After

studying the issue, however, they became convinced that the better approach was to try to find a way to ensure that all legal services were subject to ethical regulation.

At one point in the debate, it was suggested that the Recommendation be recommitted to the Commission for further study, but the opponents wanted a clear statement that the House did not support changing the rules governing nonlawyer ownership of firms. At the conclusion of the debate, it was determined that the Recommendation would be deferred indefinitely, with a statement that the ABA had not changed its position.[58]

2. 2000 Midyear Meeting

Although there was no action on MDP at the 2000 Midyear Meeting in Dallas, MDP remained on everyone's mind. On November 3, 1999, ABA President William Paul wrote to the Delegates to indicate that on February 13, 2000, there would be a town meeting at which MDP would be discussed. He concluded the letter by stating, "My hope is that the members of the House will come to New York in July for the ABA Annual Meeting prepared to determine what is the best resolution of this question for our profession and for the public."[59] The Ohio State Bar Association submitted a report (Report 8A)[60] dealing with unauthorized practice of law. Report 8A, which was approved by a three to one vote, urged each jurisdiction to establish and implement effective procedures for the discovery and investigation of violations of its laws prohibiting the unauthorized practice of law and to pursue active enforcement of these laws. In the words of the Ohio State Bar Association Report, "We owe this obligation to the public we serve to protect our citizens from persons not authorized to provide counsel affecting life, liberty and property. The public should expect no less than full and efficient enforcement of laws designed to protect their best interests."[61]

The ABA and several other groups held meetings devoted to various aspects of MDPs. A town hall meeting on this subject was hosted by ABA President William G. Paul and moderated by Judge Patrick E. Higginbotham of

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58. The final resolution as adopted reads as follows:

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

AM. BAR ASS'N HOUSE OF DELEGATES, RESOLUTION (Aug. 1999), *available at* http://www.abanet.org/cpr/flbarrec.html (last visited Nov. 1, 2002).

59. Robert R. Keatinge, *Preliminary Agenda Items for ABA's 2000 Midyear Meeting*, COLO. LAW., Feb. 29, 2000, at 33 (quoting letter from William Paul, A.B.A. President, to A.B.A. House of Delegates (Nov. 3, 1999)).

60. Thomas J. Bonasera, *Report with Recommendation to the A.B.A. House of Delegates*, 2000 OHIO ST. B. ASS'N 8A [hereinafter REPORT 8A].

61. *Id.*

the U.S. Court of Appeals for the Fifth Circuit.[62] Speaking at this meeting, Sherwin Simmons, Chair of the ABA MDP Commission, noted that no one had called a time-out on changes since the August 1999 House of Delegates Annual Meeting. As evidence, he cited several events that had occurred since the Annual Meeting: KPMG, one of the big five accounting firms, had formed a strategic alliance with Morrision and Foerster, a California-based national law firm. In the District of Columbia, McKee Nelson Ernst & Young was formed, a law firm owned by former partners of King and Spalding in Atlanta, financed with a loan from the accounting firm Ernst & Young. PricewaterhouseCoopers had established a multinational firm known as Landwell. Anderson Legal had earned $480 million in 1999 from worldwide legal services. Rogers & Wells had merged with Clifford Chance of London. The Law Society of England and Wales had adopted an interim resolution, pending legislation, permitting "legal practice plus," which permitted nonlawyers to associate with solicitors. The Canadian Bar Association International Practice Committee had issued a recommendation that MDPs be allowed in Canada under circumstances similar to those described in the Commission's Report. Finally, in New South Wales there had been a proposal that would permit law firms to be publicly owned as long as they were controlled by lawyers.

In addition, Simmons noted that MDP was being studied in most states and by such groups as the Union Internationale des Avocats, the Federation of Law Societies of Canada, and the Council of Bars and Law Societies of the European Union. Finally, he noted changes occurring in both multidisciplinary and multijurisdictional practice, and cited the merger of Bingham Dana & Gould's financial subsidiary with Legg Mason as indicative of change in the ancillary business of law firms as well.

The positions expressed at the various meetings ran the gamut, from the view of the majority that the appropriate response to MDPs was rigorous enforcement of unauthorized practice of law rules to the opinions expressed by others that it was already too late for the ABA to have any meaningful impact on the development of MDPs. Between the two extremes, several moderate positions were expressed.[63]

The opposition to ABA action on MDP was spearheaded by a group that called itself the "ABA House Coalition for an Independent Legal Profession." The

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62. The Town Hall meeting was broadcast on the Internet so that people throughout the world could watch, and the video is still available for viewing. ABA TOWN HALL MEETING ON MULTIDISCIPLINARY PRACTICE (Feb. 2000), *available at* http://www.abanet.org/cpr/multicom.html (last visited Nov. 1, 2002). Consistent with much of the ABA MDP Commission's work, technology was used to provide current information to a large number of participants. As an example, the Town Hall meeting received a question from an ABA member in Turkey during the question period.

63. Among the groups considering MDP during the Midyear Meeting were the National Association of Bar Presidents, Caucus of State Bar Associations, Association of Professional Responsibility Lawyers, ABA House Coalition for an Independent Legal Profession, ABA Commission on Multidisciplinary Practice, ABA Law Practice Management Section, and the ABA Young Lawyer's Division.

Coalition, led by Illinois Bar Association President Cheryl Niro, was sponsored by several state bar associations, principally those of Illinois, Ohio, New Jersey, and Florida. Many of these associations had passed resolutions encouraging the active prosecution of unauthorized practice of law and, in the case of New Jersey, urging the abolition of the Commission, which had proposed that the ABA revise its ethical rules to permit lawyers to practice law in MDPs. The Coalition held a meeting at which it was clear that a majority of the state bar associations represented supported the Coalition position. The Coalition relied on unauthorized practice of law prosecutions as the response to the changes brought about by MDP, although there were a few dissenting voices.

The ABA Law Practice Management Section, the State Bar of Texas Corporate Counsel Section, and the State Bar of Texas Professional Development Program sponsored an MDP roundtable the following day.[64] The discussion focused on MDP corporate and general practice perspectives. The roundtable participants generally believed that the organized bar needed to respond to the changes in the profession caused by and resulting from the MDP phenomenon. Among the issues that needed to be addressed, according to Anthony Davis, an ethics expert, was the limitation on the ability of lawyers to practice across state lines.

Texas Supreme Court Justice Enoch discussed the experience his state had in dealing with Arthur Andersen and Nolo Press/Folk Law, Inc., and the makers of Quicken Family Lawyer. In those cases, prosecutions for unauthorized practice of law ended unsuccessfully. In the case of Andersen, the Unauthorized Practice of Law Committee withdrew the complaint. In the Nolo/Folk Law, Inc., case, as soon as a U.S. District Court judge enjoined them from distributing self-help legal guides, software, and documents, the publishers went to the Texas legislature. The legislature subsequently enacted a law providing that the publication and distribution of self-help legal materials over the Internet or through other means did not constitute the practice of law.[65]

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64. Among the participants were Texas Supreme Court Justice Craig Enoch; Texas UPL Task Force Chair Brent Clifton; Exxon Mobil Development Company Chief Counsel Skip Maryan; Sherwin Simmons; Anthony Davis, an ethics and professional responsibility expert with offices in Colorado and New York; other corporate counsel; and other ABA and Texas bar leaders.

65. The Texas statute states, in pertinent part, that:

> In this chapter, the "practice of law" does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney. This subsection does not authorize the use of the products or similar media in violation of Chapter 83 and does not affect the applicability or enforceability of that chapter.

TEX. GOV'T CODE ANN. § 81.01(c) (Vernon 2001).

3. 2000 Annual Meeting and the SEC

The ABA's consideration of MDP came to a conclusion at the 2000 business meeting in New York. In a meeting that was characterized by rhetoric rather than thoughtful analysis, the House resolved to oppose MPDs. A minority led by the Colorado and Denver Bar Associations sought to continue the consideration of the implications of MDPs, but the resolution was supported by such ABA leaders as Martha Barnett and Chairman of the Standing Committee on Ethics and Professional Responsibility (Ethics Committee) Donald Hilliker.

Before the meeting, Robert MacCrate, a former president of the ABA, submitted the MacCrate Report[66] discussed above. A group of state bar associations, anxious to take advantage of the anti-MDP frenzy that had been building since the prior Annual Meeting, got together to develop a "consensus" anti-MDP resolution. The result was Report 10F.[67] While Report 10F generally

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66. *See* text accompanying notes 25–27.

67. Report 10F as adopted provides:

> RESOLVED, that each jurisdiction is urged to revise its law governing lawyers to implement the following principles and preserve the core values of the legal profession:
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> 1. It is in the public interest to preserve the core values of the legal profession, among which are:
>
> 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.
>
> 2. All lawyers are members of one profession subject in each jurisdiction to the law governing lawyers.
>
> 3. The law governing lawyers was developed to protect the public interest and to preserve the core values of the legal profession, that are essential to the proper functioning of the American justice system.
>
> 4. State bar associations and other entities charged with attorney discipline should reaffirm their commitment to enforcing vigorously their respective law governing lawyers.
>
> 5. Each jurisdiction should reevaluate and refine to the extent necessary the definition of the "practice of law."
>
> 6. Jurisdictions should retain and enforce laws that generally bar the practice of law by entities other than law firms.
>
> 7. The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.
>
> 8. The law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly

followed the anti-MDP approach of the MacCrate Report, it was more reactionary in two respects. First, the resolution sought to prohibit other "side-by-side" arrangements permitted under the rules. Second, it deleted the reference to ancillary business from the MacCrate Report.[68]

The Board of Governors, a thirty-seven member governing body of the ABA which had previously supported the study of MDP in reaction to the clamor against MDP by many of the state delegates, overwhelmingly voted to support Report 10F and to reject any move to defer the vote.

In spite of an apparently irresistible drive from the promoters of Report 10F, a few people agreed with the Commission that the issues had received neither a thoughtful nor dispassionate consideration by the House and that many state and local bar associations had not yet completed their studies. At the same time, the ABA was forming commissions to consider MJP and the future of the practice of law. All of these considerations weighed strongly against ending the debate on MDP as Report 10F would have done.

By several days into the meeting, the only entities that could make a motion to defer consideration of MDP were state bar associations. While the California Bar Association had determined to support deferral, it was not prepared to make such a motion. The Denver and Colorado Bar Associations introduced a

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> transferring to nonlawyers ownership or control over entities practicing law, should not be revised.
>
> FURTHER RESOLVED that the Standing Committee on Ethics and Professional Responsibility of the American Bar Association shall, in consultation with state, local and territorial bar associations and interested ABA sections, divisions, and committees undertake a review of the Model Rules of Professional Conduct ("MRPC") and shall recommend to the House of Delegates such amendments to the MRPC as are necessary to assure that there are safeguards in the MRPC relating to strategic alliances and other contractual relationships with nonlegal professional service providers consistent with the statement of principles in this Recommendation.
>
> FURTHER RESOLVED that the American Bar Association recommends that in jurisdictions that permit lawyers and law firms to own and operate nonlegal businesses, no nonlawyer or nonlegal entity involved in the provision of such services should own or control the practice of law by a lawyer or law firm or otherwise be permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person.
>
> FURTHER RESOLVED that the Commission on Multidisciplinary Practice be discharged with the Association's gratitude for the Commission's hard work and with commendation for its substantial contributions to the profession.

REPORT 10F, *supra* note 28.

68. The Explanation accompanying Report 10F provided as follows: "We do not believe that the debate over multidisciplinary practice should reopen the question of ancillary business. For that reason, we commend the safeguards proposed by the MacCrate Report to the jurisdictions that permit ancillary business, but take no position on the question of whether to permit ancillary business." *Id.*

report (Report 10J) requesting deferral of all MDP resolutions. Additionally, the report requested that MDP be added to the topics to be studied by the ABA Committee on Research into the Future of the Legal Profession. By moving the topic to the new futures commission, Report 10J would have disbanded the Commission, a decision Sherwin Simmons, the head of the Commission, thought appropriate. Report 10J contained the following recommendation:

> RESOLVED, that the American Bar Association take no actions that in any way discourage further discussion of Multidisciplinary Practice ("MDP") until a more substantial number of state and local bar associations and ABA entities currently studying MDP have had an opportunity to conclude their studies and the members of the House of Delegates have had an opportunity to consider those reports.
>
> FURTHER RESOLVED, that the subject of MDP be included within the jurisdiction of the ABA Committee on Research into the Future of the Legal Profession.[69]

The supporters of Report 10J, eventually including the ABA Sections of Taxation, Real Property, Probate and Trust Law, Law Practice Management, and Business Law, recognized that they faced an uphill battle.

Although Martha Barnet, the incoming President of the ABA, and Donald Hilliker, the chair of the ABA Ethics Committee spoke in favor of Report 10J, it failed by a vote of 292 to 152. Shortly thereafter Report 10F passed by a 314 to 106 vote.

In spite of the finality that Report 10F attempted to impose on this issue, the issue of MDPs continues to be debated, albeit in state and local bar associations and sections of the ABA. It also is likely that the regulation, if any, of MDP practices will come from sources other than the ABA—either through state rules, which will vary, or through legislative or judicial rules that will take the bar associations out of the process altogether.

In a related development, the Securities and Exchange Commission (SEC) issued a final rule on Auditor Independence, which prohibited audit firms from providing legal services to clients for whom they prepared audited financial statements. The SEC noted that it believed that "there is a fundamental conflict between the role of an independent auditor and that of an attorney. The auditor's charge is to examine objectively and report, regardless of the impact on the client, while the attorney's fundamental duty is to advance the client's interests."[70] Citing the House resolution on MDP and other authorities, the SEC stated that it was

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69. COLO. BAR ASS'N & DENVER BAR ASS'N, RECOMMENDATION (July 2000), *available at* http://www.abanet.org/cpr/mdprecommendation7-00.html (last visited Nov. 2, 2002) [hereinafter REPORT 10J].

70. *See* Final Rule: Revision of the Commission's Audit to Independence Requirements, SEC Release Nos. 33-7919, 34-43602, 35-27279, IC-24744; IA-1911, FR-56, 65 Fed. Reg. 76,008-01 (Dec. 5, 2000) (amending C.F.R. § 210.2-01) *available at* http://www.sec.gov/rules/final/33-7919.htm.

"inconsistent with the concept of auditor independence for an accountant to provide legal services to an audit client."[71]

The final SEC rule provided that an accountant was not independent of an audit client if the accountant provided any service to an audit client under circumstances in which the person providing the service must be admitted to practice before the courts of a U.S. jurisdiction. The rule defined "legal services" as services requiring a U.S. license. This definition was a significant narrowing of the originally proposed definition, which would have defined legal services as services requiring a license in the jurisdiction in which the services were performed. Consequently, under the SEC rule, accounting firms may provide legal services for clients as long as the services properly may be performed by persons not licensed in any U.S. jurisdiction. A lawyer licensed in a U.S. jurisdiction would not be performing "legal services" under this definition if his license were not required to perform the services.[72] As noted above, the auditor independence rules were also the subject of the Sarbanes-Oxley Act of 2002.[73]

4. 2001 Midyear Meeting

The actions of the House of Delegates in approving Report 10F at the 2000 Annual Meeting indicated a strong bias in the House against unorthodox forms of delivery of legal services. In light of that position, it is ironic that at the 2001 Midyear Meeting of the House, two awards for what might have been considered the unauthorized practice of law were given. The ABA's Louis M. Brown Award for Legal Access is an award given to a program that assists people in the resolution of their legal problems in innovative ways. In 2000, the award went to organizations that provide legal assistance to middle income clients in highly unconventional ways. Legal Grind is a legal resource center within a café-like atmosphere that combines a storefront lawyer referral service, document preparation, self-help law books, and notary services with a coffee bar.[74] Owner Jeff Hughes works with a network of lawyers, hand-picking reputable attorneys from the local legal community to volunteer time at the Legal Grind every afternoon. A "Coffee and Counsel" schedule of attorneys and their areas of expertise is posted daily. In addition, self-help law books and other resources are available to the public at no charge.

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71. *Id.*

72. 17 C.F.R. § 210.2-01(c)(4)(ix) (2002) provides:

> *Non-audit services.* An accountant is not independent if, at any point during the audit and professional engagement period, the accountant provides the following non-audit services to an audit client. . . . Providing any service to an audit client under circumstances in which the person providing the service must be admitted to practice before the courts of a United States jurisdiction.

73. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2000).

74. *See* LEGAL GRIND, *at* http://www.LegalGrind.com (last visited Nov. 1, 2002).

The second award-winning firm, MyCounsel.com,[75] offers the guidance of leading lawyers from the community, a Web collection of legal information for small businesses and consumers, and comprehensive guaranteed legal services. A third winner, the Kansas Legal Services Advice Line, provides callers with access to legal information from lawyers for $3 per minute. While none of the winners clearly violated either MDP or MJP rules, all of the programs varied significantly from traditional legal services providers.

The variety of forms of providing legal information raises interesting questions regarding the operation of many of the traditional rules governing the practice of law, such as conflict clearance, confidentiality, and written disclosures of potential conflicts and fee arrangements. Organizations like MyCounsel.com and Legal Grind represent one way in which some members of the public will receive legal services in the future.[76]

5. 2001 Annual Meeting—Strategic Alliances and Ethics 2000

When the House of Delegates met in Chicago in August 2001 the principal item of business was the consideration of the Ethics 2000 Report. A report prepared by the Standing Committee on Ethics and Professional Responsibility addressing appropriate safeguards in the Model Rules relating to strategic alliances and other contractual relationships with nonlegal professional service providers consistent with the statement of principles was presented but withdrawn. The Ethics Committee, in consultation with other bar associations and interested ABA entities, was asked to undertake a review of the Model Rules and recommend to the House "such amendments to the Model Rules as are necessary to assure that there are safeguards in the Model Rules relating to strategic alliances and other contractual relationships with nonlegal professional service providers consistent with the statement of principles in this Recommendation."[77]

On October 27, 2000, in response to a mandate in Report 10F,[78] the Ethics Committee issued an initial report and request for comments. In that report, it analyzed the impact of "strategic alliances" and "contractual relationships," which it defined as "arrangements by professional services providers and lawyers

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75. *See* MYCOUNSEL.COM, *at* http://www.MyCounsel.com (last visited Nov. 1, 2002).

76. For an articulate discussion of this phenomenon and many of the changes overtaking lawyers and their profession, see RICHARD SUSSKIND, TRANSFORMING THE LAW: ESSAYS ON TECHNOLOGY, JUSTICE AND THE LEGAL MARKETPLACE (2001). On August 20, 2002, the websites of both Legal Grind and MyCounsel.com were still active (unlike many internet services that had arisen in the 1990s).

77. REPORT 10F, *supra* note 28.

78. *Id.* Ironically, one of the events that gave rise to a concern about strategic alliances was the formation of McKee Nelson Ernst & Young, a law firm that added an accounting firm's name to the firm's trade name (which was permitted in the District of Columbia) and had a significant line of credit negotiated by Ernst & Young. Although the law firm intends to maintain its alliance with the accounting firm, it will remove Ernst & Young from its trade name and refinance its line of credit. *See* Otis Bilodeau, *Growing Fast, Firm Gives Up Ernst & Young Name*, LEGAL TIMES (May 21, 2001).

to steer business to each other on a systematic and regular basis." It noted that the relationships may range from simple understandings to refer business to agreements that include sharing space or computers. In its analysis, the Ethics Committee considered the rules applicable to client loyalty and conflicts of interest, conflicts of interest and the exercise of independent professional judgment, and the prohibition on fee-sharing with nonlawyers. After making this analysis, the Ethics Committee concluded that "participation in a strategic alliance or other contractual relationship appears to raise few unique challenges to the preservation of the lawyer's core ethical values, and finds that almost all aspects of participation in those arrangements are addressed by the present Rules."[79]

The Ethics Committee sent this report to 500 state and ABA ethics entities and received only five comments. In its Report to the House, the Ethics Committee stated, "In the Committee's view, strategic alliances do not present concerns within the rubric of 'ownership or control of a law firm' by nonlawyers. The Committee focused its attention instead on conflict-of-interest issues."

Based on the comments that the Ethics Committee received, it submitted a report (Report 113) for consideration at the 2001 Annual Meeting.[80] Report 113 included a change to Model Rule 7.2, dealing with advertising. The change provided that a lawyer would be permitted to refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under the Rules that provided for the other party to refer clients or customers to the lawyer, provided that the reciprocal referral agreement was not exclusive, and the client was informed of the existence and nature of the agreement.

On July 21, 2001, the Appellate Divisions of the New York Supreme Court amended the Disciplinary Rules of the Code of Professional Responsibility to provide rules for "Cooperative Business Arrangements between Lawyers and Nonlegal Professionals."[81] The rules expressly state that multi-disciplinary practice is inappropriate, but recognize that attorneys will engage in strategic alliances with other professions and establish rules and forms for such relationships. The rules took effect on November 1, 2001.

At the 2001 Annual Meeting, the New York State Bar Association (NYSBA) asked the Ethics Committee to withdraw Report 113 from consideration by the House so that it could file its own proposal to deal with cross-referral arrangements between lawyers and other professionals. It was to be based upon disciplinary rules and ethical considerations in the New York Code of Professional Conduct that had just gained approval in the New York courts. The Committee

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79. Robert R. Keatinge, *I Know What You Did Last Summer: House Returns to MDP and Begins Consideration of Ethics 2000*, COLO. LAW., July 2001, at 77 (quoting the Ethics Committee's initial report).

80. *Id.* (quoting the Ethic's Committee's Report 113).

81. *See* Press Release, New York State Bar Association, New Rules Clarify Standards for N.Y. Lawyers' Alliances with Nonlegal Professional Service Firms (July 24, 2001), *available at* http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_Opinions/Multi-disciplinary_Practice_Rules/News_Release/News_Release.htm (last visited Nov. 1, 2002).

accordingly withdrew its Report from consideration. The New York Rules, governing referral and other relationships between lawyers and other professionals were based on proposals made in the MacCrate Report. When adopted, the New York Rules had been described as the first state recognition of MDPs since the 2000 House vote.[82] The Ethics Committee withdrew Report 113 in order to give the NYSBA an opportunity to comment on the proposal or submit its own report.

6. 2002 The House Recognizes Strategic Alliances

The Ethics Committee[83] and the NYSBA[84] each submitted recommendations at the 2002 Midyear Meeting. After discussion, both reports were withdrawn. The Ethics Committee resubmitted its report as Report 114 at the 2002 Annual meeting.[85] After discussions, the NYSBA agreed to support Report 114.

Report 114 proposed that a new subsection (b)(4) be added to Model Rule 7.2 as follows:

> A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
>
> ....
>
> (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if the reciprocal referral agreement is not exclusive, and
>
> ....

82. *See* N. Y. COMP. CODES R. & REGS. tit. 22, § 1200.5-b (2001) (prohibiting nonlawyers from directing or regulating the professional judgment of lawyers in rendering legal services or take any action that would compromise an attorney's ability to protect client confidences); N. Y. COMP. CODES R. & REGS. tit. 22, § 1200.5-c (2001) (limiting contractual relationships between lawyers and nonlawyers); N.Y. CT. R. 1205.4 (2001) (requiring lawyers to provide clients with a "Statement of Client's Rights in Cooperative Business Arrangements" which must be signed by the client); *see also* John Caher, *MDP Remains Hot Topic of Debate*, N.Y. L.J., Nov. 7, 2000; John Caher, *New York Adopts Nation's First Official MDP Rules*, N.Y. L.J., July, 24, 2001, *available at* http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/View&c=LawArticle&cid=1015973986109&live=true&cst=1&pc=0&pa=0 (last visited Oct. 31, 2002).

83. Marvin Carp, *Report to the House of Delegates*, 2001 A.B.A. STANDING COMM. ON ETHICS & PROF. RESP. 105 (Nov. 16, 2001), *available at* http://www.abanet.org/leadership/2002/105.pdf (last visited Nov. 1, 2002) [hereinafter REPORT 105].

84. Steven C. Krane, *Report to the House of Delegates*, 2001 N.Y. ST. B. ASS'N 8B (Nov. 5, 2001), *available at* http://www.abanet.org/leadership/2002/8b.pdf (last visited Nov. 1, 2002) [hereinafter REPORT 8B].

85. Marvin Karp, *Report to the House of Delegates*, 2000 A.B.A. STANDING COMM. ON ETHICS & PROF. RESP. 114 (May 15, 2002), *available at* http://www.abanet.org/cpr/ethics-72_75.doc (last visited Nov. 2, 2002) [hereinafter REPORT 114].

(ii) the client is informed of the existence and nature of the agreement.[86]

Report 114 recognizes that strategic alliances and contracts could be maintained under the existing Model Rules, although such alliances could present concerns with conflicts of interest that require lawyers to exercise caution.[87] The House approved Report 114 by a voice vote after comparatively little discussion. While the approval of Report 114 does not represent a complete reversal on the issue of MDP, like the New York Rules governing strategic alliances, it recognizes the existence of one form of cooperation between lawyers and other professionals. Report 114 does not permit sharing of fees or ownership with nonprofessionals, but it does permit formalized nonexclusive relationships between law firms and other legal professionals. In jurisdictions in which the change to Model Rule 7.2(b) is adopted, careful firms should be able to achieve most of the benefits of MDP while maintaining the core values of confidentiality and lack of conflicts. Thus, Report 114 may represent the first step in an ABA reversal similar to its treatment of ancillary business.

7. State Responses to MDP and the ABA Action

In addition to the New York rules described above, the approval of Report 10F has not arrested the development of rules to address MDPs.[88] The actions of Colorado and California provide examples of two approaches taken since the approval of Report 10F.

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86. *Id.*

87. A new comment to Model Rule 7.2 would be added to explain the change:

> A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. *See* Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Id.

88. For a current compilation of state action on MDPs, see the ABA's Multidisciplinary Practice website. AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, MULTIDISCIPLINARY PRACTICE, http://www.abanet.org/cpr/multicom.html (last visited Nov. 1, 2002).

In May 2000, the Colorado Bar Association and Denver Bar Association issued a set of nine recommendations[89] providing: (1) the Colorado ethical rules should be amended to accommodate MDP provided the ethical rules could be changed without sacrificing the "core values" of the profession; (2) lawyers practicing in an MDP must have the control and authority necessary to assure lawyer independence in the rendering of legal services; (3) lawyers practicing in an MDP must enter into a written agreement in which the nonlawyer members agree to respect the independent professional judgment of the lawyers in the delivery of legal services and the lawyers' ethical obligations; (4) lawyers may enter into an MDP arrangement only with individuals in occupations which are subject to published ethical standards, and who are subject to regulatory oversight and an enforcement mechanism, which may be governmental or through some appropriate trade or professional organization to which the individual belongs; (5) a lawyer practicing in an MDP must ensure that clients of the MDP receive a written disclosure explaining the differences between obtaining legal services from an MDP and from a law firm; (6) clients of an MDP must be protected by rules prohibiting conflicts of interest;[90] (7) MDPs must not provide both legal and audit services to the same client, and must not provide legal services to a client when there is any other fundamental conflict between the lawyer's duty of confidentiality of client information under Rule 1.6 and the legal or ethical duty of any nonlawyer member of the MDP to disclose information concerning the client; (8) lawyers practicing in MDPs have the same responsibilities as all other lawyers to provide *pro bono publico* services; and (9) the Colorado MDP Task Force should be authorized to continue to study MDPs including the development of ethical rules to implement the other recommendations and to study MJP, ancillary business, and the issues arising from the use of the Internet to provide legal services. The Colorado Task Force is expected to release proposed ethical rules in the fall of 2002 and participated in the development of changes in the Colorado rules on MJP.[91]

On June 29, 2001, the State Bar of California Task Force On Multidisciplinary Practice released its Report and Findings on Multidisciplinary Practice (California MDP Report).[92] The California MDP Report concluded that there is much work remaining to be done,[93] but suggested some actions that should

89. JOINT TASK FORCE ON MULTIDISCIPLINARY PRACTICE, COLO. BAR ASS'N & DENVER BAR ASS'N, REPORT TO THE BOARD OF GOVERNORS OF THE COLORADO BAR ASSOCIATION AND THE BOARD OF TRUSTEES OF THE DENVER BAR ASSOCIATION (May 2000), available at http://www.cobar.org/static/mdp/mdpreport.doc.

90. *Id.* The Joint Task Force is continuing to study whether such protection must require, in all cases, that every client of the MDP must be deemed to be a client of the lawyers in the MDP for purposes of evaluating conflicts of interest.

91. Cynthia Covell et al., *Proposed Amendments to C.R.C.P. 228 and the Cross Border Practice of Law*, COLO. LAW., Jan. 2002, at 21.

92. STATE BAR OF CAL. TASK FORCE ON MULTIDISCIPLINARY PRACTICE, STATE BAR OF CALIFORNIA REPORT AND FINDINGS ON MULTIDISCIPLINARY PRACTICE (June 29, 2001), available at http://www.calbar.ca.gov/calbar/pdfs/mdpreport.pdf [hereinafter CALIFORNIA MDP REPORT].

93. The California MDP Report concludes:

be taken in studying the issue.[94] The report focused on fully integrated MDPs and did not address strategic alliances or contractual or cooperative relationships between firms.[95] The report has not been acted on by the State Bar of California, but according to its 2002 Annual Plan,[96] the State Bar of California plans to:

> Continue, through review of the Report and Findings of the State Bar of California Task Force on Multi-Disciplinary Practice and otherwise, to assess the feasibility and ethical implications of permitting lawyers to join with non-lawyer professionals in a practice where both legal and non-legal professional services are offered to the public.[97]

> It is critical in addressing MDP to appreciate that the discussion is just the starting point in the increasingly critical process necessary to evolve, develop and advance the systems by which legal services are delivered to the public with the goal of making legal services and the administration of justice more accessible. MDP alone does not address this issue in any meaningful way. But it is a starting point in reconsidering the systems by which legal services are provided to a public—a public, the majority of which is now unserved or underserved by the legal profession.
>
> Focusing on the narrow issue of MDP, there are existing practice models through which a form of MDP already exists in California and there are potentially viable models for permitting a "pure form" of MDP to exist in California. This is achievable while at the same time assuring that the "core values" of the profession are maintained.
>
> The Task Force also finds that serious consideration should be given to defining, through a Rule of Court or Rule of Professional Conduct, what constitutes the practice of law in a manner that functionally works in a market where the majority of the population cannot currently afford legal services. The State of Washington has boldly sought to address this issue and their model and foresight on this subject warrants consideration.

Id. at § VII.

94. *Id.*

95. The California MDP Report defines an MDP as follows:

> The definition of "MDP" proposed and utilized by the Task Force is limited to a Fully Integrated form of practice in which legal services and non-legal professional services are provided, the lawyer professionals share profits and are co-owners with the non-lawyer professionals, and where passive investment in the entity is not permitted. The concept of integration, in this MDP definition, is one of integration of people while maintaining an identifiable separation of services.

Id. at § IV.A.

96. STATE BAR OF CALIFORNIA, INTERIM STRATEGIC PLAN (Jan. 25, 2002), *available at* http://www.calbar.ca.gov/calbar/pdfs/stratplan01.pdf.

97. *Id.* at 9.

E. Multijurisdictional Practice (2000–2002)

In 2000, in response to *Birbrower*[98] and other concerns about practice across state lines, ABA President Martha Barnett appointed the American Bar Association Commission on Multijurisdictional Practice (MJP Commission) to:

> Research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law; analyze the impact of those rules on the practice of in-house counsel, transactional lawyers, litigators and arbitrators and on lawyers and law firms maintaining offices and practicing in multiple state and federal jurisdictions; make policy recommendations to govern the multijurisdictional practice of law that serve the public interest and take any other actions as may be necessary to carry out its jurisdictional mandate; and review international issues related to multijurisdictional practice in the United States.[99]

1. 2000 Annual Meeting

In 1997, three years before the MJP Commission was formed, the Ethics 2000 Commission had been formed to review all of the Model Rules of Professional Conduct. The Ethics 2000 Commission developed Model Rules 5.5 ("Unauthorized Practice of Law") and 8.5 ("Disciplinary Authority; Choice of Law") even though such rules dealt with interstate practice.

2. Ethics 2000

Under the Ethics 2000 approach to Model Rule 5.5, the prohibition on unauthorized practice of law, would not apply to a Home State lawyer who is or anticipates being admitted *pro hac vice* in the Host State. In addition, a Home State lawyer would not be engaged in the unauthorized practice of law when:

> (i) a lawyer who is an employee of a client acts on the client's behalf or, in connection with the client's matters, on behalf of the client's commonly owned organizational affiliates;
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> (ii) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice; or
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> (iii) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation.[100]

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98. *See* Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998).

99. The proceedings of the MJP Commission may be found at AM. BAR ASS'N COMMISSION ON MULTIJURISDICTIONAL PRACTICE, *at* http://www.abanet.org/cpr/mjp-home.html (last visited Nov. 1, 2002).

100. REPORT 401, *supra* note 30, at Model Rule 5.5(b)(2).

Similarly, the Ethics 2000 Report proposed a change to Model Rule 8.5(a) expanding the disciplinary authority of the Model Rules to apply to lawyers from other Home States practicing in a Host State that has adopted the revised Model Rule.[101] This was done by adding the language, "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer renders or offers to render any legal services in this jurisdiction."[102]

3. November 2001 MJP Commission Interim Report

The MJP Commission considered the regulatory structure and, on November 30, 2001, released a report (Interim Report)[103] setting forth a proposed revision to Model Rule 5.5 under which a person practicing on a temporary basis would not be engaged in unauthorized practice of law, provided that the lawyer's services do not constitute an unreasonable risk to the interests of a lawyer's client, the public, or the courts. [104] Specifically, the Interim Report recommended that Model Rule 5.5 be amended to:

> [I]dentify 'safe harbors' that embody specific applications of the general principle [that temporary practice does not constitute unauthorized practice so long as it does not create an unreasonable risk]; to identify other appropriate 'safe harbors'; and to make clear that, except where authorized by law or rule, a lawyer may not establish an office, maintain a continuous presence, or hold himself or herself out as authorized to practice law in a jurisdiction where the lawyer is not licensed to practice law.[105]

The amendment of Model Rule 5.5 proposed by the Interim Report listed seven "safe harbors" including: (1) services undertaken in association with a lawyer admitted in the Host State; (2) services that would not constitute the practice of law if performed by a nonlawyer; (3) services in or related to a pending or potential proceeding before a tribunal or administrative agency held or to be held in the host or another jurisdiction, if the lawyer is authorized or expects to be authorized to appear in such proceeding; (4) services in or reasonably related to a pending or potential arbitration, mediation, or other alternate dispute resolution proceeding held or to be held in the Home State or another jurisdiction; (5) services performed for a client who resides or has an office in the Home State; (6) services that arise out of or are reasonably related to a matter that has a substantial connection to the Home State; or (7) services that are governed primarily by federal law, international law, the law of a foreign nation, or the law of the home jurisdiction. In addition, the interim report provided two clear exceptions to unauthorized practice: service by an in-house attorney; and services in the Host

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101. *Id.* at Model Rule 8.5.

102. *Id.*

103. AM. BAR ASS'N, INTERIM REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE (Nov. 2001), *available at* http://www.abanet.org/cpr/mjp-final_interim_report.doc [hereinafter INTERIM REPORT].

104. *Id.* at Recommendation 2.

105. *Id.*

State pursuant to other authority granted by federal law or the law or a court rule of the Host State.[106]

4. Coalition Recommendation (2001–2002)

A coalition of the American Association of Corporate Counsel, the National Organization of Bar Counsel, and the Association of Professional Liability Lawyers developed an alternative approach under the name "Common Sense Proposal for Multijurisdictional Practice" (Common Sense Proposal).[107] Rather than set forth a series of safe harbors with respect to temporary practice, the Common Sense Proposal simply provided that a lawyer licensed and in good standing in the Home State will not be guilty of unauthorized practice in the Host State if "the lawyer performs services for a client in this jurisdiction on a temporary basis, does not establish a systematic and continuous presence in this jurisdiction for the practice of law, and does not hold out to the public that the lawyer is licensed to practice law in this jurisdiction."[108]

The Common Sense Proposal made a clear statement as to what would not constitute the unauthorized practice of law. Like the Interim Report, the Common Sense Proposal provided for Host State discipline of all lawyers practicing in the Host State regardless of whether they were licensed there. The Common Sense Proposal was intended to be "a more straightforward rule authorizing MJP, under which lawyers and clients can flourish, and by which the public will be protected from unprofessional behavior. Any such rule should be simple to understand, easy to define, hard to amend, and capable of enforcement from state to state."[109]

5. August 2002 MJP Commission Report

After discussions between the sponsors of the Common Sense Proposal and others, the MJP Commission released its report to the House of Delegates, dated August 2002 (Report 201).[110] Report 201 consisted of nine parts (denominated as Reports 201A through 201J): acknowledgment of the courts' authority to regulate the practice of law;[111] a revision of Model Rule 5.5 dealing with the unauthorized practice of Law;[112] a revision to Model Rule 8.5 dealing with disciplinary authority and choice of law;[113] a revision to the ABA Model

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106. *Id.* at Appendix J.

107. *See* AM. CORPORATE COUNSEL ASS'N, A COMMON SENSE PROPOSAL FOR MULTIJURISDICTIONAL PRACTICE, *available at* http://www.acca.com/commonsenseproposal.html (last visited Nov. 1, 2002) [hereinafter COMMON SENSE PROPOSAL].

108. *Id.* at Model Rule 5.5(b)(2)(ii).

109. *Id.*

110. COMM'N ON MULTIJURISDICTIONAL PRACTICE, REVISED FINAL REPORT (adopted Aug. 12, 2002), *available at* http://www.abanet.org/cpr/mjp-home.html (last visited Nov. 1, 2002) [hereinafter REPORT 201].

111. *Id.* at Report 201A.

112. *Id.* at Report 201B.

113. *Id.* at Report 201C.

Rules of Lawyer Disciplinary Enforcement dealing with reciprocal enforcement;[114] encouragement of the use of the National Lawyer Regulatory Data Bank to promote disciplinary enforcement;[115] adoption of the proposed Model Rule on *Pro Hac Vice* Admission, dated August 2002;[116] adoption of the proposed Model Rule on Admission by Motion, dated August 2002;[117] the encouragement that jurisdictions adopt the ABA Model Rule for the Licensing of Legal Consultants, dated August 1993;[118] and the adoption of the proposed Model Rule for Temporary Practice by Foreign Lawyers, dated August 2002.[119] Each of the Reports was approved by the House by a voice vote.

Report 201B, dealing with amendments to Model Rule 5.5, abandoned the safe harbor terminology of the earlier MJP Commission Reports in defining temporary practice. The exception from unauthorized practice of law for temporary practice was improved from that in the Interim Report in two ways. First, the number of types of temporary practice was reduced from seven to four, but those types were made broader and more workable. For example, the requirement in the Interim Report that temporary practice either be for a Home State client or "arise out of or [be] reasonably related to a *matter* that has a substantial connection to a jurisdiction in which the lawyer is admitted to practice" was changed to require that the matter be reasonably related to a lawyer's *practice* in the Home State. Thus, a lawyer whose practice in the Home State consists of expertise in a particular area of law may practice in that area in a Host State so long as the practice is done on a temporary basis, even if the practice is not related to a Home State matter. Second, the practices within the temporary exception were defined as not constituting the unauthorized practice of law rather than "safe harbors."[120] While the distinction may seem subtle, many, including the supporters of the Common Sense Proposal, believed that eliminating the "safe harbor" construction and reducing the number and increasing the breadth of categories of permissible practice would make the Model Rule clearer and fairer. In addition, by stating a clear set of exceptions, there was a better chance for more uniform treatment of the exceptions among the states. To the extent that states adopt inconsistent "safe harbors" much of the current burden on interstate practice will continue.

Report 201 proposed the following changes to Model Rule 5.5(a) and (b):

> (a) A lawyer shall not~~: (a)~~ practice law in a jurisdiction ~~where doing so violates~~ in violation of the regulation of the legal profession in that jurisdiction~~;~~, or ~~(b)~~ assist ~~a person who is not a member of the bar~~ another in ~~the performance of activity that constitutes the unauthorized practice of law~~ doing so.

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114. *Id.* at Report 201D.
115. *Id.* at Report 201E.
116. *Id.* at Report 201F.
117. *Id.* at Report 201G.
118. *Id.* at Report 201H.
119. *Id.* at Report 201J.
120. *Id.* at Report 201B.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.[121]

In addition, Report 201B added Model Rule 5.5(d) to provide two exceptions to address permanent practice as an in-house attorney or purely federal practice:

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

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121. *Id.*

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.[122]

At the 2002 Annual Meeting, the House of Delegates approved Report 201 with insubstantial modifications.

6. The Lessons of the ABA Experience with Multidimensional Practice

The experience of the House in dealing with multidimensional practice has shown that the ABA may be helpful when it attempts to understand change and face the complex questions that change engenders, but that it may not be effective as a leader on these issues. By considering the elements of multidimensional practice separately rather than as parts of a common question, the considerations have overlapped but have not been entirely coordinated. For example, many of the objections to MDP made in the House dealt not with the fundamental question that MDP presents (who the owners of the firm are), but with the issue that the rules on ancillary business had dealt with in 1994 (what services the firm could provide).

By rethinking the proscriptions on ancillary business and MJP, the ABA may provide a useful place to start for states trying to come to terms with those issues. While Model Rule 5.7 has not been widely adopted, it is looked to for guidance on the question of ancillary business. Similarly, as states grapple with trying to develop a rule for MJP, a consensus view that provides some clear exceptions that accurately reflect the current practice will be helpful. On the other hand, the original ABA approach of total proscription on MDP prevented the ABA from development of rules to deal with complex relationships within and among firms. The adoption of Report 114 dealing with strategic alliances provided one exception to the proscription on relationships between lawyers and other professionals, which initiated some of the consideration of the practical actions necessary to protect "core values." Perhaps that is an appropriate interim step so that as the fear within the House subsides, the rules on strategic alliances may evolve into a thoughtful approach to MDPs. In its experience with MJP, the MJP Commission was confronted with a problem that could not be dismissed with a proscription and denial, which had been the House's initial reaction to both ancillary business and MDP. Because both the MJP Commission and the House recognized the degree to which most lawyers practice on a multistate basis, they were forced to try to get it right the first time. Thus, the MJP Commission provided a useful advance in the thinking on multidimensional practice on its first try.

To the extent that the ABA recognizes that it will not regulate the profession through outright denial of change but may help shape the rules through

122. *Id.*

thoughtful analysis, it may again become an important player in the development of the practice.

IV. WHAT MULTIDIMENSIONAL PRACTICE TELLS US ABOUT THE DEFINITION OF THE PRACTICE OF LAW

The concepts of MDP, MJP, and ancillary business all depend upon the definition of the practice of law and the concept of the unauthorized practice of law. In a time when lawyers and nonlawyers are providing similar services, any regulation of the practice of law will need to come to grips with what constitutes the practice of law in order to determine what sorts of activities should be subject to regulation. As a result of the uncertainty in the definition of the practice of law, many rules focus not on what constitutes the practice of law, but rather on what does not constitute the unauthorized practice of law. In that manner, the rules can maintain a broad definition of the practice (or no definition at all) while exempting some activities from regulation regardless of whether the activities would be included in the definition of the practice of law.

The principal application of the definition of the practice of law occurs in the enforcement of rules and statutes proscribing the unauthorized practice of law. In general, most states have statutes or rules that prohibit the "practice of law" by persons not licensed to practice law.[123] The penalties for unauthorized practice of law include criminal penalties, contempt of court, forfeiture of fees, and, in the case of persons licensed in other states, sanctions for ethical violations.[124]

An example of an area in which states have come to different resolutions is the regulation of real estate closing services performed by nonlawyers. The Colorado Supreme Court has held that while services performed by realtors may constitute the practice of law, licensed realty brokers should not be enjoined from preparing, in the regular course of their business, deeds and other related instruments, at the request of their customers in connection with transactions being handled by them, where such work is done without separate charge therefore.[125] In Washington, the Supreme Court has adopted a rule under which it permits nonlawyers to perform real estate closing services, but subjects them to regulation by the courts.[126] A Virginia statute provides for the licensing of lay settlement providers, and provides rules for the imposition of financial responsibility and rules for handling settlement funds.[127] The New Jersey Supreme Court does not prohibit lay settlements, but requires written notice to consumers of the risks

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123. *See, e.g.*, COLO. REV. STAT. § 12-5-101 (2002) (requiring license to practice law); COLO. R. CIV. P. 228 (Supreme Court has power to define and punish the unauthorized practice of law).

124. MODEL RULES, *supra* note 8, at R. 5.5 (penalties for practicing law in violation of local rules).

125. Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998 (1957).

126. WASH. CT. R. 12, Limited Practice Rule For Closing Officers (2002) (providing a rule under which the Supreme Court regulates closing officers, but which does require closing officers to be attorneys).

127. VA. CODE ANN. § 6.1-2.19 to -2.29 (West 2001).

involved in proceeding with a real estate transaction without an attorney.[128] In contrast, Rhode Island House Bill 7462 would prohibit closings and loan investigations by persons other than attorneys. It imposes criminal sanctions on non-attorneys who conduct closings. It would define the practice of law to include:

> The evaluation of the legal rights and obligations of buyers, sellers, lenders or borrowers in a real estate transaction, including, but not limited to, representation of the buyer in examining the title and removing exceptions to the title, supervising the disbursement of funds which are not regulated by chapter 5-20.5 and responding to questions and ramifications of a transaction by which title to real estate is transferred or used as security for the repayment of a debt or the performance of an obligation, with the exception of home equity lines of credit, or title I loans, in which the lender is acting in a pro se capacity and no evaluation of exceptions to title is required, provided, however, that a holder of a license pursuant to chapter 5-20.5 shall not be precluded from responding to questions and ramifications arising out of an offer to purchase, purchase and sale agreement with any addenda thereto, and real estate disclosures.[129]

In other states there has been an attempt to require consumers to use lawyers in real estate closings. In North Carolina, the State Bar Ethics Committee has issued two rulings seeking to prevent closings without involvement by lawyers.[130]

The Federal Trade Commission (FTC) and the Department of Justice have objected to the Rhode Island legislation,[131] the North Carolina Ethics Committee opinions,[132] and other attempts to preclude nonlawyers from providing settlement services.[133] The FTC letters argue that legal services significantly and

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128. *In re* Opinion No. 26 of Comm. on Unauthorized Practice of Law, 654 A.2d 1344 (N.J. 1995).

129. H.B. 7462, 2001-02 Leg., Jan. Sess., A.D. 2002 (R.I. 2002).

130. N.C. Ethics Comm., Formal Op. 4 (2001) (requiring the physical presence of attorneys at all refinancings of residential real estate deals); N.C. Ethics Comm., Formal Op. 8 (2001) (requiring attorney's presence at the closing conference for real estate purchases).

131. *Unauthorized Practice: FTC, DOJ Support Continued Use of Nonlawyers To Do Real Estate Closings*, 18 Laws. Man. on Prof. Conduct (ABA/BNA) 234 (Apr. 10, 2002).

132. Letter from Federal Trade Commission, to North Carolina State Bar Ethics Committee (Dec. 14, 2001), *available at* http://www.usdoj.gov:80/atr/public/guidelines/9709.wpd (last visited Oct. 31, 2002).

133. *See* Letter from Federal Trade Commission, to Supreme Court of Virginia (Jan. 3, 1997), *available at* http://www.usdoj.gov:80/atr/public/comments/3967.wpd (last visited Oct. 31, 2002) (objecting to Proposed UPL Opinion No. 183); Letter from U.S. Department of Justice, to Kentucky Bar Association Board of Governors (Sept. 10, 1997), *available at* http://www.usdoj.gov:80/atr/public/busreview/3966.wpd (last visited Oct. 31, 2002) (objecting to a proposed rule prohibiting real estate closings by nonlawyers); Brief Amicus Curiae of the United States of America in Support of Movants Kentucky Land Title Ass'n et al., Kentucky Land Title Ass'n v. Kentucky Bar Ass'n (Feb. 29, 2000) (No. 2000-

often unnecessarily increase the cost of the transaction and that while disclosure of the risks of not using a lawyer is appropriate, prohibiting the public from selecting nonlawyers to handle settlements is not. The FTC is not alone in asserting that a lawyer is not essential to many transactions.[134]

While all of the rules dealing with Multidimensional Practice have turned on the practice of law or the provision of legal services, there is no generally accepted definition of what constitutes the practice of law. Even the Restatement (Third) of the Law Governing Lawyers notes:

> The definitions and tests employed by courts to delineate unauthorized practice by non-lawyers have been vague or conclusory, while jurisdictions have differed significantly in describing what constitutes unauthorized practice in particular areas.
>
> Certain activities, such as the representation of another person in litigation, are generally proscribed. Even in that area, many jurisdictions recognize exceptions for such matters as small-claims and landlord-tenant tribunals and certain proceedings in administrative agencies. Moreover, many jurisdictions have authorized law students and others not locally admitted to represent indigent persons or others as part of clinical legal education programs.
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> Controversy has surrounded many out-of-court activities such as advising on estate planning by bank trust officers, advising on estate planning by insurance agents, stock brokers, or benefit-plan and similar consultants, filling out or providing guidance on forms for property transactions by real estate agents, title companies, and closing-service companies, and selling books or individual forms containing instructions on self-help legal services or accompanied by personal, non-lawyer assistance on filling them out in connection with legal procedures such as obtaining a marriage dissolution. The position of bar associations has traditionally been that non-lawyer provision of such services denies the person served the benefit of such legal measures as the attorney-client privilege, the benefits of such extraordinary duties as that of confidentiality of client information and the protection against conflicts of interest, and the protection of such measures as those regulating lawyer trust accounts and requiring lawyers to supervise non-lawyer personnel. Several jurisdictions recognize that many such services can be provided by non-lawyers without significant risk of incompetent service, that actual experience in several states with extensive non-lawyer provision of traditional legal services indicates no significant

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SC-000207-KB), *available at* http://www.usdoj.gov:80/atr/cases/f4400/4491.wpd (last visited Oct. 31, 2002).

134. The Eviction Center of Redlands, California offers eviction services. Its flyer expressly lists the costs of evicting a tenant, and it not only makes clear that, unless requested, a lawyer will not be a part of the proceeding, but sets forth the price of adding a lawyer by stating, "Attorney Fee $145 (optional)." THE EVICTION CENTER, COSTS & FEES, *available at* http://www.eviction-center.com/fees.html (last visited Oct. 27, 2002).

> risk of harm to consumers of such services, that persons in need of legal services may be significantly aided in obtaining assistance at a much lower price than would be entailed by segregating out a portion of a transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services. In addition, traditional common-law and statutory consumer protection measures offer significant protection to consumers of such non-lawyer services.[135]

The "practice of law" may be defined in a variety of ways based on what the service consists of, who is performing the service, or even how the service is described. In addition, the definition of practice of law may differ, depending upon the context in which it is being used. Thus, the practice of law may have different meanings in the context of prohibiting unauthorized practice of law, determining the application of ethics rules and privilege, proscribing sharing legal fees with nonlawyers, providing malpractice insurance coverage, imposing limitations on the activities of professional business organizations, and determining whether a firm is providing ancillary business services. Potential definitions for the practice of law are considered below:

1. *Things only a lawyer may do.* The practice of law may be limited to those activities that may only be undertaken by a lawyer. The classic example of such an activity is the appearance in state or federal court. To the extent the definition is limited to these activities, all of the activities of transactional lawyers would be excluded from the practice of law. In the context of the unauthorized practice of law, this definition may become circular, providing that the practice of law consists of those things that only a lawyer may do and then proscribing activities by nonlawyers because they constitute the practice of law. This definition is probably too restrictive in that it excludes all activities of a significant part of the bar: all transactional and counseling lawyers and even litigators when conducting activities ancillary to the litigation such as research and factual investigation.

2. *Things done by a lawyer, even though the same services may be performed by nonlawyers.* This definition would impose a different standard on lawyers than on nonlawyers, where each is performing the same services. An example of this approach is the "tax practice," compliance and planning under state and federal tax laws. In this area it has been accepted that accountants and others may advise and assist in planning under tax rules without violating the unauthorized practice of law rules. Even so, the same services, when performed by a lawyer, would constitute the practice of law and be subject to the rules regulating the practice of law. Although less settled, a similar argument has been made in the context of acting as a third-party neutral in arbitration or mediation. In some circumstances it may be appropriate to impose different standards and duties on different people performing the same services, particularly where the recipients of

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135. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 4 cmt. c (2002) (delineation of the unauthorized practice of law).

the services anticipate a difference. For example, a client having an attorney prepare tax returns may expect a higher level of confidentiality from a lawyer than from a commercial tax return preparer. In other circumstances, particularly where the service recipient is unaware of the fact that the provider of services is licensed, it may be more appropriate to impose the same standards on all people performing the same services.

3. *Providing advice with respect to legal matters.* The practice of law might be also defined as providing any interpretation of any law or regulation. Obviously this definition would be excessively overbroad. It would encompass not only professionals such as engineers who seek to comply with building codes, but also the provision of gratuitous opinions on the inequities of the tax system. Attempting to limit this to providing such advice only for pay would not significantly solve the problem and would run contrary to the historic rule that an attorney is subject to the ethical rules regardless of whether compensation is expected or received. Occasionally this concept is applied to people who provide advice with respect to legal matters "in a representational capacity."[136]

4. *"I know it when I see it."* Rather than any of the broad rules set forth above, even the states that have attempted a thorough definition of the practice of law have been constrained to develop a menu of matters comprising, or excluded from, the practice of law. In a world in which professional services are changing, this may be the only truly workable approach. Under this approach, separate rules may apply to such activities as providing representation to the indigent, acting as in-house counsel, practicing as an out-of-state attorney, acting as a third-party neutral, acting pursuant to another professional license, and performing legislative lobbying.

5. *Circumstances in which the "client" has a perceived attorney-client relationship.* To the extent the object of lawyer regulation is to assure that those who are receiving legal services receive services that meet a certain standard, the best measure might be that a client is receiving legal services when the client thinks he or she is receiving legal services. In other words, if a person believes that he has an attorney-client relationship with the person providing services, the person does. Thus, if a person is consulted because the person knows or claims to have the knowledge of a lawyer, that person is engaged in the practice of law. In this circumstance, there may be greater justification for treating this as the practice of law than there would be in the case of simply giving legal advice, because the recipient of the advice has an anticipation of receiving the benefits of the attorney-client relationship.

This approach has been recognized in at least two of the Model Rules. Model Rule 2.4 provides that the duty of a lawyer acting as a third-party neutral is to ensure that the parties understand that the lawyer does not have an attorney-client relationship with either of them.[137] Model Rule 5.7 provides this

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136. *See* Denver Bar Ass'n v. Pub. Utils. Comm'n, 391 P.2d 467, 471 (1964).

137. MODEL RULES, *supra* note 8, at R. 2.4(b) ("A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's

approach most clearly, stating that the provision of ancillary services will be subject to the ethical rules "if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist."[138] Because most of the Model Rules relate to duties owed by the lawyer to the client, basing the definition on the client's perception seems appropriate. There are two other sets of consideration under the Model Rules: duties of a lawyer to persons other than clients; and the duty to maintain the integrity of the profession. With respect to duties owed to third parties and to the tribunal, the rules relate to the balancing of the duty of the lawyer to a client with those of candor and fair dealing with the tribunal and other parties. To the extent that no relationship with a client exists, the balancing does not exist, and the lawyer should only be subject to the rules dealing with the integrity of the profession under the Model Rules.[139] Thus, in acting on behalf of a customer in providing nonlegal services, the proscriptions on dishonesty contained in Model Rule 8.4 would apply as opposed to the more carefully balanced rule in Model Rule 4.1 that would apply if the customer were a legal client expecting a lawyer's duty of confidentiality.

To the extent that a definition of the practice of law is necessary, a definition based on the understanding of the client is one that will most realistically serve the needs of the client and the profession. Of course, the lawyer should bear the burden of taking steps to assure that the client understands the nature of the services being provided. As noted below, the Model Rules provide that most of the "core values" of the profession are subject to intelligent waiver, so it may make sense to expand this concept to deal with issues of Multidimensional Practice.

Defining the practice of law based on the client's understanding of the relationship would be limited to the application of the ethical rules. Courts and government agencies will, of course, continue to determine the qualifications of those appearing before them or representing people dealing with them. Presumably, the definition for ethical purposes would include the concept that persons providing services that by other laws are required to be provided by lawyers, such as appearing in court, would be subject to ethical rules.

A. State Approaches to Defining the Practice of Law

As part of the debates over MDP, the ABA House of Delegates (House) urged all jurisdictions to "reevaluate and refine to the extent necessary the definition of the 'practice of law.'"[140] Jurisdictions responded to this call in various ways. State legislatures, bar associations, and courts in several states have defined "the practice of law" differently. At least two states, Texas and Washington, have

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role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.").

138. *Id.* at R. 5.7(a)(2).

139. *Id.* at R. 8.1–8.5.

140. REPORT 10F, *supra* note 28.

undertaken thorough studies devoted to arriving at a definition. As noted below, other states have defined the practice of law in passing when describing what does and does not constitute the unauthorized practice of law.

The Colorado Supreme Court found that "one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting him in connection with these rights and duties is engaged in the practice of law."[141] Under a proposal of a task force of the Texas State Bar, "the practice of law" means providing legal advice or legal representation with the expectation that compensation will be paid directly or indirectly on behalf of a client for such advice or representation or that such compensation, although ordinarily expected by the provider, will be waived for charitable or civic reasons.[142] The Washington Supreme Court has adopted a rule under which the practice of law is broadly defined. [143] The rule sets forth eleven activities that, regardless of whether they constitute the practice of law, will not constitute the unauthorized practice of law if conducted by a nonlawyer including practicing under a limited license,[144] serving as a courthouse facilitator, serving as a lay representative before an administrative agency, serving as a neutral arbitrator or mediator, serving as a labor negotiator, gratuitously providing assistance in completion of forms related to harassment or domestic violence, acting as a lobbyist, selling forms, participating in activities preempted by federal law, acting as a neutral clerk or court employee providing information, and any other activities that the Supreme Court determines in published rulings.[145] California does not have a statutory definition of the practice of law,[146] but in the recently released California MDP Report discussed below, the Task Force states that it would be beneficial to develop, through a rule of court or rules

141. *Denver Bar Ass'n*, 391 P.2d at 471.

142. STATE BAR OF TEX. TASK FORCE, RECOMMENDATION OF A NEW STATUTORY DEFINITION FOR THE UNAUTHORIZED PRACTICE OF LAW (Apr. 2001) *available at* http://www.texasbar.com/newsinfo/newsevents/upltf.pdf (last visited Nov. 1, 2002) (proposing an amendment to Tex Gov't Code § 81.101 C defining the practice of law as "the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined" and amending Tex. Penal Code § 38.122(a) to make impersonating a lawyer a crime).

143. WASH. CT. R. 24(a), General Rules (2002) (defining the practice of law as "the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law" and setting forth examples of matters included in the practice of law); *id.* at R. 24(b) (giving exceptions to the definition practice of law).

144. *Id.* at Gen. R. 24(b)(1). Under the Washington Admission to Practice Rules there are rules for special admission for a particular purpose or action, indigent representation, educational purposes, emeritus membership, and house counsel, legal interns, closing officers, and foreign law consultants.

145. *Id.* at Gen. R. 24(b).

146. CAL. BUS. & PROF. CODE § 6180.14.

of professional conduct, a concise definition of what constitutes the practice of law as is currently being considered by the State of Washington.[147] The Ohio Bar Association has also adopted a report dealing with the unauthorized practice of law.[148]

V. MODIFYING THE ATTORNEY-CLIENT RELATIONSHIP THROUGH AGREEMENT AND DISCLOSURE.

As between the attorney and the client, the rules of ethics are in many respects a codification of the rules governing the agent's duties to the principal.[149] While the Model Rules have always had provisions permitting the client to waive certain duties under some circumstances, the revision of Model Rule 1.0(e) as adopted by the ABA in 2002 provides a new definition of "informed consent."[150] Model Rule 1.0(e) defines "informed consent" as "the 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."[151]

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147. CALIFORNIA MDP REPORT, *supra* note 92, at Finding 11.

148. The Ohio recommendation contained the principles adopted by the Council of Delegates pertaining to the activities of lawyers in representing clients in a multijurisdictional capacity, as such activities pertain to the unauthorized practice of law. *See* REPORT 8A, *supra* note 60.

149. *Compare, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 394 (1958) ("Unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed.") *with* MODEL RULES, *supra* note 8, at R. 1.7 (Conflict of Interest: Current Clients); RESTATEMENT (SECOND) OF AGENCY § 395 (1958) ("Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge.") *with* MODEL RULES, *supra* note 8, at R. 1.6 (Confidentiality of Information); RESTATEMENT (SECOND) OF AGENCY § 396(b) (1958) ("Unless otherwise agreed, after the termination of the agency, the agent has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty.") *and* RESTATEMENT (SECOND) OF AGENCY § 396(d) (1958) ("Unless otherwise agreed, after the termination of the agency, the agent . . . has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relation.") *with* MODEL RULES, *supra* note 8, at R. 1.9 (Duties to Former Clients).

150. MODEL RULES, *supra* note 8, at R. 1.0(e).

151. *Compare* MODEL RULES, *supra* note 8, at R. 1.0(e) (definition of "informed consent") *with* RESTATEMENT (SECOND) OF AGENCY § 376 (1957) ("The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is

This is the standard that must be met in order to modify the attorney's duties to the client where the Model Rules permit such modification. Among the duties that the Model Rules permit to be modified are the duties related to the scope of representation,[152] the disclosure of confidential information,[153] conflicts of interest,[154] transactions between lawyers and clients,[155] the use of information relating to the representation of the client to the disadvantage of the client,[156] the receipt of payment for representing a client from anyone other than the client,[157] the obtaining of consent to settlement where the lawyer represents more than one client,[158] the representation of a new client in the same or a substantially related matter in which the new client's interests are materially adverse to the interests of the former client,[159] the representation of a new client before a former governmental employer,[160] the representation of any party that had appeared before the lawyer as a judge or arbitrator,[161] the representation of a new client adverse to a prospective client,[162] and the provision of a third-party evaluation which will affect the client's interests materially and adversely.[163] While some of the Model Rules require that the informed consent be "confirmed in writing"[164] or signed by the client,[165] the Model Rules now provide a definition of "informed consent," which requires disclosure and explanation by the lawyer and intelligent assent by the client. The comment to Model Rule 1.0 confirms that the degree of explanation necessary for informed consent will vary depending upon the experience of the client and whether the client is represented by other counsel.[166]

One of the benefits of the MDP debates before the House was the focus on what constitutes the "core values" of the profession. The Resolution ultimately adopted by the House defined the core values as: the lawyer's duty of undivided loyalty to the client; the lawyer's duty to competently exercise independent legal judgment for the benefit of the client; the lawyer's duty to hold client confidences inviolate; the lawyer's duty to avoid conflicts of interest with the client; 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

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made, except to the extent that fraud, duress, illegality, or the incapacity of one or both of the parties to the agreement modifies it or deprives it of legal effect.").

152. MODEL RULES, *supra* note 8, at R. 1.2(c).
153. *Id.* at R. 1.6(a).
154. *Id.* at R. 1.7(b)(4).
155. *Id.* at R. 1.8(a)(3).
156. *Id.* at R. 1.8(b).
157. *Id.* at R. 1.8(f).
158. *Id.* at R. 1.8(g).
159. *Id.* at R. 1.9(a).
160. *Id.* at R. 1.11(a)(2).
161. *Id.* at R. 1.12(a).
162. *Id.* at R. 1.18(a).
163. *Id.* at R. 2.3(b).
164. *See, e.g.*, *id.* at R. 1.7(a) and R. 1.9(a).
165. *See, e.g.*, *id.* at R. 1.8(a) and R. 1.8(g).
166. *Id.* at R. 1.0 cmt. 6.

special responsibility for the quality of justice; and the lawyer's duty to promote access to justice.[167]

It is interesting that under the Model Rules those "core values" about which the critics of MDP spoke most vehemently, the duties to the client of loyalty,[168] confidentiality[169] and freedom from conflict,[170] may, with some limitations, be waived. A client may also limit the scope of representation with informed consent, provided the limitation is reasonable under the circumstances.[171] It is not clear where in the Model Rules the duty to maintain the legal profession as a single profession exists.[172] To the extent this is a duty to protect the client, it is subsumed in the lawyer's duty of loyalty. To the extent it is a duty to protect the profession from competition as a trade, presumably it is reflected in Model Rules 5.4 and 5.5, which, as noted below, do not provide for waivers. The duty to provide *pro bono* services continues to be aspirational.[173] Thus, all of the Model Rules comprising core values relating to the attorney's relationship with the client are waivable to some extent.

The Model Rules also provide a disclosure-based approach to relationships that do not constitute attorney-client relationships. Under the Model Rules, a lawyer has a duty to ensure that where no attorney-client relationship exists, the persons with whom the lawyer is dealing understand that fact. This situation arises where the lawyer is acting as an arbitrator or mediator,[174] or, as noted above, where the lawyer is providing ancillary services.[175] In an environment in which fewer and fewer professional services are provided only by lawyers and where lawyers are providing a broader array of professional services, much of the definition of the practice of law may turn on whether the "client" believes that it has an attorney-client relationship with the professional.

The justification for the limitations imposed on multidimensional practice in general, and MDP in particular, are loftily propounded as being based on the need to protect the core values of the profession, particularly as they relate to the client. Nonetheless, both the Model Rules and actual practice have indicated that

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167. REPORT 10F, *supra* note 28; *see supra* note 67.

168. MODEL RULES, *supra* note 8, at R. 1.8.

169. *Id.* at R. 1.6.

170. *Id.* at R. 1.7 and R. 1.8.

171. *Id.* at R. 1.2(c).

172. One might note that the righteous indignation with which the MJP addresses the possibility of federal rather than state regulation of the profession suggests that we are really trying to maintain the practice of law as fifty-one separate professions.

173. MODEL RULES, *supra* note 8, at R. 6.1.

174. *Id.* at R. 2.4(b) ("A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.").

175. *Id.* at R. 5.7(a)(2) (requiring the lawyer providing law-related services to "take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.").

each of the core values relating to the client relationship are subject to modification by agreement. On the other hand, rules such as Model Rule 5.4, which proscribes behavior that has no direct adverse impact on the client but merely removes the lawyer from participating in a structure which might cause the lawyer to breach other duties, is not subject to waiver by informed consent. This seems irrational. For example, if a client can intelligently waive such core values as confidentiality and conflicts of interest in the traditional attorney-client relationship, should that client not be entitled to intelligently waive the *risk* of conflicts or the protection of confidentiality that may exist in an MDP? The Model Rules governing multidimensional practice appear to be moving in this direction, with the rules governing strategic alliances and ancillary business both imposing a disclosure obligation on the attorney. To the extent that the Model Rules move toward allowing the lawyer to practice in a multidimensional manner provided the client is informed of the limitations or risks such form of practice may entail, they are moving toward what has often been the practice with sophisticated clients, where the client knows the limitation, for example that a particular lawyer is not licensed in the state in which he needs to perform the services or that a nonlawyer is performing a particular type of service.

VI. THE PROBLEM OF INVINCIBLE IGNORANCE

To the extent that the practice of law becomes increasingly defined by contractual relationships between lawyers and clients, a critical issue that will need to be resolved is how the profession deals with the issue of "invincible ignorance." Historically, many of the Model Rules have dealt with potentially troublesome situations by proscribing certain types of behavior. This was the case with ancillary business in its earliest iteration and the traditional rule on multijurisdictional practice. Now, state bars are reconsidering the types of services that a firm may provide and the types of owners that a firm may have. Nonetheless, these traditional rules and many like them were predicated on the assumption that no client, regardless of experience or sophistication would be capable of evaluating and accepting the risks attendant to certain types of behavior and relationships.

The concept of "invincible ignorance" is a theological concept under which a person is not morally culpable if the ignorance cannot be dispelled by "moral diligence."[176] Under the moral concept of "invincible ignorance," the

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176. According to one authority:

> So far as fixing human responsibility, the most important division of ignorance is that designated by the terms *invincible* and *vincible*. Ignorance is said to be invincible when a person is unable to rid himself of it notwithstanding the employment of moral diligence, that is, such as under the circumstances is, morally speaking, possible and obligatory. This manifestly includes the states of inadvertence, forgetfulness, etc. Such ignorance is obviously involuntary and therefore not imputable. On the other hand, ignorance is termed vincible if it can be dispelled by the use of "moral diligence."

ignorant person is not culpable "even if that ignorance be crass or supine," although the same rule does not apply to ignorance which is "deliberately fostered."[177] A party's invincible ignorance reduces the party's responsibilities and culpability.[178] In this context, it is intended to refer to those clients who, as a result of the lack of sophistication or experience, are incapable of intelligently consenting to waivers of certain duties owed by the lawyer. The Comment to Model Rule 1.0(e) makes clear that the level of explanation required to obtain "informed consent" will vary depending on the sophistication and experience of the client.[179]

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7 THE CATHOLIC ENCYCLOPEDIA 648–49 (Robert Appleton Co. 1910); *see also* PAUL CHRISTOPHER, THE ETHICS OF WAR AND PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES 62–63 (1994) (describing "a situation known as 'invincible ignorance' in which a party to a dispute is not capable of discerning the objective morality of his position and assumes his position to be just").

177. G.H. Joyce, *Invincible Ignorance*, *in* 7 ENCYCLOPEDIA OF RELIGION & ETHICS 404 (James Hastings ed., 1915).

178. Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward A General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 981 (1983) ("Little can be done to remedy 'invincible ignorance,' a situation in which no one has access to the information necessary to recognize a cost-effective adjustment. But when one party does have access to information necessary for the other's cost-effective adjustment, the communication of that information should be ensured."); Lindemann Maschinenfabrik GmbH v. Am. Hoist & Derrick Co., 895 F.2d 1403, 1405 (Fed. Cir. 1990) (citing "invincible ignorance" as a basis for declining to impose sanctions).

179. Comment 6 to Model Rule 1.0 provides:

> Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. *See, e.g.*, Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the

In practice, many attorneys are comfortable in accepting waivers and consents to modifications of rules governing conflicts, disclosure, and confidentiality from sophisticated clients with in-house counsel. By being able to provide this sort of relationship, the client often receives more efficient and cost-effective service. For other clients, the "invincibly ignorant," it may be difficult or impossible for an attorney to be satisfied that the client can intelligently forego the protections of the default provision of the rules. This results in the client being constrained to accept (and, presumably pay for) more legal services than might be efficient. While providing the maximum in legal services to those least able to cope may seem a salutary solution, the net result may be that many people who might benefit from limited legal advice are priced out of the market and must do without or use some alternative source of information.

Nor is it a fully satisfactory result to hold all clients to the same standards. Should a sophisticated client who understood the limitations on the types of services provided be entitled to complain later that the services provided were not within the rules and either hold the lawyer liable or refuse to pay fees? Such a result does not seem socially beneficial.

VII. CONCLUSION

The traditional position of the lawyer as the essential element in any legal transaction is being diminished. The Enron scandal has caused many to say that the attempt to respond to these changes is wrong, and that lawyers should strongly resist any attempt to rationalize the practice lest they fall victim to the fate of the accountant for Enron. On the other hand, lawyers are finding many of the services they thought they alone could provide are being provided by others. Thus, they find themselves in many transactions having to prove their value against many alternative providers. To the extent that the organized bar attempts to use rules to restrict competition (an effort that seems doomed to failure) lawyers will have to decide the most appropriate direction in which to progress: to either distinguish themselves as providing unique benefits or to seek to compete on the same basis as the competition. In all likelihood, attorneys will go in both directions. This is not to say that the ethical underpinnings of the profession are not important. The ethical structure of the profession should be an important justification for clients to hire a lawyer to perform services that could be performed by a nonlawyer, even if those services may be more expensive. To the extent that the rules governing multidimensional practice become more rational as the rules governing MJP and ancillary business have become, they strengthen the profession. To the extent that they represent an attempt to outlaw change, as the current MDP rules do, either the rules or the profession will become irrelevant in some areas.

> consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

MODEL RULES, *supra* note 8, at R. 1.0 cmt. 6.

As described above, the inconsistency between what lawyers and other professionals are doing and the way in which the Rules operate has been growing. As such, the profession is in a position to rethink the purpose and operation of the Rules. If the Rules are intended to prevent lawyers from being exposed to competition, at best they will be ineffective like the current rules on MJP. At worst, they will be ineffective in curbing competition but will be perceived by the public and regulators as an attempt by a trade group to discourage choice. On the other hand, if the Model Rules develop as a set of standards that can be held up as a reason to engage lawyers to perform certain services, they will provide a strong selling point for the profession in competing with nonlawyers in providing services that are not considered to be "legal services." An analogy may be seen in the area of tax preparation. Federal tax forms may be completed by a variety of people, but many who are particularly concerned about the quality of the returns go to firms of certified public accountants. The "CPA" designation is not critical for tax return preparation, but is seen as an indication that the accountant holding the designation has met certain requirements and agreed to be subject to certain rules that have not been met or do not apply to others preparing tax returns. In some areas of transactional practice, and, to a lesser extent, dispute resolution, attorneys are already in a similar position.

As lawyers provide additional services in direct competition with other professionals and non-professionals, there will be an increasing tension to determine what constitutes the practice of law and what activities may be conducted by unlicensed individuals. To the extent that some activities are not the exclusive province of lawyers, there will be a question of whether lawyers engaging in those activities are practicing law or providing law-related services. From the proliferation of services being offered by law firms of all sizes, it seems unlikely that the ABA will provide the last word on these issues. Nonetheless, to the extent the ABA is willing to approach the questions that need to be addressed thoughtfully, it may be able to provide insight that should be considered by the states and the lawyers who are trying to operate under the ever-changing rules applicable to professional services.

While it is unclear how many of these rules will ultimately be resolved, it appears that in many cases there is little trouble when the client fully understands and accepts the limitations on the lawyer's practice. Thus, issues of MDP, MJP, and ancillary business are rarely raised when the client is a large corporation with in-house counsel, except by adverse counsel. On the other hand, unsophisticated clients may have trouble distinguishing the duties owed by a lawyer from those owed in connection with other business. As such, we may find that the ultimate test may be that of informed consent.

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