Comparative Multi-Disciplinary Practice of Law: Paths Taken and Not Taken

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INTRODUCTION

It is always an interesting journey to return to one's roots, and many of the most important of my personal and professional roots are here in Cleveland, including my birth and the first twenty years of life. Subsequent wanderings have taken me far from here, but always to return. We consider here another set of journeys and pathways that are institutional, not personal. The paths traversed are both national and international, and they will take us on journeys that are far from completed. They concern the ways in which various contemporary legal cultures have so far approached the subject of this conference—multi-disciplinary practice (“MDP”).

My examples include the well-known efforts to date of the American Bar Association (“ABA”) in its fervent and flawed, but perhaps temporary, rejection of the MDP concept almost entirely. I will contrast that with the much less well-known example of the route mapped out by the Canadian Bar Association (“CBA”), which one only rarely hears mentioned in domestic discussions, and which has taken a much more welcoming approach to the MDP concept. I then will briefly examine work underway in New York and California. Both states have also recently taken steps along very different paths with respect to MDP practice—quite restrictively in the case of New York and in a much more welcoming way thus far in the case of California.

Although I do not elaborate upon it here at any length, I think it would be well at the outset to identify my own “lean” on the MDP issue. Those who have attended similar conferences on MDPs in re-

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cent years have been struck, as have I, at the great divide between academics—almost all of whom are more or less in favor of more or less significant expansion of opportunities for MDP practice—and some (but hardly all) practitioners, whose manifested reactions range from wariness to vehement opposition. I, another academic, stand with those who are largely unimpressed with the concerns and criticisms of those opposed to the MDP in any but its most timid forms and who, as with the majority of the ABA House of Delegates, would confine them, if permitted at all, to only joint marketing efforts, thus effectively banning them almost entirely. To the contrary, I think that, accompanied by appropriate regulatory arrangements, MDP practice could and should be permitted in the United States without significant risk of harm to either consumers or lawyers. Further, MDP should be permitted because it holds the promise of greatly improved delivery of legal services.

I. THE VARIETIES OF MDP

The MDP concept is most frequently discussed in connection with large corporate clients, who appear to be the major impetus for change on the public stage. More importantly in my view, MDP practice promises to improve significantly the availability and quality of legal services delivered to individuals of modest means. Allowing MDP practice to evolve freely might even lead to the creation of new models for the delivery of legal and other services to those who are currently unserved or under-served by lawyers.

Some lawyer traditionalists (and a very few academics of that bent of mind) are appalled at the prospect of lawyers practicing law in MDP arrangements—perhaps large corporate firms in which there were tens of thousands of public shareholders, where non-lawyer managers would be free to direct and supervise the work that the lawyers performed, and in which the fees that the lawyers earned went into a common corporate accounts-payable department to be shared

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with both lawyers and non-lawyers as management might determine, as well as with the corporation’s shareholder-investors. That, in one of its most highly-integrated forms, is one possible model—to be sure, the most extreme possible model—for MDP law practice. But such a large-corporate monolith is hardly the only form of MDP that we should view as a model. Too often, I think, discussions about multi-disciplinary practice devolve into a discussion of the ambitions of the Big Five, the (for the moment at least) five large accounting companies, to provide a much wider array of consulting services to their large corporate clients. While that aspect of the discussion is doubtless of great importance, it hardly describes all of the possible reach of the MDP concept.

As illustration of a very different kind of MDP practice, consider a much smaller debate that raged on the Internet a couple of years ago, and about which a reporter for a lawyers’ newspaper called me. (The newspaper, not coincidentally, is the Lawyers Weekly—which markets itself for small-firm lawyers.) A lawyer who participated in a lawyers’ chat group on the Internet apparently asked for the group’s reaction to her decision to set aside her will-drafting and estate-administration practice for a year or two to go back to school and gain a degree necessary to be certified as both a life insurance agent and a financial planner. She planned to meld these new specialties with her existing wills and probate practice, planning that the combined skills would attract more clients and bring her more income because of the opportunity to sell additional services to each client. The reactions of the lawyers in the chat group ranged from professional outrage to guarded approval.

The Lawyers Weekly reporter suggested that other interviewee lawyers had already informed her that the lawyer had come upon a startling innovation. My own reaction was that the lawyer was about to launch herself as a pioneer into the seventeenth century, not the twenty-first. From the time of the earliest American lawyers, there has been an enduring tradition of what we ethicists used to call “dual practice”—a type of practice in which a lawyer provides legal services as well as something else, such as insurance sales, real-estate sales, title-insurance sales, accounting, banking, lobbying, etc. At one

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3 I obviously sketch quickly. As mentioned, all forms of MDPs require careful thought about the appropriate regulations that should accompany them. And surely Ross Perot was right in insisting that the devil is in the details.

4 Telephone Interview with Krista Evestas, Reporter, Lawyers Weekly USA (Nov. 15, 1999).


6 CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 16.4, at 897 (1986).
moment, for example, the same person would provide legal advice to a client, and at another moment would attempt to sell the same person (or someone else) a life-insurance policy. "Dual practice," which lawyers have conducted and today continue to conduct all across the country, now goes by the longer and fancier title of "ancillary business practice," but the issues for a solo or small-firm practitioner remain the same. I should also add that, under the applicable lawyer code rules and with proper precautions, it is perfectly permissible for our chat-group lawyer to package herself as practicing dual or triple or whatever-other-number-is-accurate professional competences. The precautions, which are certainly important, have to do with confidentiality, conflicts of interest, and, primarily, with full disclosure and appropriate consent on the part of affected clients.8

Now what "dual practice" or "ancillary business practice" has to do with MDPs is simply this: Suppose that, astutely enough, our Lawyers Weekly will-writing lawyer wanted to forego the considerable expenditure of years of precious lost time, deferred income, and real dollars laid out to obtain two additional nonlaw specializations. If so, she might consider the possibly more efficient alternative of packaging herself—right now, and without a lost year of income—in a single business with two other people who already were certified and skilled practitioners in insurance and financial planning. Unless she were fortunate enough to find these competences embodied in another lawyer, almost certainly the entrepreneurial lawyer would have to consider a professional arrangement of some sort with one or two other professionals who were not lawyers. Such an arrangement would be permissible under the existing lawyer code rules, although with appropriate precautions and, quite importantly, only in certain quite restrictive ways, and then not in all jurisdictions.9

7 The "ancillary business" term might have been spawned by one of the first contemporary complaints about it. See ABA COMM'N ON PROFESSIONALISM, "... IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 30-31 (1986) (expressing concern about firms providing services "ancillary to the practice of law" as constituting "actual or potential conflicts of interest"). On the range of issues involved in ancillary business activities of lawyers, see generally Partnership with Non-Lawyers, Laws. Man. on Prof. Conduct (ABA/BNA) No. 142, at 401 (May 18, 1994).

8 See generally WOLFRAM, supra note 7, § 16.4, at 897-98. Compare NYSBA Comm. on Prof'l. Ethics, Op. 687 (Apr. 21, 1997) (stating that a lawyer licensed as insurance broker could sell insurance to clients so long as the lawyer's judgment is not compromised and the client understands and consents to risks of potential lawyer self-interest conflict), with In re Opinion 682 of the Advisory Committee on Professional Ethics, 687 A.2d 1000 (NJ. 1997) (stating that a lawyer may not operate title insurance company to provide coverage to clients because of inherent and non-consentable personal-interest conflict of interest).

9 E.g., R.I. S. Ct. Ethics Advisory Panel, Op. 96-26 (Nov. 14, 1996) (explaining that because of conflict of interest and self-dealing considerations, estate-planning lawyer could not sell life insurance products to new or existing estate-planning clients). See generally Joanne
The main considerations in structuring the business relationship with the non-lawyers would be to observe restrictions found in the lawyers codes in most of the states. Let’s take the *Ohio Disciplinary Code of Professional Responsibility* for lawyers, which is quite representative of what is found in almost every other state. One applicable rule states that a lawyer shall not share legal fees with a non-lawyer. That means lawyers’ fees have to be billed separately from the billings of the non-lawyer specialists, or at least segregated on a common bill if that is used, and the fees received for the lawyer’s work may not be shared with the non-lawyer. By itself, that limitation doesn’t preclude a joint arrangement of some sort, but it does require that the non-lawsyers have no interest in profits. That, of course, does not preclude a salaried position, so long as it is not based at all on a commission or a similar percentage of the income of the enterprise. But there are other relevant restrictions on possible types of arrangements. A set of other rules provides, in effect, that a lawyer cannot be an employee of or form or join a partnership or other legal entity in which a non-lawyer either is a partner or owns any interest in the entity, in which a non-lawyer is a corporate director or officer, or in which a non-lawyer has the right to direct or control a lawyer’s professional judgment in rendering legal services.


10 *Ohio Code of Prof'l Responsibility* [hereinafter *Ohio Code*] DR 3-102(A)(2000) (“A lawyer or a law firm shall not share legal fees with a non-lawyer” except for intra-firm situations that are not relevant to this example). See also, e.g., *Model Rules of Prof'l Conduct* [hereinafter *Model Rules*] R. 5.4(a)(2000).

11 *Ohio Code* DR 3-103(A) (2000). See also, e.g., *Model Rules* R. 5.4(b) (2000). See also *Model Rules* R. 5.4(d) (2000), which provides as follows:

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

\[\begin{align*}
\text{(1) a non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;} \\
\text{(2) a non-lawyer is a corporate director or officer thereof; or} \\
\text{(3) a non-lawyer has the right to direct or control the professional judgment of a lawyer.}\end{align*}\]

See also *Ohio Code* DR 5-107(C) (2000), which is identical to the above provision.

12 *Model Rules* R. 5.4(d); *Ohio Code* DR 5-107(C). See, e.g., Me. Bd. of Bar Overseers Prof'l. Ethics Comm’n, Op. 158 (Apr. 3, 1997) (stating that a lawyer could not permissibly form a partnership with a non-lawyer to provide government relations and lobbying services to clients of a lawyer; a lawyer must first take inactive status from law practice and not hold self out as lawyer).

13 See also *Model Rules* 5.4(c) (2000) (“A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.”); *Ohio Code* DR 5-107(B) (2000). It should also be noted that the lawyer codes in some states, such as Ohio, contain special advertising restrictions bearing on multi-disciplinary practice. See, e.g., *Ohio Code* DR 2-102(E) (2000) (“A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on the lawyer’s letterhead, office sign, or professional card,
Cumulatively, the foregoing set of rules is intended to assure that a non-lawyer who recommends, employs, or pays the lawyer to render legal services for another person does not direct or regulate the lawyer’s professional judgment in rendering those services. That collection of rules means that our will-drafting lawyer could not hire a financial planner as a management-level employee in her MDP to supervise the work of still other lawyers in drafting wills for clients. She herself also couldn’t go to work for a corporation engaged in writing wills for clients, if part of the business of the corporation was something other than law practice. Structurally, the several professionals (lawyer and non-lawyers) would have to form separate professional corporations, or whatever form each wishes to set up, in order to comply with the prohibition against practicing in a firm in which a non-lawyer owns an interest. Moreover, because of the prohibition against fee-splitting, the proceeds of the lawyer’s work would have to be allocated out, as mentioned above, as salary, rent, or some other measure not based on the fees themselves. Not surprisingly, with no ability to share in the profits or effective management of the enterprise—but instead being relegated by the lawyer code rules to the subservient position of mere employee of lawyers—very few non-lawyer professionals have felt any pull toward law firms. Nonetheless, within the foregoing strictures, certain forms of MDP practice are permissible under existing lawyer code regulations, and may be feasible as a matter of sound economics and marketing.

II. MDP MODELS

A. Loose Alliance

One model, which I believe to be quite consistent with Ohio’s Disciplinary Rules (“DRs”) on the subject,\(^\text{14}\) would be for the lawyer to form a loose alliance with the non-lawyers—either as individuals or through their partnerships or other entity forms, perhaps going as far as practicing in the same suite of offices. They would have to maintain separate files, books, billings, and profit-and-loss statements, and in general the lawyer would have to assure the confidentiality of information relating to the lawyer’s representation of the client.\(^\text{15}\) That would not preclude co-working on a multi-discipline prob-

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lem of the same client with the other professionals, but it would require explicit and informed client consent to sharing any confidential information that the lawyer or an employee of the lawyer comes to possess. In addition, of course, the lawyer would want to be sure to inform clients fully about the nature of the relationship, the absence of confidentiality should the client deal with the allied non-lawyers, and whatever arrangements have been made (or are imposed by the jurisdiction) to deal with imputing conflicts of interest between the various parts of the association.  

The lawyer also would be required to comply with applicable prohibitions against the use of a non-lawyer (individual or organization) as a means of directly soliciting clients. At a much-larger extreme of size, just such a non-integrated, collaborative alliance was forged in 1997 between a tax-law firm, Miller & Chevalier in Washington, D.C., and the accounting firm then known as Price Waterhouse.

**B. Captive Law Firm**

An arrangement involving a closer association between the law firm and the other enterprise is also possible, if in a limited number of jurisdictions. Such an arrangement appears to be the alliance of the Big Five accounting firm of Ernst & Young and two lawyers, William S. McKee and William F. Nelson, from the Washington, D.C. office of Atlanta’s King & Spaulding. A November, 1999 Wall Street Journal article announced that the two lawyers were founding a law firm to be known as “McKee Nelson Ernst & Young.” The new law firm will practice on the premises of the D.C. offices of Ernst & Young, but it will bill separately and retain its own fees and profits. While Ernst & Young will have no ownership or managerial interest in the new law firm, it will make a large loan to the new law firm (the size of the loan was not disclosed in the Wall Street Journal article). The law firm presumably will use the loan proceeds to finance its very

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(see the general confidentiality rule); MODEL RULES R. 5.3 (2000) (concerning the supervisory responsibilities of lawyers with respect to non-lawyer employees of a firm).

16 Imputation of conflicts among lawyers in the same firm is required under OHIO CODE DR 5-105(D) (2000). See also, e.g., MODEL RULES R.1.10 (2000).


18 See e.g., Chris Klein, Tax Firms React: Strategic Alliance, NAT’L.L.J., Feb. 24, 1997, at A4 (reporting tax lawyer reaction to announcement of alliance).

ambitious plan to build itself quickly from two lawyers into a 50-lawyer and then a 100-lawyer law firm within a short period of time. The marketing idea, as with the loose-alliance form of MDP, is that the two enterprises would engage in joint advertising and cross-referrals and would work in close collaboration on joint projects. For tax and similar clients, the arrangement undoubtedly will be marketed as one in which the client can gain the advantage of closely coordinated work: legal services, including appearances in court, from the law firm; and accounting, business consulting, economic forecasting, and similar business and financial disciplines from Ernst & Young. The law firm's physical location within the Ernst & Young offices presumably will be accomplished with sufficient physical separation so that a client will not be confused about the distinctness of the two entities and presumably will be accompanied by whatever separate security is necessary for client funds and files of the firm. The firm says it plans to have additional clients who would not use Ernst & Young for its accounting or other consulting services. This sort of arrangement is referred to as the "captive law firm" model of MDP.

My own brief review of the District of Columbia Rules of Professional Conduct indicates that McKee Nelson Ernst & Young can be operated in Washington, D.C. consistently with those rules. Whether the same exact arrangement, in all its details, could pass muster under the lawyer code rules in force in Ohio and other states is much more debatable. The chief difference is that the District of Columbia rules on law firm names are quite permissive, while the rules in many other states are more restrictive. But perhaps the chief point to be made is that, by the simple expedient of removing "Ernst & Young" from the law firm name and eliminating all non-lawyer owners, all would be well with the resulting arrangement in a great many states. In other words, even the captive law firm model of MDP can be structured and operated in a way that would be permissible in many states.

C. Highly-Integrated MDP

A third general model (and there are a vast number of permutations of all three) is what we will call the "highly-integrated" form of an MDP. An example, drawing on the above, would be operation of the announced law practice of McKee Nelson Ernst & Young as a fully-integrated division of Ernst & Young. For a much more arguable example, it would be instructive for a number of purposes to consider what at least a committee of the Texas Bar Association at one time claimed was actually happening within large accounting companies in that state. One fact is not disputed: the Big Five accounting firms have been hiring large numbers of lawyers in recent
years. These have been primarily tax lawyers—hired both as laterals from law firms and as new graduates of law schools. The terms of employment are highly attractive and each of the Big Five now employs at least several hundred such lawyers. Some employ several thousand such lawyers. The controversy is over what they are doing.

In pushing for criminal prosecution of one of the Big Five firms in Texas, the Texas state bar claimed that the accounting firm lawyers were “practicing law” in a way not permissible for lawyers hired by a non-lawyer corporation. It is, of course, permissible in every state for a corporation’s employee lawyers to “practice law” if their sole client is their employer. That, of course, is what is done by the inside legal counsel staff of a corporation. What is not permissible is for a corporation’s lawyers to “practice law” for others—certainly when the corporation’s customers are the clients. To do so would constitute one kind of unauthorized practice of law under the traditional American rule that a corporation may not practice law. Thus, it would not be permissible legally for the lawyer employees of a Big Five accounting firm to write wills for the firm’s customers. But accountants for the past forty years, and very dominantly today, provide federal tax services for Big Five customers, and permissibly so. Can lawyer-employees of a Big Five company do the same thing? No court has yet ruled on the question. At least in Texas, the threatened prosecution has been dropped, although I’m told that the state bar is still considering a possible injunctive action.

In short, under existing lawyer code rules, by far the most problematical of the MDP forms is the highly integrated form. But that is precisely the form that the Big Five (and many other possible service providers) would create and employ if they were able. That form is the crux of the MDP debate and consideration of it cuts to the heart of that controversy.


21 On the recency of the legislation that led to the concept that a corporation could not practice law, see the excellent historical study in Bruce A. Green, The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate, 84 MINN. L. REV. 1115 (2000) (noting origins in early twentieth century New York state anti-competitive legislation pushed by nascent bar associations).

22 I refer here, of course, to recent legislation that permits lawyers to practice in the corporate form in almost every American jurisdiction. See RESTATEMENT, supra note 21, § 9, at 87 (noting proliferation of corporate forms in which law practice is now permitted); Charles W. Wolfram, Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign, 39 S. TEX. L. REV. 359 (1998) (same).

23 The leading decision, very widely followed, is Gardner v. Conway, 48 N.W.2d 788 (Minn. 1951).
III. PATHS TAKEN AND NOT TAKEN: BAR APPROACHES TO MDPs

In analyzing that debate, the particular emphasis that I would like to pursue is a comparative look at how bar association committees in two neighboring and closely related legal systems have recommended that their legal profession change to legitimize highly integrated MDPs. One is the American Bar Association ("ABA"); the other is the Canadian Bar Association ("CBA"). Starting at a relatively common point of departure, the relevant committees studying the MDP issue in both organizations reached similar conclusions. Remarkably—in my eyes, at least—neither group recommended holding the present lines against highly integrated MDP practice. I refer to the June, 1999 recommendations of the ABA’s Commission on Multidisciplinary Practice and, two months later, the August, 1999 report of the CBA’s International Practice of Law Committee.25 As we will see, those different efforts led to rather similar proposals, but eventually to very different fates.

Before I do so, however, let me pay homage to the memories of many of my mentors and teachers in law school and just beyond. For such lawyers, who could not bear to contemplate a world in which lawyers could advertise in the public media, I’m sure it would be even more of an abomination to think of a world in which lawyers could practice law for the public as employees of major corporations. I can almost hear such lawyers muttering from their graves “What’s next—a Sears Roebuck ‘law department’?” The answer of the Canadian MDP report (but not the ABA report) would be a guarded “Perhaps.” My own response would be, “Yes. Why not? It’s about time.”

In fact, the so-called Kutak Commission, which drafted what became the ABA Model Rules of Professional Conduct—adopted by the ABA House of Delegates in 1983—brought all the way to the floor of the House of Delegates for final approval a proposal to permit just such a broadening of the rules on delivery of legal services.26 The ABA House of Delegates, on being informed by the Commission’s reporter that under its proposed rule Sears Roebuck might become a corporate competitor of lawyers, promptly rejected the Kutak Commission’s proposed radical revision of the text of Rule 5.4.27 Instead,

it replaced that text with the prohibitions already stated in the 1969 ABA Model Code of Professional Responsibility—prohibitions which had not been mandatory for lawyers prior to 1969.28 Those prohibitions, which we already have considered briefly, are the prohibitory regulations now found in force in Ohio and in every jurisdiction except the District of Columbia.

A. ABA’s MDP Commission Report and Recommendations

I can describe only imperfectly how amazed I and, I am sure, many other legal scholars and lawyers were to learn of the June 1999 recommendations of the ABA’s MDP Commission. From twenty-five years of working in the field of legal ethics, I had come to know well about a third of the Commission’s members, including its chair, Sherwin Simmons—a tax lawyer from a large general practice law firm in Miami, Florida. Mr. Simmons is a long-time member of the council (governing board) of the American Law Institute. If we reporters brought to the council a provision that broke new ground in the law governing lawyers, particularly new ground that conflicted with the ABA’s Model Rules of Professional Conduct, one of the most skeptical and sharply questioning voices on key issues was likely to be that of Sherwin Simmons. On the specific topic of MDPs, as recently as the mid-year meetings of the ABA in Los Angeles in February of 1999, Sherwin and I had appeared on a panel together to discuss MDPs. What I heard from Sherwin was what I expected—his very cautious and, for the most part, largely hostile questioning of the value of MDPs to clients, the dangers imagined in their operation, and concern about the ill-motivated designs of accounting firms in their push to legalize them. I would definitely describe Sherwin as an adherent of the Wolfram-mentor school—a dyed-in-the-wool traditionalist about all things having to do with the legal profession.

At some point in the months between February and June of 1999, Sherwin Simmons joined with (or possibly led) every other member of the twelve-member MDP Commission29 to unanimously recommend that the ABA take steps to achieve very broad liberalization of the ABA’s rules on MDPs. Included in the report was a recommendation to authorize at least some forms of fully-integrated MDPs. The

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28 Id. at 1630-31.
29 In addition to chair Sherwin P. Simmons, the members were: Carl O. Bradford, Paul L. Friedman, Phoebe A. Haddon, Geoffrey C. Hazard, Jr., Roberta Reiff Katz, Carolyn B. Lamm, Robert H. Mundheim, Steven Craig Nelson, Brunele V. Powell, Michael Traynor, and Herbert S. Wander. The very able reporter for the Commission was Professor Mary Daly of the Fordham law school.
rules would not be liberalized quite to the extent recommended in 1983 by the Kutak Commission, but the report would have moved the ABA much closer to that position than is true of the ABA's present position of unconditional prohibition of all forms of integrated MDPs.

The most profound divide in the initial recommendations of the ABA MDP Commission was between MDPs controlled by lawyers and those controlled by non-lawyers. MDPs not controlled by lawyers would have been subject to an extensive MDP regulatory apparatus. Such an apparatus would have to be set up in each state by the state's supreme court. The basic regulatory features would have consisted of an initial regulatory undertaking by the non-lawyer organization. The recommended scheme would have required that the MDP's CEO and each member of the governing board sign the undertaking, promising to abide by the jurisdiction's MDP regulations. That would have included a required promise that no non-lawyer in the organization would interfere with the exercise of professional judgment by a lawyer in the MDP performing services for a client. In addition, the MDP would have been required to file an annual report of compliance and submit to an annual compliance audit by auditors from the MDP regulators.

Quite by contrast, MDPs in which lawyers exercise majority control would have been subject to none of those regulatory requirements. That distinction rested on the rationale that lawyers already are subject to equivalent requirements, or at least that the requirements already applicable to lawyers avoided the necessity of having lawyer-controlled MDPs make an initial or annual filing and submit to a compliance audit.

The Simmons Commission also proposed a general outline for what it projected as a detailed set of amendments to the *ABA Model Rules of Professional Conduct* to implement its recommendations. Some of those proposed amendments would have reinforced the concept of independent professional judgment on the part of lawyers practicing in an MDP. Others were to emphasize the need of lawyers within an MDP to protect confidential client information, and still others would have provided safeguards parallel to those that now exist for non-lawyer employees of a law firm to assure that non-lawyer practitioners in the MDP would act in a manner consistent with the professional obligations of the MDP's lawyer-employees. Chief, and most controversial, of these requirements would be the requirement that each customer of the MDP be treated as a "client" of a "law firm"

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30 The specific recommendation was to have the actual text of the Rules' amendments developed and reported to the ABA House of Delegates by the ABA's Professional Ethics Committee.
for purposes of the conflict of interest rules, including the rules on imputed conflicts. That would have been true, even if one of the customers involved in the conflicts assessment received only accounting or other non-legal services from the MDP. That, obviously, was the limitation that has been most fervently resisted by accounting firms. Accounting firms have long operated under much more relaxed imputed conflicts rules that permit liberal use of screening to separate teams of consultants working on opposite "sides" of a matter. Finally, additional Model Code amendments would have required MDP lawyers to inform clients that non-lawyer MDP services may not be protected by the attorney-client privilege.

What about lawyers providing tax services within an accounting company—in other words, doing the same things, but only the same things, that an accountant could do without running afoul of the rules on unauthorized practice of law? The initial Simmons Commission approach was to deal with such lawyers with a "holding-out" rule. Under it, a lawyer could continue to perform such "accounting" services without complying with standards of the legal profession that would apply to a lawyer performing those services only if the lawyer is not "held out" as such to clients. And it wouldn't have taken much to constitute "holding out." That was defined, for example, to include the published use of any legal title ("J.D.," "attorney at law" or the like) or any publicity of a biographical kind identifying the person as a lawyer.

Other MDP Commission recommendations dealt with pro bono service requirements and the matter of dealing with client funds. On pro bono, the initial report would have put lawyers in MDPs on a par with more traditional lawyers by requiring the same levels of pro bono practice—no more and no less. Given that pro bono requirements are non-existent in most jurisdictions, that requires nothing of MDPs. On client funds, a lawyer in an MDP would have been required to segregate client funds, as would a lawyer in a law firm. Again, those requirements, although perhaps nettling, would seem to be susceptible of compliance without stifling the effectiveness of the MDP method of delivering legal and non-legal services.

At the end of the day, the major difference between the recommendations of the ABA's MDP Commission and those made by the Kutak Commission in 1983, but rejected by the ABA House of Delegates, was that the Simmons Commission was not prepared to recommend relaxation of the prohibition against non-lawyer equity investment in a legal-services organization. Thus, the Simmons Committee would still have prohibited an attempt by Sears Roebuck to set up a "legal services" counter. Moreover, any plans of an accounting
company to "go public" and enhance its financing through sales of shares to public shareholders would have prevented it from qualifying for MDP status. A qualifying MDP must be owned only by lawyer and non-lawyer service providers within the MDP, but can be owned by any such provider, and in whatever proportion of ownership shares they may wish to contract for.

Debate within the ABA over the Simmons Commission recommendations was extensive and very heated. The proposals were generally lauded in academic settings, but fiercely attacked by some practitioners, primarily litigators. Among the most prominent, for example, was Lawrence J. Fox, former head of the ABA's Litigation Section and former head of his law firm's litigation department. In a very vituperative article, among many hot-blooded pieces he spun off, Fox played with the laws of libel in accusing the Big Five of engaging in the crime of unauthorized practice. His attack on accountants as moral and legal low-lifes would be laughable in any forum but a gathering of lawyers. But that, of course, was the only audience that Fox and his allies had to persuade. And their rhetoric was successful. In a very lopsided vote in New York City in August 2000, the policy-making ABA House of Delegates dismissed the Simmons Commission. Instead, it adopted a resolution that, in effect, soundly dismissed all of its MDP recommendations, including a revised set of very watered-down recommendations that were obviously designed as a political device to meet enough objections of MDP doubters to carry the day, it was hoped, in the House of Delegates. From all that appears from the resolution that in fact carried, the ABA is soundly in favor of the status quo, and indeed is eager to draw lines in the sand and challenge the accounting profession and any other group that would dare to engage in unauthorized practice—a subject to which I will return.

B. Canada: Lawyer-Employees As the MDP Regulatory Focus

To date, the MDP discussions in Canada have taken a very different path. We American lawyers too often tend to ignore events within the legal profession occurring less than fifty miles to the North of where we are (Cleveland). George Gilder in The Message of the Microcosm, describing a world in which information technology holds

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31 Fox, being a lawyer, knew his libel law. His accusation of engaging in unauthorized practice charges an offense that in most states is only a misdemeanor, and thus is not libelous per se. Also the "of and concerning" requirement of libel law would be difficult to maintain under his carefully written, if heated, rhetoric.

32 See infra text accompanying notes 76-86.

increasing sway, had this to say about the modern relevance of national boundaries:

Visit the Pentagon or the New York Times, and everywhere there are maps, solemnly defining national borders and sovereign territories. No one shows any signs of knowing that we no longer live in geographic time and space, that the maps of nations [and, I would add, states] are fully as obsolete as the charts of a flat earth, that geography tells us virtually nothing of interest about where things are in the real world.

At least with respect to law, Gilder is a bit ahead of events, for national borders and, to a much lesser extent, state boundaries, still have great significance in erecting and perpetuating differences in the way that law is understood—and for our purposes, how law is applied and practiced by lawyers. While we in the United States share much with our professional colleagues in Canada, there is also much that is different. As only one example, on which I recently had the enriching experience of sharing views with a Canadian legal audience, I would mention the contrasts between how two significantly different legal systems handle the problem of advocates talking to the media. In a lecture in Nova Scotia, I contrasted the conduct of lawyers, respectively, in Toronto's murder trial of Paul Bernardo and in the murder trial in Los Angeles of O.J. Simpson. Such things as the adoption by Canada in 1990 of an apparently American-style Bill of Rights should not be allowed to mask the very different way in which legal doctrines that apparently are the same are applied very differently, and often in a very different legal and cultural environment.

Of chief relevance, I believe, in the reaction of the Canadian legal profession to MDPs is the difference in the ways that law firms are constructed and situated there. While law firms in the United States

35 KURZWEIL, supra note 33 (quoting George Gilder). I owe the source, and much else of a thought-provoking nature, to my much-valued friend and colleague, Peter Martin, whose visionary labors with Cornell's Legal Information Institute web site is itself doing much to transform the way that law is made available and thus to cause us to rethink the question of competence to practice law. See Peter W. Martin, Impermanent Boundaries: Imminent Challenges to Professional Identities and Institutional Competence, Address at the Dedication of Sullivan Hall, University of Seattle School of Law (Oct. 13, 1999) (on file with Professor Wolfram).
have grown at an almost exponential rate,\textsuperscript{37} Canadian firms remain comparatively small.\textsuperscript{38} Law practice in Canada in that respect resembles much more the 1940s and 1950s in large cities in the United States, when solo practitioners and small-firm lawyers dominated the profession. With the vast ramping-up of the size and complexity of large U.S. law firms in the last thirty years, it is easy to lose sight of how localized such growth can be. Dominance of smaller firms and solos remains true in many parts of the United States, particularly, indeed almost invariably, in areas away from large cities. That perhaps starts to explain why the General Practice, Solo and Small Firm Section of the ABA, consisting of solo practitioners and small-firm lawyers,\textsuperscript{39} was enthusiastic about the Simmons Commission proposals while much of the opposition has been led by large-firm lawyers, particularly litigation lawyers in those firms. Just as with that group of American small-practice lawyers, Canadian lawyers are more familiar with and more accepting of the notion of permitting a lawyer to gather the additional non-legal competences by adding additional non-lawyer business partners to a law/nonlaw business enterprise.

Initially, in an interim report, the CBA\textsuperscript{40} committee on MDP had recommended a rather highly regulatory model for permissible MDP.\textsuperscript{41} It would have required that all MDPs be controlled by lawyers, with lawyers as the majority of owners, and that the provision of legal services be the primary activity of the MDP. This position strongly resembles the present D.C. rules on the election of non-lawyers to ownership-management positions in a law firm, with the exception that the D.C. rule does not require a lawyer majority of owners.\textsuperscript{42} It also strongly resembled the ill-fated compromise recommendation that the Simmons Commission took to the ABA House of Delegates a year earlier.

\textsuperscript{39} A variety of views of the section's constituency, largely supportive of the MDP concept, can be found at http://www.abanet.org/cpr/multicommsched1099.html (last visited Mar. 24, 2002).
\textsuperscript{40} The Canadian Bar Association is similar in some ways to the ABA, but in other ways quite different. Its similarities include the fact that it is a voluntary, non-official bar, and that its membership does not by any means include nearly all Canadian lawyers. On the other hand, the influence of the CBA is probably less, as it must share influence with the Federation of Law Societies, which consists of delegates from each of the provincial law societies.
\textsuperscript{41} The interim report is described in STRIKING A BALANCE, supra note 26, at 29-30.
However, in its August 1999 report, *Striking a Balance*, the committee significantly shifted ground. As the report indicates, there are three general approaches that can be taken to MDPs, on the assumption that they are to be permitted at all: (1) regulate only those lawyers practicing in MDPs, without regulating the entity itself; (2) regulate the entity itself, specifying how it must be structured and operated; and (3) permit MDPs as a general proposition, but specify only those regulatory issues of particular concern. The third "balanced" approach is the one urged by the committee, although it combines that recommendation with a strong de facto endorsement of the first regulatory strategy—that of regulating lawyers in MDPs, rather than MDPs themselves.

In brief compass, the following are the key recommendations of the CBA’s MDP committee:

- MDPs would be legitimated, to provide greater scope for consumer choice and innovation in the delivery of law and related services. In this respect, no distinction would be drawn between captive law firms and fully integrated MDPs, and no restriction would be imposed on the kind of services that an MDP could permissibly offer.

- There would be no requirement that MDPs be controlled by lawyers, or any distinction drawn between those so controlled and those differently controlled by non-lawyers.

- Lawyers in MDPs would be subject to the lawyer code rules of their provincial bar associations ("law societies") and would remain responsible for seeing that the services they deliver comply with all professional requirements.

- Bar associations would address specific regulatory issues—some of which are identified in the report. Chief among them is the preservation of the "solicitor-client privilege" (attorney-client privilege).

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43 *Striking a Balance*, supra note 26, at 5.
44 See id. at 6.
A majority of the committee (all but its chair) did not support registration or licensing of MDPs.

Perhaps most importantly, and in sharp contrast to the overwhelmingly negative vote of the ABA House of Delegates, the Council of the CBA a year ago approved the Striking a Balance report.\(^4\)

How the CBA proposals ultimately will be received in the all-important Canadian provincial structure for lawyer regulation, I have no clear idea. Certainly the general bar reception has been much more muted than the noisy clamor and significant discord within the ABA that greeted the recommendations of the Simmons Commission. If the CBA committee has been at all adept in reading its public, its radical switch from what is essentially the District of Columbia model of lawyer-controlled MDPs to acceptance of the fully-integrated model in which non-lawyers predominate tells us much about future acceptance of its proposals.

C. MDPs Abroad

What about MDPs further abroad? The story can be told very briefly.\(^4\) In short form, MDPs involving lawyers and others with allied professional skills have existed in Europe for almost a quarter century, first probably in Germany, with relatively small firms of transactional lawyers and accountants.

In the last ten years, a number of factors have coalesced to produce a great upsurge in the number of European countries that are permitting many forms of MDPs, to a greater or lesser degree. First, the Treaty of Rome and the European Union ("EU") administrative structure have produced a deregulatory environment in Europe that is even stronger in some respects than the general anti-regulatory sentiment in the U.S. Most importantly, the right to provide services in any EU country if you can provide them in your "home" country has led to a "transparency of borders" notion that is generally pushing toward permitting in many, if not all, countries many kinds of practices that are permissible in any one. Second, the revival of the business climate in Europe has given new and stronger voices to segments of the business community that have clamored for more highly integrated professional services, at a cheaper price, and with more integrated management of work on the total package of services. Third,


\(^{47}\) I have told it at much greater length elsewhere, in a chapter in a book that collected papers from a 1997 comparative-ethics conference in Paris. See Wolfram, LAWYERS' PRACTICE, supra note 3, ch. 11.
and perhaps of transcendent importance, the U.S.-based accounting companies have looked abroad, and primarily to Europe, for areas in which to achieve significant growth in their "consulting" services—their most rapidly growing and profitable segment of business.

The resulting MDP scene in Europe and the rest of the globe is difficult to sketch accurately yet briefly.\(^4^8\) In general it can be said that the accounting-law (and other) disciplines combined through an MDP that has been initiated and is still dominated by accounting/consulting firms have seen very significant growth abroad. That has been accomplished with some backing and filling—for example, in France, where in late 1996 eight of the ten largest law firms were owned by accounting companies, but where in 1999 (because of an act of the French Parliament in early 1997) we now find the law firms at least formally "divested" from the MDP structure, but still functioning very much like captive law firms.

For American lawyers, perhaps the most profoundly instructive foreign comparison is with Great Britain. After the initial hostilities of the Revolutionary War of 1776-81 and the War of 1812, Great Britain has long since become, of course, the European country with which most Americans, including most American lawyers, have the most natural affinity. That has always been most true of law, and still remains true to a degree. We lawyers trace our professional roots very directly to what we have confidently mythologized as the practices of English barristers and, to a much less significant degree, solicitors. (Never mind that most American lawyers bear much stronger resemblance to English solicitors than to English barristers, even without their robes and wigs.) We believe that in England, courts regulate lawyers as courts do here. That is largely false, both currently and historically, except in a highly attenuated sense in the case of barristers—the smaller of the two branches of the profession by far—even after taking into account their recent period of relatively great percentage growth.

Very symbolic of this mythologizing was the ABA’s pilgrimage to London in August 2000 during its "split" annual meeting, to cele-

brate the new millennium. Although it eventually occurred in New York City, it would have been delicious irony for the ABA’s MDP Commission to present its revised set of recommendations to the ABA House of Delegates when they were sitting in London. In any event, ABA delegates in London would have done well to visit the offices of Big Five accounting companies in London, by far the financial capital of Europe. What they will find is very similar to what was announced in 1998 in the creation of McKee Nelson Ernst & Young. Most of the Big Five’s London offices have captive law firms on premises. If you walk into the offices of one of the Big Five in London and turn right, you walk into the consulting offices. Should you turn left, you find the lawyers. Nor is it likely that this new-look way of practicing law will be reversed. Even more than the political climate here, both major political parties in England have come out strongly for MDPs. The concept first arose in the famous set of Green Paper recommendations by Margaret Thatcher’s Lord Chancellor in 1989. Tony Blair’s Labor government is in full agreement, announcing as one of its party planks support for liberalizing rules of MDP practice. The Law Society in England currently has the matter under study, and it is under persistent pressure from England’s Competition Bureau (antitrust enforcers) to allow MDP practice. As here, and more so, the non-professional pressure is toward liberalization.

IV. THE FUTURE: POLICY AND OPTIONS

A. What Lies Ahead in the United States?

Where will the MDP debate go and where will it end up? I do not consider myself a bar politician, and my record of forecasting what the ABA will do is about fifty-fifty—in other words, something approaching sheer chance. There are certainly powerful and numerous voices within the ABA who regard the MDP Commission’s report, even if now thoroughly rejected by the ABA, as a serious affront to the profession and its clients. The Commission’s initial report drew strong criticism and an organized attack, led by the Ohio bar, among other groups.49

New York’s state bar association also issued a lengthy analysis of MDPs,50 with strong recommendations against any expansion of the

permissible forms. This was warmly embraced by the state bar, which promptly submitted amendments to the New York Code of Professional Responsibility. These amendments were promptly (and quite remarkably, for the normally slow-moving New York courts) adopted by all of the appellate divisions of the state. The new rules leave New York with prohibitions and limitations as strictly limiting the concept of MDP as any state in the nation. Essentially, the rules permit only the most timid of MDPs—essentially joint-marketing arrangements, so-called strategic alliances, between law firms and non-law entities, and at that with several onerous restrictions. Rather clearly, and clearly by design of the authors of New York's restrictive approach, if all states were to follow the lead of New York, the concept of MDP basically would be dead on arrival at any lawyer's office. And the New York State Bar intends just such a nationwide result, having now submitted to the ABA a model rule, based very closely on the recently-adopted New York restrictions, that would, if adopted in each state, essentially end the prospect of significant lawyer involvement in MDPs. One might thus conclude, but erroneously, that the MDP concept is therefore dead in the United States. To be sure, from a count of the states it appears that a majority of jurisdictions whose state bars have taken a position on MDPs are opposed. But such a conclusion would assuredly be premature. Among other things, as of this writing, the clear majority of jurisdictions is either studying the concept or has issued reports favoring MDP.

The present is an important point at which it is fundamentally important to focus on a singular fact about bar regulation and another fundamental point about clients. First, bar regulation is highly Balkanized, with lawyers being admitted and regulated on a state-by-state basis. That means that, while New York or Ohio might intend

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54 Aside from opposition from powerful segments of the bar, a recent negative factor is the adverse fall-out from the Enron/Andersen debacle, commented on infra at notes 70-76.
56 Id.
57 I explore the disciplinary implications of the state-by-state admission system in Charles W. Wolfram, Expanding State Jurisdiction to Regulate Lawyers, 30 HOFSTRA L. REV. (forth-
to slam the door forever against MDP, a neighboring state, or one far away, may open its doors. Lawyers admitted in that more-permissive jurisdiction can practice in MDPs as there permitted. That condition creates one of the two elements necessary to create a kind of "race to the bottom" in MDP regulation. As with Delaware and corporate law, there could ensue a kind of "Delawar-ization" of law practice in the MDP field. That might come about because of the second fundamental point. Second, as indicated above, many modern-day clients, particularly large corporate clients, are increasingly oblivious to such geographic artificialities as state lines. A corporation headquartered in Cleveland is hardly relegated to using Cleveland-based, or even Ohio-based, lawyers for all its important work. Suppose that the Cleveland-based corporation's managers, involved in a possible merger with a company headquartered in New York, decide that they would prefer an MDP to handle the very expensive (and very lucrative for the service provider) work of doing the investment banking, environmental work, lobbying, business consulting, and lawyering involved in a merger. Noting that both Ohio and New York preclude such integrated service, suppose the Ohio corporation finds a firm in California that will provide that service. Further, and again hypothetically, suppose that MDP arrangements are allowable. What, in either practical or legal terms, would prevent the Ohio corporation from engaging the California MDP? While the answer, done carefully, is somewhat complex, its bottom line is that nothing significant would prevent the Ohio client from using the California-based MDP.

B. "California Here We Come"

That brings me to my final destination—California. That state is the home to more than 125,000 lawyers, something on the order of

coming 2001) (article to be included in symposium issue on legal ethics, copy on file with author).

58 See supra text accompanying notes 34-36.

59 Among the complexities would be whether a California-connected law firm with offices in states that had much stricter limitations on MDP could be assured that compliance with the California rules would protect all lawyers in the firm—including those non-California offices. Similar issues have already arisen because of differences in bar regulations, most notably those dealing with non-lawyer partners in law firms as permitted only in the District of Columbia. See generally ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 360 (1991) (opining that a lawyer licensed both in a jurisdiction prohibiting non-lawyer members in partnership and in the District of Columbia, permitting such, may practice in D.C. but not in offices in other jurisdiction).

60 Focus on California as one of the states in which MDP regulation might prove particularly creative was first suggested in a clairvoyant article by Dean Burnele V. Powell, Looking Ahead to the Alpha Jurisdiction: Some Considerations that the First MDP Jurisdiction Will Want to Think About, 36 WAKE FOREST L. REV. 101, 108-09 (2001) (cogently suggesting that California has many of the characteristics of a jurisdiction most likely to experiment with significant loosening of MDP restrictions).
one out of every eight lawyers—one out of every eight lawyers actively practicing in the United States. The state is also considerably, if not uniformly, more populist in its politics than are most Northeastern states, certainly including Ohio and New York. This is found, most prominently for our purposes, in the governance of the State Bar of California, the so-called “integrated” or, more comprehensibly, mandatory bar to which every California lawyer must belong. The Board of Governors of the California Bar is comprised of twenty-three members, twelve of whom are elected from districts by lawyers living in those districts. One is the annually elected bar president, and another is a lawyer appointed from the California Young Lawyers Association. Most salient for my purposes, six members—are non-lawyer “public” members, whose appointment is closely watched by a highly activist legislature.

California’s Bar Board of Governors has recently received a report from its MDP task force, which reacts very positively to the possibilities for expanded service presented by the concept and recommends that the Bar propose rules providing for a wide variety of MDP forms, including highly-integrated forms. The task force filed its report on June 29, 2001. In August 2001, the Board of Governors released the report for comment. What will ensue is beyond my powers of prognostication. On the positive side is California’s history of political activism and significant interest among both lawyers and non-lawyers in providing MDP-based services. On the negative side, the California Board of Governors, in the fairly recent past, has buried ambitious commission proposals to liberalize the delivery of law-related services. That most notable and recent instance occurred when the board rejected a quite radical committee proposal urging

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62 Id. A simple tabulation of the state-by-state numbers for “resident active” lawyers in each of the fifty states and the District of Columbia from the data indicated in supra note 62 indicates a nationwide active lawyer population of 1,018,813 as of 2000.

63 See CAL. BUS. & PROF. CODE § 6013.1(a) (2002) (fifteen members to be elected from each of state’s fifteen bar districts); id. § 6013.1(b) (one member from California Young Lawyers Association); id. § 6013.5 (six members to be non-lawyers appointed by governor with consent of senate).

64 Id. §§ 6013.1(b), 6013.4.

65 Id. § 6013.5.

66 TASK FORCE ON MULTIDISCIPLINARY PRACTICE, STATE BAR OF CALIFORNIA, REPORT AND FINDINGS (June 29, 2001), at http://www.calbar.org/2bar/3exd/reports/mdp01/mdpreport.pdf.

repeal of all laws against unauthorized practice, and that would have replaced them with a simple annual registration system applicable to all persons providing law-related services. The report, issued after extensive empirical research across the state, including interviews with consumer protection agencies and prosecutors, found that perhaps 50,000 persons in the state made middle-income livings engaging in what bar rules would regard as unauthorized practice, but that not a single complaint by a disgruntled customer of any of those practitioners had been recorded anywhere in the state.

C. Where Do We Go from Here?

Lawyers are essentially a conservative lot. Even when what has been is very recent—as with the rule (Model Rule 5.4) prohibiting fee-splitting with non-lawyers—the instinct of many lawyers is to resist change unless and until it has the force of inevitability about it. To the extent, however, that the ABA proves capable of changing its collective mind, and reversing the strong negative stance against MDPs that it took, the following thoughts may be relevant. In any event, they clearly are relevant and topical now, given the apparent beginnings of a tendency on the part of the states to go their own way in trying out the MDP idea. It well might be, in other words, that, as many warned, the train has left the station, but the ABA has decided to pretend that it stopped the train by lying down in front of the locomotive.

On the other hand, it might be, as opponents of MDPs have been quick to claim, that the involvement of the Big Five accounting firm Arthur Andersen in the Enron Corporation mess will chill the enthusiasm of any state for significant relaxation of the current heavy restrictions on MDP practice. Arthur Andersen served Enron and its

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70 See e.g., Steven C. Krane, Let Lawyers Practice Law, NAT'L L.J., Jan. 28, 2002, at A16 (editorial by president of New York State Bar Association and MDP skeptic arguing that endless succession of Enron collapses would follow if ability of lawyers to practice in MDP form were to be liberalized).

71 See e.g., Geanne Rosenberg, The Enron Implosion: Scandal Seen as Blow to Outlook for MDP: Andersen Role a Vindication, Foe Says, NAT'L L.J., Jan. 21, 2002, at A1 (reporting claim by Robert MacCrate, New York City foe of MDPs, that Enron collapse and role of auditor/consultant Arthur Andersen in it vindicated everything lawyer-opponents have feared);
shareholders as the auditor of the company’s books. It was also reportedly responsible for providing MDP consulting services in advising and assisting the company to set up the off-books partnerships within whose secret, and apparently quite capacious, recesses Enron was able to hide hundreds of millions of dollars in liabilities. Once these were exposed to public view, investors and lenders lost confidence in Enron; it lost all financial traction, and was required to seek the problematical protection of bankruptcy.\(^7\) Whether Arthur Andersen’s consulting advice was technically defensible or not as a matter of accounting standards is now beside the point, at least for purposes of the MDP debates. Enron’s messy and very public demise after the loss of investor and lender confidence speaks volumes about the profoundly unwise business judgment that was exercised by several of the company’s top officers and directors and, reportedly, its MDP adviser Arthur Andersen. Further, it is not implausible to speculate that Arthur Andersen’s audit was insidiously influenced by the consulting services that it was also selling to Enron, and doubtless wished to continue to sell at an increasing pace. That consulting role and the hope for future fees from Enron for similar services arguably would have been put at risk by an aggressive audit that questioned the same transactions.

Viewed dispassionately, however, the Enron-Arthur Andersen imbroglio makes a different point—that some MDP mixtures are the proverbial fire and gasoline that should not be permitted to mix. In the specific case of Enron, the apparently explosive mixture was the public attest function of serving as auditor of a company’s book together with the private, and highly profitable, business of business advising to the same company.\(^7\) In the wake of the Enron disclosures, all of the Big Five have announced that they will no longer simultaneously provide both audit services and any other services to a client com-

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\(^7\) Bankruptcy obviously has not enhanced the reputation of Arthur Andersen as a certifier of audits. The firm may now be in a spiral of collapse as many large clients, particularly those subject to governmental regulation, abandon Andersen and sign on with less-troubled auditors. See e.g., Christina Binkley, *Heard on the Street: Vegas Casinos May Not Gamble on Andersen*, WALL ST. J., Mar. 20, 2002, at C1 (reporting several large gambling-related corporations seeking to drop Andersen as auditor). See also Ken Brown et al., *Andersen: Called to Account: Andersen’s Foreign Offices Defect*, WALL ST. J., Mar. 22, 2002, at C1 (reporting that Andersen Worldwide partners in Russia, China, and Hong Kong deserting firm for partnership positions with rival firms).

\(^7\) See e.g., Bill Sternberg, *Accounting’s Role in Enron Crash Erases Years of Trust: Credibility Crisis Among USA’s 350,000 Accountants Most Troubling for the Ones Who Audit Company Finances*, USA TODAY, Feb. 22, 2002, at 1 (indicating public-relations difficulties of 15% of nation’s accountants that audit company books).
The SEC, which has been slowly moving in the same direction as a regulatory matter, presumably can impose that requirement now that companies (or at least the largest companies—the Big Five) have announced they have withdrawn beyond that line as a voluntary matter.

Nonetheless, whatever post-Enron/Andersen measures are taken, the movement toward MDP liberalization probably has slowed. Whether it has been entirely, and permanently, arrested is a matter for the future to tell. On the assumption that the concept remains viable—and at least given acceptance of some forms of MDP practice, including highly integrated forms, in important countries around the globe—it remains appropriate to consider the merits and demerits of the concept in general.

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74 On the seriatus public announcements by the Big Five that they would no longer perform audits for companies for whom they also and contemporaneously provided consulting services, see, e.g., Michael Peel & Peter Spiegel, The Enron Collapse—SEC Set to Mull Range of Rule Reforms of Accounting, FNN TIMES, Feb. 5, 2002, at 19; CNBC Business Center Newscast, Deloitte & Touche Reportedly Spinning Off Its Consulting Division, available at 2002 Westlaw 5790719 (CNBC television broadcast, Feb. 5, 2002) (reporting Deloitte & Touche announcement of intent to spin off consulting arm in wake of Enron/Andersen scandal, and that other four members of Big Five accounting firms had already made similar announcements).


76 Most of the Big Five have traditionally resisted regulatory efforts to achieve a complete separation of the audit function from consulting services to the same client, as well as such proposals as a limited period of years one company could serve as auditor (in order to prevent an auditor-client relationship from becoming too cozy). Opposition on the part of accounting companies to the basic concept of separation has reportedly crumbled worldwide in the immediate aftermath of Enron's collapse. See e.g., The Trouble with Accounting; When the Numbers Don't Add Up; Enron Shows How Unreliable the Information on Which Markets Depend Is, ECONOMIST, Feb. 9, 2002, available at 2002 WL 7245130 (reporting that all Big Five accounting companies plan to separate audit and consulting functions after Enron collapse, that additional companies have since disclosed unreported losses, and that companies such as Unilever and Disney have announced that they would not give consulting work to auditing company). See also Michael Peel, Regulators Put Big Audit Firms in Spotlight, FIN. TIMES, Feb. 7, 2002, available at 2002 WL 3316575 (reporting post-Enron movement within Great Britain accounting circles to agree to separation of audit and consulting services). Following, rather than leading, events as national leaders are often constrained to do, President Bush has recently announced legislative and administrative reforms that, among other things, would prohibit auditors from also offering consulting services to audited companies if the services would compromise the independence of the audit. See Adam Entous, Bush Plans Crackdown on Corporate Abuses, REUTERS, Mar. 7, 2002 (AOL "Top News" Item).
D. Why MDPs and Why the Apparent Bar Toleration of Nominally Unauthorized Practice and MDP Developments?

One of the most startling aspects of the MDP concept is that it arrived, like Venus, fully formed. The Big Five were well into aspects of MDP in the United States and around the globe before most American lawyers were even aware of the existence of such a concept. Now that the bar is on full alert, there is also the reality, which must be puzzling to some thoughtful observers, that MDP opponents are hurling charges of unauthorized practice at the Big Five (several of which have already hired more lawyers than work for all but the very largest American law firms), but little is being done about it. Two thoughts converge, at least in part: the reasons why MDP practice may be a powerfully alluring concept, and the reason why the ABA and local bar associations in recent decades have taken a dominantly passive stance in the face of vastly increasing evidence of unauthorized practice.

As one way to pose the issue, consider the following question: If powerful elements within the ABA feel so strongly that the Big Five are engaged in unauthorized practice and a violation of the “independence” rule, why hasn’t the ABA taken a more aggressive stance? After all the anti-MDP rhetoric, all that the ABA House of Delegates has done about alleged law practice by some or all of the Big Five is to rail mildly against it. Why isn’t the ABA itself suing the Big Five for unauthorized practice or more actively supporting, perhaps with funding, efforts of state and local bars to curb what they perceive to be unauthorized practice?

Theories of liability and remedies, of course, exist. The traditional way that such a dispute would have been handled in the 1960s, when I first became a lawyer, would be for a state or local bar association to sue one of the Big Five (in, say, Texas). That could be done on the theory that their activities constituted the unauthorized practice of law and, also, the practice of law by a corporation, which is independently

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77 The most vehement is Lawrence J. Fox. See Lawrence J. Fox, Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs, 84 MINN. L. REV. 1097 (2000).

78 The ABA House of Delegates in July, 2001 in effect rejected the unanimous recommendation of its MDP commission, instead passing a “Resolution 10F,” which disbanded its MDP commission and reaffirmed what the ABA called the traditional approach that quite substantially limits MDP arrangements. See generally L. Harold Levinson, Collaboration Between Lawyers and Others: Coping with the ABA Model Rules After Resolution 10F, 36 WAKE FOREST L. REV. 133 (2001). Resolution 10F is reprinted id. at 164-65. Item 6 of Resolution 10F, for example, called upon states, in effect, to enforce more vigorously existing unauthorized-practice prohibitions: “Jurisdictions should retain and enforce laws that generally bar the practice of law by entities other than law firms.” Id. This dig was obviously aimed at the Big Five, but in the circumstances was quite oblique and mild.
prohibited. Where such an offense has been proven, injunctive relief has been granted in a significant number of cases. There are several cases from that earlier era allowing such suits, recognizing the standing of the bar association, and—on facts that are, in the final analysis, fairly indistinguishable from those that the bar claims to exist now—granting injunctive relief. An injunction, of course, would put the offending accounting company right out of the law-related MDP business. Moreover, and of overriding importance, in almost all states injunction actions are tried to presumably more sympathetic lawyer-judges rather than, as with criminal prosecutions and most other forms of civil relief, juries composed largely if not entirely of non-lawyers who would be systematically suspect as fact-finders in the eyes of bar association officials.

But we don’t see such suits, at least successful suits. Why? The fundamental reason would cause my now-deceased lawyer mentors no end of unrest, for the plain truth is that times have changed so fundamentally that one now must conclude that unauthorized practice (at least as it once would have been confidently defined by bar associations and readily followed by courts) has now become such big business—such important and useful business—that it probably lies beyond the financial and political power of the ABA, any local bar association, or any collection of bar associations, to mount a successful injunctive attack of the kind I’ve described. Note that I say “probably,” for the issue lies ahead of us, and strange things happen.

What would the bars need to beat back the unauthorized practices—if they are that—if, say, one of the Big Five accounting firms? The elements needed for a successful attack can be simply listed, but probably aren’t available to the bar associations. First, they would need a huge financial war chest comparable to that of the accounting firms. An injunctive action would hardly be a lay-down situation as far as the accounting companies are concerned. To the contrary, they can be expected to fight it with all of their enormous wealth, and it is entirely likely that other accounting firms will intervene; bringing added legal and political firepower to the defense of the suit. Could the courts be expected to give quick relief in favor of the bar associations, providing it with a quick-and-cheap victory? I doubt it very much. The image of the bar as the single-minded guardian of the pub-

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79 On the historical origins of the commonly-encountered state statutory prohibition against the practice of law by a corporation, and the leading role that such statutes took in early twentieth-century bar efforts to eliminate non-lawyer competitors, see Green, supra note 22.
81 See generally Note, Remedies Available to Combat the Unauthorized Practice of Law, 62 COLUM. L. REV. 501 (1962).
lic welfare has been so tarnished in recent decades that many courts would either share or be influenced heavily by the widespread public perception that bar associations are essentially guilds—trade associations whose primary mission is to protect the vested economic interests of the majority of their lawyer members.

In general, there is little political mileage to be made from coming down hard on accounting companies, and at the same time favoring the interests of, primarily, certain large corporate law firms. We have a track record of bar public-relations failures in several states to document this. Let me mention only the litigation in Florida several years ago over whether the courts should enjoin the work of a self-advertised "legal secretary" who would type up your divorce action papers for under $100. In a sense, the bar won in its effort to stifle the attempts of this pioneer, named Rosemary Furman, to practice divorce law through her "secretarial services" outlet. She was indeed beaten badly about the head and shoulders in the Florida courts, and if one confined one's source of information to the official court reports, it appears that the campaign was an unmitigated success for the Florida bar. But in the larger, political picture, the Florida bar took a large publicity hit. In the face of largely negative media and public attention, the bar soon changed its rules on unauthorized practice, referring all unauthorized practice cases to the state system for criminal prosecution, thus loosening substantially the bar's control over the process.

If that outcome applies to "legal secretaries," how likely is it that the bar could win an encore injunction action with one of the Big Five companies? An episode indicating possible legislation that was not at all to the bar's liking occurred in Texas when the bar obtained an injunction against sale in the state of a software package that selected and customized legal documents based on the user's response to a series of questions. While the bar "succeeded" in obtaining a broad

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82 See Florida Bar v. Furman, 376 So. 2d 378 (Fla. 1979) (enjoining Furman from continuing to practice law without license in original injunction proceeding in state supreme court brought by state bar). See also Florida Bar v. Furman, 451 So. 2d 808 (Fla. 1984) (holding, again on original application to state supreme court by bar association, that Furman's continuation of same services constituted contempt and imposing sentence of 120 days of imprisonment, with 30 days to be served and 90 days suspended on condition Furman ceases practice for period of at least two years).

83 On the media and political reaction to Rosemary Furman's court-ordered imprisonment for unauthorized practice, see H. Glenn Boggs, The New Face of the Unlicensed Practice of Law, FLA. B.J., July/Aug. 1987, at 55; Ryan J. Talamante, Note, We Can't All Be Lawyers . . . or Can We? Regulating the Unauthorized Practice of Law in Arizona, 34 ARIZ. L. REV. 873, 880-81 (1992).
injunction from a surprisingly cooperative federal trial court, the victory proved Pyrrhic when the state legislature amended the state unauthorized practice statute to exclude from its definition both such computer software and many comparable forms of print publications.

For the same reasons, the possibility of obtaining a criminal conviction of a Big Five accounting company is probably even bleaker, as far as the bar is concerned. Again, if you consult only the law books, the prospects for successful prosecution appear to be good, assuming the bar has its facts right, and it can prove that the accounting companies are "practicing law." In most every state, it is a criminal offense to engage in the unauthorized practice of law. Nonetheless, in California, for example, there are now something on the order of 50,000 non-lawyers who make middle-class livings practicing law—as "notaries" (or "notarios" in Latino neighborhoods), as "paralegals," as "small-business consultants," etc. Those non-lawyer "lawyers" freely advertise. You can find them right in the San Francisco phone book. (To do so, incidentally, you have to flip past the now-familiar dozens of differently-colored pages of sometimes-lurid lawyer ads to find them, but masses of consumers are apparently doing that, or finding these non-lawyer practitioners in other ways.) This booming business continues to grow in a state where you can find in the California criminal code a statute solemnly making it a misdemeanor to practice law in the state without a license—as these people are doing clearly and openly.

The reason for this de facto de-criminalization of much unauthorized practice is simple: in California, as in many states, the local prosecutor responsible for making front-line decisions about what criminal statutes to enforce is popularly elected. There have been very few consumer complaints about non-lawyer practitioners in California. While the compelling public-policy logic of that empirical fact was ignored by the California bar, it has not been lost on local prosecutors, who, in any event, have much bigger, more politically-attractive fish to fry in the persons of violent offenders and other street criminals and ever-present drug offenders—the kinds of criminals that the public wants to see prosecuted, and the incarceration of which brings success at the voting booths.


85 See TEX. GOV'T CODE § 81.101(c) (2000) (excluding such kits form definition of unauthorized practice, so long as "products clearly and conspicuously state that the products are not a substitute for the advice of an attorney").

86 See supra note 70.
If that analysis is correct, the traditional eagerness of bar associations to root out unauthorized practice currently is largely neutralized by public opinion and political and economic impotence of the organized bar on the unauthorized-practice issue. Another very considerable factor is the threat of federal antitrust enforcement, which caused the practical elimination of unauthorized-practice committee work from the agenda of the ABA and other non-mandatory bar associations during the past two-plus decades. There is little reason to think things would be any different should the bar consider taking on the issue of unauthorized practice with the Big Five, with their enormous wealth, the enormous number of law firms who consider them clients—or who hope to see them as clients, or at least as referral sources—and with the allegiance of numerous large corporate clients who are, at least in the marketing assessment of the Big Five, very eager to enjoy the business benefits of "one-stop shopping" through MDP arrangements.

CONCLUSION

The forces pushing for more effective forms of multi-disciplinary practice are strong. The intrinsic appeals to lawyers of either joining in a form of multi-disciplinary practice or at least acknowledging the worth of multi-disciplinary practice as another innovative and useful way of delivering legal and nonlegal services is clear—at least to me, to the ABA MDP commission, to the CBA, to the California MDP task force, and perhaps to others. Whether either force is sufficiently strong to bring about real change in the United States within the next five years remains to be seen.

Meanwhile, of course, the rest of the world will not hold its breath while the American legal profession thrashes out what it intends to permit by way of additional multi-disciplinary practice. It well might happen, at least with respect to multi-disciplinary practice by the Big Five, that a sufficiently permissive legal regime will emerge in Europe—perhaps in England, of all places—so that the Big Five and perhaps other large organizations can readily sustain an in-

87 See generally WOLFRAM, supra note 7, § 15.1, at 826-27 (summary of 1975-84 developments, which saw national and local bar association retreat from the field of unauthorized-practice enforcement). Although perhaps mainly of historical interest, given that antitrust enforcement policies vary considerably with each incoming presidential administration, it might be worth noting that in early 1977 the ABA (and the Treasury Department, which had apparently adopted the ABA position) attracted the distressed attention of Justice Department antitrust lawyers because of its Informal Opinion 1032 (1968), which restricted representation by lawyers employed by public accounting companies. See Ethics: Justice Faults A.B.A. Limit on C.P.A. Firm's Lawyers, 63 A.B.A. J., Feb. 1977, at 165 (news report of Justice Department letter to Treasury objecting that ABA position "promotes a substantial and unjustifiable commercial restraint").
international multi-disciplinary practice from abroad, including in ways that serve significant numbers of American clients. The same, of course—and perhaps in even more proximately threatening ways—could become true in Canada. We may shortly begin to see an ever-growing northwardly flow of law business on the part of major American corporate clients. Should such events come to pass, we would find that American law firms that had previously enjoyed great success in expanding themselves abroad will be increasingly hobbled in their attempts to compete for international law business—an area in which most large American law firms see opportunities for significant firm business expansion. Threatening to strengthen the forces leaning toward MDP liberalization is the work of the working groups crafting profession-specific rules for conducting the profession’s business internationally, being conducted under the aegis of the General Agreement on Trade in Services (“GATS”).

As with the development abroad with respect to MDPs in general, these discussions are also being ignored for the most part by the American bar, leaving open the possibility that non-U.S. voices will determine the course of global liberalization of MDP restrictions. Perhaps of most importance in the long run, a sufficiently strong position under GATS may supersede more restrictive state rules on the MDP concept.

During some relatively early state of such an erosion of competitive position, it is not unimaginable that a combination of large American law firms and their erstwhile client-competitors, the Big Five, would take the truly transformative step of seeking multi-disciplinary practice relief from Congress. The subject of the power of Congress to regulate the American legal profession is a large and fascinating one. Suffice it to say on this occasion that I believe it would clearly lie within the powers of Congress under even a Rehnquist Court’s conception of the reach of Article I Commerce Clause powers for Congress to preempt state lawyer-code rules with respect to lawyers practicing in MDPs. Once such a legislative enactment was in place, truly significant legislation on other burning

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88 For a comprehensive canvassing of this subject and its U.S. implications, see Laurel S. Terry, GATS’ Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers, 34 VAND. J. TRANSNAT’L L. 989 (2001). On more recent developments, see, e.g., Anthony DePalma, W.T.O. Pact Would Set Global Accounting Rules: Purpose is to Allow Free Trade in Services, N.Y. TIMES, Mar. 1, 2002, at W1, (noting continuing work of World Trade Organization under GATS charter, and noting lack of public controversy or even attention to its work).

89 Id.

lawyer-regulation issues\textsuperscript{91} might follow in its wake. Whether that would be a better or a worse world for lawyers and clients, I again do not and cannot say. That it would be a very different world, all must fully agree.

\textsuperscript{91} An obvious candidate now very much on the bar's own agenda is "MJP"—multi-jurisdictional law practice. \textit{See supra} note 88. For information on multijurisdictional practice, see http://www.abanet.org/cpt/mjp-home.html (last visited Mar. 7, 2002).