

Multidisciplinary Business Planning Firms: Expanding the Regulatory Tent Without Creating a Circus

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INTRODUCTION

Students studying business planning in an American law school should be told up front that a twenty-first century transactional lawyer rarely encounters a truly simple business transaction. Legal educators acknowledge the need to emphasize the complex, multidisciplinary nature of advising modern business clients.¹ Law students must be introduced to the reality that transactional attorneys routinely collaborate with accountants, engineers, and other types of specialists and consultants to properly identify issues and address

¹ See generally Mary C. Daly, *What the MDP Debate Can Teach Us About Law Practice in the New Millennium and the Need for Curricular Reform*, 50 J. LEGAL EDUC. 521 (2000); Phoebe A. Haddon, *The MDP Controversy: What Legal Educators Should Know*, 50 J. LEGAL EDUC. 504 (2000); Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 CAP. U. L. REV. 241 (1997); Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249 (2004); Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 WASH. U. J.L. & POL'Y 195 (2003); see also Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 284-85 (2000) [hereinafter Daly, *Choosing Wise Men Wisely*]; Susan Poser, *Main Street Multidisciplinary Practice Firms: Laboratories for the Future*, 37 U. MICH. J.L. REFORM 95, 117-21 (2003).

their clients' needs. Businesses—particularly firms comprised of entrepreneurs on tight budgets in terms of both time and money—benefit greatly when relevant information is accurately and efficiently communicated to the requisite team of advisors, and primary responsibility for each pertinent issue is assigned to the most qualified team member. The value of services delivered to business clients is further enhanced if all team members have a meaningful understanding of at least the basic elements of the issues being handled, as well as the vocabulary and problem-solving techniques employed by each trade or profession involved.

A uniquely effective approach to providing high quality service might take the form of an interdisciplinary business planning firm, owned and controlled by a group of knowledgeable parties that are willing to share risks and rewards, abide by ethical rules designed to protect the public, learn from each other, and deliver coordinated advice to firm clients. Law students—educated on both the importance of collaborative efforts among service providers and the long-recognized advantages of pooling resources and sharing profits in a business organization—might, therefore, be surprised to learn that the formation of such a “fully integrated, multidisciplinary partnership”² (“MDP”) violates rules governing the conduct of attorneys in virtually every state.³ The existing rules require service

² For purposes of this Article, “fully integrated” refers to a firm that is owned by lawyers and nonlawyers, controlled by lawyers, nonlawyers, or both, offering legal and other services, and presumably marketing itself as the provider of an effectively coordinated web of services. For descriptions of the “Fully Integrated” model, along with descriptions of the four “less integrated models” of multidisciplinary practice (known as the “Cooperative,” “Command and Control,” “Ancillary Business,” and “Contract” models), in which either the variety of services and/or the extent to which nonlawyers can possess ownership or control rights are severely limited, see generally Marc N. Biamonte, *Multidisciplinary Practices: Must a Change in Model Rule 5.4 Apply to All Law Firms Uniformly?*, 42 B.C. L. REV. 1161, 1172 (2001); Daly, *Choosing Wise Men Wisely*, *supra* note 1, at 224-27; Mary C. Daly, *Monopolist, Aristocrat, or Entrepreneur?: A Comparative Perspective on the Future of Multidisciplinary Partnerships in the United States, France, Germany, and the United Kingdom After the Disintegration of Andersen Legal*, 80 WASH. U. L.Q. 589 (2002) [hereinafter Daly, *Monopolist, Aristocrat, or Entrepreneur?*]; John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 153-71 (2000); COMM'N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS'N, HYPOTHETICALS AND MODELS (1999), at <http://www.abanet.org/cpr/multicomhypos.html> (last visited Oct. 21, 2004); STATE BAR OF CALIFORNIA TASK FORCE ON MULTIDISCIPLINARY PRACTICE, REPORT AND FINDINGS ON MULTIDISCIPLINARY PRACTICE iv-v, 21-23 (June 29, 2001), *available at* http://www.calbar.ca.gov/calbar/pdfs/reports/2001_MDP-Report.pdf [hereinafter CAL. MDP RPT.].

³ As discussed *infra* in notes 160-69 and accompanying text, the principal impediment to fully integrated MDPs is the version of Rule 5.4 of the ABA Model

providers to pursue more cumbersome (and less entrepreneurial) mechanisms for the delivery of interdisciplinary services.⁴ These rules also encourage lawyers in nonlegal professional services firms to claim that they are not providing legal services in order to avoid what has been called the “regulatory tent” under which lawyers ordinarily practice.⁵

Rules of Professional Conduct that is in place in most United States jurisdictions. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4 (1990) [hereinafter MRPC 5.4]; *see also* COMM'N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS'N, BACKGROUND PAPER ON MULTIDISCIPLINARY PRACTICE: ISSUES AND DEVELOPMENTS 8 n.41 (Jan. 1999), at <http://www.abanet.org/cpr/multicomreport0199.html> (last visited Oct. 21, 2004) [hereinafter ABA MDP COMM'N 1999 BACKGROUND PAPER] (explaining that while the District of Columbia has a special version of MRPC 5.4 that allows lawyers to practice in an MDP owned by lawyers and nonlawyers in that jurisdiction if the MDP's purpose is confined to the delivery of “legal services,” and although some states have generally declined to adopt a version of the ABA's Model Rules, prohibitions corresponding to the key aspects of MRPC 5.4 precluding fully integrated MDPs “are found in the ethics codes of the fifty states”).

The current version of MRPC 5.4, as it relates to the MDP debate and reflecting the 1990 and 2002 amendments, is essentially the same as the original rule that was adopted by the ABA House of Delegates in 1983. *See infra* note 162; *see also* CAL. MDP RPT., *supra* note 2, at vi, 3 (referring to the fully integrated model as the “pure form” of MDP and noting that such form of MDP is “universally prohibited”).

⁴ *See, e.g.*, Dzienkowski & Peroni, *supra* note 2, at 167 (noting that solo and small firm lawyers may find it “too complicated or cumbersome to contract with other professionals” and that a fully integrated model provides a more sensible sharing of economic risks and rewards); George Steven Swan, *A Multidisciplinary Bar and Financial Planners: The Recommendation of the District of Columbia Bar Special Committee on Multidisciplinary Practice*, 32 CAP. U. L. REV. 369, 374 (2003) (observing that the rules banning fee-sharing with non-lawyers “renders multidisciplinary practice more costly and inefficient”); COMM'N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS'N, APP. C: REPORTER'S NOTES (1999), at

<http://www.abanet.org/cpr/mdpappendix.html> (last visited Oct. 21, 2004) [hereinafter ABA MDP COMM'N 1999 REPORTER'S NOTES] (citing testimony of the ABA General Practice Council, Solo and Small Firm Section regarding “the need for multidisciplinary counseling of individual and business clients and the inefficiencies in attempting to satisfy that need through the coordinated advice of professionals in nonaffiliated firms”); CAL. MDP RPT., *supra* note 2, at 1 (explaining the reasons for the formation of the California MDP Task Force by observing that limitations on lawyers fee-sharing and acting as “co-principals” with nonlawyers “may have become hindrances in delivering effective legal services to the consuming public”). *Cf.* Burnele V. Powell, *Back to the Future Along the Hudson: Is the New York State of Mind Confused About MDPs?*, 2003 U. ILL. L. REV. 1377, 1398 [hereinafter Powell, *Back to the Future*] (suggesting that the MDP issue might be properly framed as a question of how the legal profession can “release the pent-up entrepreneurial talents of lawyers—especially, the traditional small and solo practitioners and young lawyers who have been educated in, and in many instances have become used to working in, team-oriented environments”).

⁵ *See* COMM'N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS'N, UPDATED BACKGROUND AND INFORMATIONAL REPORT AND REQUEST FOR COMMENTS 8, at <http://www.abanet.org/cpr/febmdp.html> (last visited Oct. 21, 2004) [hereinafter ABA MDP COMM'N 2000 UPDATED BACKGROUND REPORT]; ABA MDP COMM'N 1999

Proposals to remove existing obstacles to the formation and maintenance of fully integrated MDPs have been the subject of heated debate in the legal profession and legal academia for approximately the last six years.⁶ Attention to the MDP issues has been fueled to some extent by developments in other countries that have accepted at least some forms of multidisciplinary practice, or are studying proposals to do so.⁷ Approximately four years ago the American Bar Association's ("ABA") House of Delegates summarily rejected the recommendations of the ABA's Commission on Multidisciplinary Practice ("MDP Commission"), which would have facilitated the formation and regulation of at least some forms of fully integrated MDPs in the United States. Despite the ABA's adoption of "Resolution 10F" in July 2000,⁸ many states have continued to consider modification of their rules to permit these firms. Thus far

REPORTER'S NOTES, *supra* note 4, at 8 (both sources referring to an effort to prevent attorneys in non-traditional practice settings from attempting to avoid the attorney conduct "regulatory tent" by claiming that they are not practicing law).

⁶ See, e.g., Janice A. Alwin & Jason P. Eckerly, *Raising the Tax Bar: Redefining the Roles of Accountants and Lawyers for a Practical Solution to the Multidisciplinary Practice Debate*, 1 DEPAUL BUS. & COM. L.J. 257, 259-60 (2003) (chronicling the debate since 1998); Daly, *Monopolist, Aristocrat, or Entrepreneur?*, *supra* note 2, at 589-92; Robert R. Keatinge, *Multidimensional Practice in a World of Invincible Ignorance: MDP, MJP and Ancillary Business After Enron*, 44 ARIZ. L. REV. 717, 733-51 (2002).

But note that similar issues had been debated before. See, e.g., Daly, *Choosing Wise Men Wisely*, *supra* note 1, at 241-43; James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A 'Radical' Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1192-96 (both sources recounting the history of MRPC 5.4, and describing the ABA's 1983 rejection of the proposal by the Kutak Commission that would have legitimized "all forms of law practice and all financial arrangements for providing legal service, so long as there were assurances that the participating lawyers would meet their responsibilities under the rules of professional conduct").

⁷ See generally COMM'N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS'N, SUMMARY OF FOREIGN MDP ACTIVITY, at http://www.abanet.org/cpr/mdp-summ_fore_act.html (last visited Oct. 21, 2004); Daly, *Monopolist, Aristocrat or Entrepreneur*, *supra* note 2; Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV. 1547 (2000); Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become A New Rule*, 72 TEMP. L. REV. 869, 883-91 (1999) [hereinafter Terry, *A Primer on MDPs*]; Charles W. Wolfram, *Comparative Multi-Disciplinary Practice of Law: Paths Taken and Not Taken*, 52 CASE W. RES. L. REV. 961 (2002) [hereinafter Wolfram, *Comparative Multi-Disciplinary Practice*].

⁸ See HOUSE OF DELEGATES, AM. BAR ASS'N, RESOLUTION 10F, at <http://www.abanet.org/cpr/mdprecom10f.html> (last visited Oct. 21, 2004) [hereinafter RESOLUTION 10F]. Approximately three-fourths of the Delegates that voted cast their votes in favor of Resolution 10F. See John Gibeaut, *It's a Done Deal: House of Delegate Crushes MDP*, 86 A.B.A. J. 92, 92 (2000); L. Harold Levinson, *Collaboration Between Lawyers and Others: Coping with the ABA Model Rules After Resolution 10F*, 36 WAKE FOREST L. REV. 133, 133 (2001). The work of the MDP Commission in the approximately two years leading up to the adoption of Resolution 10F is discussed *infra* notes 170-223 and accompanying text.

none have implemented such modifications.⁹ Over the last few years, the ABA, the courts, and the bar associations of many states have also been revisiting existing definitions of the “practice of law,” as those definitions are used in rules prohibiting the unauthorized practice of law (“UPL”).¹⁰ At the same time, UPL issues have been involved in

⁹ In February 2000, the MDP Commission reported that approximately forty-one state and local bar associations were studying the possible relaxation of prohibitions on fee sharing in a multidisciplinary practice context. See COMM’N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS’N, POSTSCRIPT TO FEBRUARY 2000 MIDYEAR MEETING 1 (2000), at <http://www.abanet.org/cpr/postscript.html> (last visited Oct. 21, 2004) [hereinafter ABA MDP COMM’N 2000 POSTSCRIPT]. The ABA Web site contains status reports, in both chart and narrative form, that cover MDP studies and initiatives of various states and demonstrate that many states continued MDP studies after the ABA House of Delegates took action in July 2000. See COMM’N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS’N, STATUS OF MULTIDISCIPLINARY PRACTICE BY STATE (AND SOME LOCAL BARS)-UPDATED CHART, at http://www.abanet.org/cpr/mdp-state_action.html (last modified Apr. 2, 2003); COMM’N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS’N, STATUS OF MULTIDISCIPLINARY PRACTICE BY STATE (AND SOME LOCAL BARS)-UPDATED NARRATIVE, at http://www.abanet.org/cpr/mdp_state_summ.html (last modified Apr. 2, 2003) [hereinafter ABA MDP COMM’N STATES STATUS RPT.]. As of the fall of 2003, only a few of these studies had yielded pro-MDP recommendations, though many were deferred or put on hold. See Poser, *supra* note 1, at 107-08 & nn.64-70. Subsequent responses to status inquiries directed to representatives of state bar associations and court committees indicate that as of the date this Article was submitted for publication, most state bar association and court committee activity related to the MDP issue had been suspended because of the onset of other important issues. Memorandum from Andrew Koszewski, to Professor Anthony Luppino (Apr. 28, 2004), as updated by Memorandum from Theresa Fette-Warner, to Anthony Luppino (October 16, 2004) [hereinafter Koszewski Memo] (on file with author). In 2002, New York did adopt a very limited set of provisions permitting certain types of contract models and “strategic alliance” MDPs, but it clearly continued banning fully integrated MDPs. See *infra* notes 275-76 and accompanying text. Perhaps the most ambitious of the existing state MDP projects, in terms of the possibility that it will result in at least a “pilot” or “demonstration” project for a fully integrated MDP, is the proposal reflected in the California MDP Report. See discussion *infra* Part IV.

¹⁰ See TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, AM. BAR ASS’N, DRAFT DEFINITION OF THE PRACTICE OF LAW, at http://www.abanet.org/cpr/model_def_definition.html (Sept. 18, 2002) [hereinafter ABA MODEL DEFINITION]; TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, AM. BAR ASS’N, APP. A: STATE DEFINITIONS OF THE PRACTICE OF LAW, at http://www.abanet.org/cpr/model-def/model_def_statutes.pdf (last visited Oct. 23, 2004). The ABA Task Force’s failed attempt to formulate a “model definition” is discussed in Part III, *infra*. Responses to status inquiries regarding state-by-state initiatives indicate that the most productive active state practice of law projects have been in Indiana, Kansas, Massachusetts, Nebraska, Utah, and Wyoming. Koszewski Memo, *supra* note 9. See also KAN. BAR ASS’N, FINAL REPORT OF UNAUTHORIZED PRACTICE OF LAW COMMITTEE (May 23, 2004) [hereinafter KAN. UPL COMM. RPT.] (on file with author) (urging Board of Governors of Kansas Bar Association to recommend the Committee’s proposed practice of law definition to the Kansas Supreme Court); MASS. BAR ASS’N, REPORT OF THE TASK FORCE TO DEFINE THE PRACTICE OF LAW IN MASSACHUSETTS (June 2, 2004), at http://www.massbar.org/article.php?c_id=6622 [hereinafter MASS. UPL TASK FORCE

several areas, including studies of possible reform of rules governing multi-jurisdictional practice (“MJP”) by lawyers licensed in one or more jurisdictions who seek to work on matters in jurisdictions in which they are not licensed; law firms’ provision of “ancillary,” that is nonlegal services; and the regulation of “legal software” or “e-commerce.”¹¹ One commonly expressed goal of these projects is to provide more affordable, readily accessible professional services to underserved segments of the public.¹²

This Article will focus primarily on one such constituency—entrepreneurs endeavoring to start, sustain, or grow businesses. Representing a large segment of the United States economy, entrepreneurs, especially those involved in “small firm” businesses,¹³

RPT.] (requesting comments on a proposed practice of law definition). Significant state practice of law definition projects are discussed *infra* notes 108-19 and 151-57 and accompanying text.

¹¹ See COMM’N ON MULTIJURISDICTIONAL PRACTICE, AM. BAR ASS’N, CLIENT REPRESENTATION IN THE 21ST CENTURY, *available at* http://www.abanet.org/cpr/jclr/jclr_home.html (last visited Oct. 21, 2004) (including MJP-related recommendations adopted by the ABA’s House of Delegates on August 12, 2002); AM. BAR ASS’N, JOINT COMMITTEE ON LAWYER REGULATION, STATE MJP AND ETHICS 2000 CONTACTS, *at* http://www.abanet.org/cpr/jclr/state_contact_list.pdf (last visited Oct. 23, 2004); Keatinge, *supra* note 6, at 752-70; Justin D. Leonard, *Cyberlawyering and the Small Business: Software Makes Hard Law (But Good Sense)*, 7 J. SMALL & EMERGING BUS. L. 323 (2003); Mark Nance, *E-Commerce and the Unauthorized Practice of Law*, 8 ELEC. BANKING L. & COM. REP. 11 (June 2003).

¹² See, e.g., Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 574-78 (1994) (discussing the interplay of restrictions on practice with nonlawyers and the needs of “ordinary” American consumers several years prior to the most recent MDP, but after the Kutak Commission’s unsuccessful attempt at relaxation of such restrictions); Nathan M. Crystal, *Core Values: False and True*, 70 FORDHAM L. REV. 747, 762 (2001) (discussing studies documenting “a substantial need for legal services by both poor and moderate-income Americans”); CAL. MDP RPT., *supra* note 2, at 43 (characterizing the MDP debate as “a starting point in reconsidering the systems by which legal services are provided to a public . . . the majority of which is now unserved or underserved by the legal profession”); see also Press Release, Am. Bar Ass’n, American Bar Association Announces New Online Legal Research Center, *available at* <http://www.abanews.org/releases/news041404.html> (April 14, 2004) (announcing the establishment of an on-line resource center to provide assistance to groups studying “unbundling” arrangements under which, in an effort to make legal services more affordable, clients handle some aspects of their matter *pro se* and the lawyer delivers specified legal services on discrete tasks).

¹³ According to a 2002 report by the United States government’s Small Business Administration’s (“SBA”) Office of Advocacy, “small firms” (which the SBA defines as those with fewer than 500 employees) “represent about 99 percent of employers, employ about half the private sector workforce and are responsible for about two-thirds to three-quarters of the net new jobs.” OFFICE OF ADVOCACY, U.S. SMALL BUS. ADMIN., SMALL BUSINESS ECONOMIC INDICATORS FOR 2002, at 2, *available at* www.sba.gov/advo/stats/sbei02.pdf (last visited Oct. 21, 2004). The SBA also

have a distinct need for the coordinated delivery of legal counsel and other services. Unfortunately, there is reason to believe that many entrepreneurs are failing to get adequate advice on legal matters.¹⁴ At the same time, many others are customarily using an inordinate amount of their resources to pay the separate fees of lawyers and other professionals who are failing to achieve the communication and other efficiencies that might result if they were members of a single firm.¹⁵ This Article posits that fully integrated MDPs among lawyers, accountants and other nonlawyers (such as, for example, financial planners, engineers, business consultants, and insurance specialists), with a business planning and transaction implementation focus, would not only provide high quality, cost-effective services to their clients, but also help ensure that all of the service providers follow ethical rules designed to protect the public. In support of that conclusion, the analysis herein expands on arguments derived from the rich body of literature surrounding the MDP Commission's work and subsequent MDP debate, and draws on more recent lessons from ill-fated UPL initiatives as they relate to competence in the delivery of interdisciplinary services. The discussion below also emphasizes

reported that during 2002, the number of sole proprietorships in the United States rose to 18.4 million. *Id.* at 4; *see also* Jones, *supra* note 1, at 250-59 (discussing the importance, prominence, and underserved needs of small businesses in the context of community revitalization and economic and social justice).

¹⁴ *See, e.g.*, ABA MDP COMM'N 1999 REPORTER'S NOTES, *supra* note 4, at 7 (citing testimony and comments from consumer groups received by the MDP Commission suggesting that "more clients might actually use the services of a lawyer if that lawyer were practicing in a multidisciplinary professional services firm," and that "many middle-income individuals with legal needs do not go to lawyers due to unfamiliarity, discontent or even fear"); CAL. MDP RPT., *supra* note 2, at 43 (observing that a majority of the public is "unserved or underserved by the legal profession"); Dzienkowski & Peroni, *supra* note 2, at 126-27 (arguing that MDPs might be of benefit to small businesses, particularly in small towns where partnerships between lawyers and nonlawyers might be necessary to produce economically viable services); Poser, *supra* note 1, at 109-14 (pointing to "client demand" in various areas of need for legal advice to lower and moderate income individuals and small businesses).

¹⁵ *See* ABA MDP COMM'N 1999 REPORTER'S NOTES, *supra* note 4, at 6 ("The testimony before the Commission by consumer groups offered overwhelming support for the proposition that individual clients need integrated professional advice in any number of areas, including estate planning, small business counseling, accounting, and regulatory compliance. In the consumer groups' collective opinion, a dual practice model cannot meet these pressing needs."); Daniel R. Fischel, *Multidisciplinary Practice*, 55 BUS. LAW. 951, 972 (2000) (positing that a firm of professionals from multiple disciplines may be more attractive to a client than contracting with such professionals separately and may thereby "offer clients a superior product at lower cost [than law firms]"); Haddon, *supra* note 1, at 516 (citing anecdotal evidence of low-income consumer and small business demand for MDPs due to cost efficiencies and other benefits of a "team-centered" rather than "segmented" approach to problem-solving).

several practical aspects of transactional work and the sharing of risks and rewards in a business organization to demonstrate the feasibility of a regulatory structure under which participants in a fully integrated business planning MDP would have incentives to abide by appropriate standards of conduct in the delivery of services to their clients.

To provide context for these propositions, Part I summarizes the principal policy arguments that have characterized the MDP debate, including a description of conflicting views as to the extent to which MDPs might erode “core values” of the legal profession.¹⁶ Part II describes a hypothetical business formation scenario, as an example of a common situation in which the services of a business planning firm owned and operated by qualified lawyers and nonlawyers might be tremendously valuable. Part III then examines existing obstacles to the operation of such a firm, taking into account recent efforts to better define the “practice of law,” and addressing attorney conduct rules that continue to preclude the formation of fully integrated MDPs. That examination reveals that in business planning and

¹⁶ See, e.g., Fischel, *supra* note 15, at 974 (arguing that “rhetoric” of MDP opponents regarding such core values is merely a “cloak” for economic protectionism); Lawrence J. Fox, *Dan’s World: A Free Enterprise Dream and Ethics Nightmare*, 55 BUS. LAW. 1533, 1534 (2000) [hereinafter Fox, *Dan’s World*] (responding to Fischel by advocating strenuous resistance to MDPs, citing “core values” of the legal profession and arguing that “what separates [lawyers] from a world of auditors, investment bankers, and insurance salesman is our commitment to a higher set of values”); Lowell J. Noteboom, *Professions in Convergence: Taking the Next Step*, 84 MINN. L. REV. 1359, 1375-76 (2000) (describing the “core values” rationale expressed by MDP opponents and observing that William G. Paul, then President of the ABA, “suggests that allowance of MDPs would impact ‘our treasured core values,’ including ‘[l]awyer independence, avoidance of conflicts of interest, zealous representation [of clients] and the attorney/client privilege”); MULTIDISCIPLINARY PRACTICE TASK FORCE, ALA. STATE BAR, PROPOSED REPORT TO THE BOARD OF BAR COMMISSIONERS OF THE “CON” SUBCOMMITTEE OF THE ALABAMA STATE BAR’S MULTIDISCIPLINARY PRACTICE TASK FORCE (June 2, 2000) (on file with author) (“The rule changes required to render the MDP concept legal would, in the opinion of this committee, require the abandonment of the core values of the legal profession in this state and deprive clients of the most valued and basic principles governing the practice of law.”); SPECIAL COMM. ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION, N.Y. STATE BAR ASS’N, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION—THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, available at <http://www.lawcornell.edu/ethic/mdp.htm> (Apr. 2000) (on file with author) [hereinafter MACCRATE NY-MDP RPT.] (recommending rejection of proposals to allow fully integrated MDPs based on traditional core values and the proposition that maintaining a “unified profession” is itself a core value of the American Legal Profession); see also Daly, *Monopolist, Aristocrat, or Entrepreneur?*, *supra* note 2, at 624 (noting that “professional judgment, avoidance of conflicts of interest, and protection of client communications” are “the nettlesome core issues of the MDP debate”).

transactional work, where the lines between “legal” and “nonlegal” work are often quite blurry, there are no compelling reasons to retain a system that grants to firms owned or controlled exclusively by lawyers a monopoly on the delivery of the arguably “legal” services involved. Finally, Part IV suggests specific elements of a regulatory framework that are designed to permit fully integrated business planning MDPs to operate in a manner—adaptable to other types of multidisciplinary firms as well—that would elevate substance over form to both serve clients more efficiently and preserve core values of the legal profession that are in the public interest.

I. OVERVIEW OF THE MDP DEBATE

Many proponents of MDPs have properly cited “one-stop shopping” as a key to effective communication, appropriate division of responsibility, and informed collaboration among the professionals involved in a challenging modern day business planning project.¹⁷ Other supporters of MDPs stress free market concepts,

¹⁷ See, e.g., Alwin & Eckerly, *supra* note 6, at 261 (“Lawyers cannot do it all, but neither can any other licensed professional. A coordination of legal and nonlegal services into one practice minimizes the risk that a pertinent legal or business issue will be missed.”); Stacy L. Brustin, *Legal Services Provision through Multidisciplinary Practice—Encouraging Holistic Advocacy While Protecting Ethical Interests*, 73 U. COLO. L. REV. 787, 789 (2002) (advocating the acceptance of multidisciplinary practice in providing a range of legal, medical, and social services to those in need and arguing that separating legal from other services is “a reflection of shortsighted planning or lack of will”); Daly, *Choosing Wise Men Wisely*, *supra* note 1, at 282 (extolling the benefits of one-stop shopping both with respect to advising small business clients and advising individual clients on a wide range of “life-style decisions”); Dzienkowski & Peroni, *supra* note 2, at 117 (“When individuals work together on a regular basis, they provide a synergy that is simply not present when an individual works alone. The synergy is more likely to produce higher quality service for a client requiring both legal and non-legal representation.”); Jones & Manning, *supra* note 6, at 1210 (“Given the significant challenges facing American lawyers in the twenty-first century, such as globalization, rapid technological change, universal access to specialized information, and growing consumer demands for efficiency and cost effectiveness, it seems likely that the use of MDP organizations will prove an increasingly effective approach (and perhaps the only efficient approach) for the delivery of at least some legal services.”); Corinne N. Lalli, *Multidisciplinary Practices: The Ultimate Department Store for Professionals*, 17 ST. JOHN’S J. LEGAL COMMENT. 283, 286 (2003) (characterizing “one-stop shopping” as a centerpiece of movements toward MDP); J. Michael Norwood & Alan Patterson, *Problem-Solving in a Multi-Disciplinary Environment? Must Ethics Get in the Way of Holistic Services?*, 9 CLINICAL L. REV. 337, 341 (2002) (observing, with respect to relationships among legal and other professionals, that “[i]f they are managed well, the client will benefit from access to a creative and holistic problem-solving approach that can only be designed and implemented by a team of multidisciplinary professionals.”); Poser, *supra* note 1, at 113 (“A common partnership fosters a shared culture and produces a consistently high work product with uniform attention to professional standards.”); Swan, *supra* note 4, at 375 (“high net-worth individuals desire one-stop shopping for services”).

arguing that the competition engendered by allowing such firms to compete with traditional law firms will ultimately benefit the public.¹⁸ Still others take the position that MDPs will inevitably exist in some form in the United States, and that those who oversee the legal profession should acknowledge them and subject them to thoughtfully tailored regulation sooner rather than later.¹⁹ Nonetheless, the rules restricting the practice of law and those that govern attorney conduct in the United States have historically prohibited the formation of fully integrated MDPs, primarily through bans on partnerships and profit-sharing between lawyers and nonlawyers.²⁰

Opponents of initiatives to modify the existing rules and legitimize MDPs have based their opposition principally on the risk of having legal services provided by presumably unqualified nonlawyers,²¹ and perceived threats to core values of the legal profession. The most commonly cited “core values” allegedly in

¹⁸ See, e.g., Fischel, *supra* note 15, at 972-73 (arguing that MDPs may offer lower-cost interdisciplinary services than law firms and that self-serving protectionist arguments by lawyers to avoid or delay giving clients that option are “inimical to clients’ welfare and reverse indicators of desirable social policy”); Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977, 1038-39 (2003) (observing that advocates of the “dominant view” of professional regulation favor the ability of clients to choose their legal representation, and that “dominant view critics” ought to appreciate that multidisciplinary practice can result in greater access to and affordability of legal services).

¹⁹ See, e.g., John H. Matheson and Edward S. Adams, *Not “If” but “How”: Reflecting on the ABA Commission’s Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269, 1271, 1313 (2000); M. Courtland McBryde, *The Future of Multidisciplinary Practices in North Carolina: Love ‘Em or Hate ‘Em, North Carolina’s Only Option Is to Regulate Them*, 36 WAKE FOREST L. REV. 193, 195, 215 (2001); 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, 104 (2001) [hereinafter Powell, *Looking Ahead*]; Terry, *A Primer on MDPs*, *supra* note 7, at 922, 948.

²⁰ See *supra* note 3.

²¹ See, e.g., Dzienkowski & Peroni, *supra* note 2, at 144 (“Opponents of MDPs also contend that relaxing current restrictions will lead to a proliferation in the unauthorized practice of law, and will place lawyers who work in MDPs at risk of violating ethical rules by assisting nonlawyers engaged in such conduct.”); Carol A. Needham, *Permitting Lawyers to Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as We Know It?*, 84 MINN. L. REV. 1315, 1338 (2000) (“Any effort to use MDPs as an opening wedge to explicitly permit persons with no legal training to practice law should not be permitted.”); Robert A. Stein, *Multidisciplinary Practices: Prohibit or Regulate?*, 84 MINN. L. REV. 1529, 1535 (2000) (“Opponents of MDPs are concerned that if this development is permitted, we could soon have title companies openly practicing real estate law, banks practicing estate planning and probate law, and even large department stores having a legal department where legal services could be purchased” and “[s]ome have argued that the best way to deal with the MDP phenomenon is to more strictly enforce the unauthorized practice of law statutes.”).

jeopardy are the maintenance of the lawyer's independent judgment, avoidance of conflicts of interest, and preservation of the confidentiality of communications with clients.²² The invocation of unauthorized practice and core values concerns ultimately thwarted the efforts of the ABA MDP Commission in 1999 and 2000 to fashion reforms that, if adopted by the states, would have accommodated fully integrated MDPs within a regulated framework.²³

Several commentators have challenged such opposition, arguing that the predictions of harm to the public and subversion of the legal profession's core values that might come about by permitting MDPs are nothing more than rhetoric and hyperbole.²⁴ The fact that "competence" was not prominently mentioned in the litany of core values typically cited by MDP opponents did not deter other interested observers from recognizing its importance in the MDP debate,²⁵ and further supported questioning of the selectivity of the core values targeted by those opposing MDPs. Supplementing their usual arguments in response to such criticisms, MDP opponents have opportunistically cited recent, major audit failures involving publicly held companies as evidence of the dangers they see in allowing lawyers to fraternize too closely with accountants.²⁶ Using initial

²² See *supra* note 16.

²³ See, e.g., Crystal, *supra* note 12, at 747-49; Dzienkowski & Peroni, *supra* note 2, at 87, 128-52; see *infra* notes 170-218 and accompanying text.

²⁴ See, e.g., Fischel, *supra* note 15, at 974 ("Although defenders of the ban on fee sharing have attempted to cloak their arguments in the rhetoric of 'professionalism,' 'lawyer's independent judgment,' and the 'public interest,' their goals are no different from any other trade union or interest group pursuing economic protectionism."); 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, 1145 (2000) ("[T]he core values rationale is a belated explanation for restrictions that, at their inception, were transparently motivated by the financial self-interest of the bar's leadership [O]nly recently have defenders united around the core values rationale, which remains a work-in-process."); Powell, *Looking Ahead*, *supra* note 19, at 117 (citing the lack of empirical support for many of the "hyperbolic warnings" of MDP opponents and observing that "many of the predictions made by MDP opponents were, of course, the products of hyperbole, distortion, and the convenient lapses of memory that are so common to political discourse").

²⁵ See, e.g., Jones & Manning, *supra* note 6, at 1201-02 (discussing competence as core value and arguing that MDP arrangements can "preserve the individual lawyer's ability to develop professionally while at the same time the client is protected from unqualified decision-making and advice by the lawyer acting outside his own field of expertise"); see also Terry, *A Primer on MDPs*, *supra* note 7, at 934; *infra* notes 203-04 and accompanying text (discussing the MDP Commission's failure in its initial Report and Recommendation to identify competence as a core value).

²⁶ See, e.g., Lawrence J. Fox, *MDPs Done Gone: The Silver Lining in the Very Black Enron Cloud*, 44 ARIZ. L. REV. 547, 549 (2002) [hereinafter Fox, *MDPs Done Gone*] (referring to the Enron experience as a "vindication" of lawyers who opposed what

reactions to the “Enron debacle” and similar corporate financial scandals in this manner reflects a superficial and ultimately flawed analysis. As persuasively argued by Dean Burnele Powell,²⁷ who served as a member of the ABA’s Commission on Multidisciplinary Practice, those who argue that these corporate crises support a distancing of lawyers from accountants on purported ethical grounds overlook the reality that plenty of lawyers were involved in those situations.²⁸ These MDP opponents fail to recognize the distinct possibility that *more* interaction among the accountants and lawyers involved might have helped to avoid, rather than facilitate, scandalous transactions and deceptive accounting.²⁹

he characterizes as the Big Five accounting firms’ “arrogant business model of one-stop shopping”); Seth Rosner, *The Enron “What-If”—The Other Multidisciplinary Practice Story*, 12 EXPERIENCE 22, 22 (Spring 2002) (citing Arthur Andersen’s involvement in the Enron collapse as evidence that MDP opponents were right and commending those who opposed the MDP proposal when it came to the ABA House of Delegates for saying, “Not in our profession”); *see also* Keatinge, *supra* note 6, at 718 & n.2 (citing various reports of such claims of victory and observing that “[w]ith the demise of Enron Corporation, those who have opposed [multidisciplinary practice] have wasted no time in claiming that their opposition has been vindicated and that the last nail has been driven into the coffin of [multidisciplinary practice]”); Poser, *supra* note 1, at 98 (discussing the trend that many commentators see Arthur Andersen’s Enron problems as the “nail in the MDP coffin”); Order, *In re* Petition of the Minn. State Bar Ass’n to Amend the Minn. Rules of Prof’l Conduct to Authorize Multidisciplinary Practice, No. C8-84-1650 (Minn. Sept. 17, 2002) (reasoning, in the course of denying the Minnesota state bar’s request for rules amendments to permit MDPs, that “[d]evelopments in the arena of the accounting profession and corporate financial misconduct . . . counsel strongly against adoption of such a change in the structure of the legal profession at this time”).

²⁷ Dean of the University of Missouri–Kansas City School of Law during his tenure on the ABA’s MDP Commission, and currently Dean of the University of South Carolina School of Law.

²⁸ *See* Burnele V. Powell, *The Lesson of Enron for the Future of MDPs: Out of the Shadows and Into the Sunlight*, 80 WASH. U. L.Q. 1291 (2002) [hereinafter Powell, *The Lesson of Enron*]; *see also* Susan P. Koniak, *When the Hurlyburly’s Done: The Bar’s Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1237-43 (2003) (observing that many lawyers were undoubtedly involved in structuring and implementing the Enron transactions that are being scrutinized and referred to as accounting scandals).

²⁹ *See* Powell, *The Lesson of Enron*, *supra* note 28, at 1299 (asserting that “the one thing that will become clear when the dust settles after Enron is that if the legal profession had put the multidisciplinary safeguards in place . . . when it had the opportunity to do so, Enron would probably not have happened”); *see also* NANCY B. RAPOPORT & BALA G. DHARAN, *ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS* xiii (2004) (“The financial engineers assumed that the lawyers were taking care of the ‘legal stuff,’ and the lawyers assumed the accountants were taking care of the ‘financial stuff.’ Instead, legal and financial niceties were ignored, forgotten, or distorted.”); Richard W. Painter, *Afterword: Jurisdictional Competition as Federalism’s Answer to the Multidisciplinary Practice Debate*, 36 WAKE FOREST L. REV. 185, 188 (2001) (“Whether or not lawyers and accountants practice in the same firm, they need to understand each other’s professions and cooperate in order to maximize their value to corporate clients.”); Nancy B. Rapoport, *Multidisciplinary Practice After In re Enron*:

In many other respects, the MDP debate has been unduly influenced by exaggerated arguments, unwarranted predictions of doom, form over substance reasoning and, most importantly, insufficient attention to the needs of clients and obligations to the public at large. Notable literature in opposition to MDPs suggests, for example, that condoning the formation of such firms would result in a handful of multinational accounting firms essentially putting American lawyers out of business.³⁰ MDP opponents also strain to foster the belief that by practicing in firms together with accountants, lawyers will automatically lose their ability to comply with their ethical obligations and will recklessly facilitate the unauthorized practice of

Should the Debate on MDP Change at All?, 65 TEX. B.J. 446, 446-447 (2002) [hereinafter Rapoport, *Multidisciplinary Practice After In re Enron*] (arguing that the MDP debate should continue post-Enron and that both lawyers and accountants should focus on determining what kind of advice they should be giving their clients); Susan B. Schwab, *Bringing Down the Bar: Accountants Challenge the Meaning of Unauthorized Practice*, 21 CARDOZO L. REV. 1425, 1442 (2000) (“Accountants must know the law to adapt their accounting practice to its requirements. Similarly, lawyers must be familiar with accounting principles to properly advise their clients on various business issues.”).

³⁰ See generally Fox, *Dan’s World*, *supra* note 16 (arguing that there are many dangers inherent in the then “Big Five” taking over ever-increasing segments of the practice of law in ways that would undermine “core values” of the legal profession); 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, 1100, 1107 (2000) [hereinafter Fox, *Accountants*] (asserting that the then “Big Five” had “mounted a frontal assault on the legal profession”—which Fox characterizes as “guerilla war”—and warning against what he perceives as threats to the legal profession’s “core values” as “the accounting profession, in the name of the Big Five, have continued to expand their legal services, hiring new lawyers, launching their own law firms . . . and establishing special relationships with existing firms”).

Many commentators on the MDP controversy acknowledge the prominence of considerations regarding the “Big Five” in the debate. See, e.g., Crystal, *supra* note 12, at 748 (observing that “the issue of MDP is usually associated with the ‘Big Five’ accounting firms seeking to expand the delivery of professional services to sophisticated clients”); Green, *supra* note 24, at 1115 n.6 (“The current debate about multidisciplinary practice was sparked by the work of the Big Five accounting firms which employ thousands of lawyers to assist in rendering services to their clients.”); Geoffrey C. Hazard, *Foreword: The Future of the Profession: A Symposium on Multidisciplinary Practice*, 84 MINN. L. REV. 1083, 1084 (2000) (“In contemplating the MDP issue, we naturally think first of the big accounting firms.”); Jones & Manning, *supra* note 6, at 1183 n.112 (stating that “the [MDP] issue was pushed to the forefront only as large accounting firms began to make significant inroads in providing services traditionally offered through law firms”); Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1476 (2000) (positing that “with the specter of the Big Five haunting the legalization [of MDPs] debate, any regulatory system must be designed with such entities in mind”); Charles W. Wolfram, *The ABA and MDPs: Context, History, and Process*, 84 MINN. L. REV. 1625, 1635-36 (2000) (characterizing the focus on the activities of the Big Five as a “fixation”).

law by presumably unqualified and perhaps less scrupulous nonlawyers, quizzically implying that individual lawyers have the ability to maintain high ethical standards only if surrounded and influenced exclusively by other lawyers.³¹

While the MDP debate continues to focus largely on alleged excesses of the now “Big Four” accounting firms,³² apparently under an assumption that lawyers are, as a group, inherently more virtuous than accountants or other professionals,³³ many elements of the public—not just the relatively affluent clients who could afford the fees of “Big-Four” MDPs—suffer from the delay in permitting and regulating what many feel is the unavoidable emergence of MDPs in the United States.³⁴ As some observers have begun to point out with more vigor in the last few years—in such diverse areas as family law, health and social services and small business and community development—many low and middle income consumers of legal and other professional services are likely beneficiaries of the efficiencies of multidisciplinary practice, and are consequently damaged by bars

³¹ See Fox, *Dan’s World*, *supra* note 16, at 1534 (declaring that “what separates us from the world of auditors, investment bankers, and insurance salesmen is our commitment to a higher set of values,” and that “placing lawyers in alternative practice settings in which they were mere employees or even partners of others would destroy the bulwark that has been our profession’s best defense against the compromise of these values”); Fox, *Accountants*, *supra* note 30, at 1103 (“It is pressure from nonclient, nonlawyers that we must be ever vigilant to guard against and it is precisely those influences that compromise our professional independence.”); Rosner, *supra* note 26, at 23 (reflecting on the Enron debacle and asserting that the legal profession owes much to lawyers and bar associations who kept MDPs out of “our profession,” but also suggesting that lawyers not be “smug about the MDP matter” and instead be diligent in telling clients when they are engaging in wrongdoing and when they should take corrective action). Cf. Powell, *Looking Ahead*, *supra* note 19, at 114-15 (“The opponents to MDPs were, from the outset and remain, wedded to the principle that lawyers are inherently incapable of working in peer relationships with other professionals . . .”).

³² See, e.g., Daly, *Monopolist, Aristocrat, or Entrepreneur?*, *supra* note 2, at 599-644 (describing the ongoing prominent role of the accounting firms in MDP debates in various European countries, as well as the United States, and predicting that the demise of Arthur Andersen will not mean the end of MDP efforts by what she cleverly refers to as the “Final Four”—i.e., the four firms remaining of the “Big Five,” which formerly included Arthur Andersen); Wolfram, *Comparative Multi-Disciplinary Practice*, *supra* note 7, at 963 (suggesting that “too often” MDP discussions “devolve into a discussion of the ambitions of the Big Five”).

³³ Compare sources cited *supra* note 31, with Fischel, *supra* note 15, at 956 (“[T]he notion that lawyers are somehow more virtuous and public minded than others is an obviously self-serving characterization without empirical support.”), and Jones & Manning, *supra* note 6, at 1203 (“Indeed, to suggest that lawyers are more prone to honesty and fair dealing than other professionals or even more interested in the maintenance of an effective judicial system than other citizens smacks of professional hubris.”).

³⁴ See *supra* notes 18-19 and accompanying text.

to the formation of MDPs.³⁵ In keeping with the focus of this Article on business transactions, Part II below illustrates in detail how a fully integrated MDP might be of particular value to entrepreneurs of modest means planning the formation and operation of a business venture.³⁶

II. A TYPICAL BUSINESS PLANNING CHALLENGE

Among the many types of projects on which a business lawyer, along with other professionals and specialists, might customarily provide assistance to clients is the formation of a new business venture. Imagine, for example, a situation in which an individual named Brad is planning the establishment of a sports/recreational facility (the "Transplex"), featuring what he believes will be a unique blend of interactive sports-oriented games and water-sports rides, along with a food court. Brad is a mechanical engineer by training and is currently employed as the supervisor of the repair crew at a very large amusement park in a metropolitan area. He is an extremely observant and creative individual. He makes a decent salary, but has little savings and a substantial amount of outstanding student loans.

Brad shows his friend Janet a sketch he made of the Transplex and shares with her his ideas as to an ideal location on some undeveloped land which he inherited from his parents. The proposed site is about one hundred miles south of the amusement park where Brad works. Janet teaches physical education at a local high school near the proposed site of the Transplex, and coaches some of the school's sports teams. She earns a very modest salary and does not have other substantial financial resources, apart from

³⁵ See generally, e.g., Brustin, *supra* note 17; Crystal, *supra* note 12; Jones, *supra* note 1; Norwood and Patterson, *supra* note 17; Poser, *supra* note 1.

³⁶ For general references in the MDP literature to the possibility of MDPs benefiting small firms and small business, see, e.g., ABA MDP COMM'N 1999 REPORTER'S NOTES, *supra* note 4, at 7 (reporting that the MDP Commission found particularly significant testimony of the Council of the ABA General Practice, Solo and Small Firm Section and noting "the need for multidisciplinary counseling of individual and business clients and the inefficiencies in attempting to satisfy that need through the coordinated advice of professionals in nonaffiliated firms"); Daly, *Choosing Wise Men Wisely*, *supra* note 1, at 282 ("An MDP will allow the Main Street lawyer to offer the small business client "one-stop-shopping for advice in a wide range of areas, including dispute resolution, tax, technology, business planning, environmental regulation compliance, and human resources."); Poser, *supra* note 1 (citing both "client demand" and "lawyer demand" and proposing special system of regulation for fully integrated MDPs that would limit the number of "professional members" which might operate in a variety of practice areas, including advising small businesses, to thirty members).

\$50,000 that she recently won in the state lottery. Having concluded that Brad's plans for the Transplex are well conceived, and that, in her opinion, it will likely do very well in the proposed location, Janet tells Brad that she might be interested in investing in the project. Neither Brad nor Janet has any meaningful experience with business organizations, marketing, or finance, and neither has ever hired a lawyer. Brad is now seeking professional advice regarding the formation of a business venture to develop, own, and operate the Transplex.

The circumstances surrounding Brad's Transplex proposal are not unlike those present in many entrepreneurial endeavors. Someone with creativity, a willingness to take calculated risks and a confident sense of what consumers want has an idea, and has identified someone else with some "seed money" that might help transmute that idea into a profitable business. As with many start-up business ventures, there is a multitude of issues to address in advising Brad, which will require many different types of expertise. The remainder of this section will briefly discuss some of the principal business planning issues implicated in the Transplex scenario and identify a variety of service providers with whom Brad may want to consult.

A. Principal Issues Presented

1. Threshold Business Points

Two broad categories of business issues confront Brad. First, he will have to consider matters pertaining to the business enterprise in relation to third parties, such as consumers and competitors for the same consumer dollars. Second, he will have to address the appropriate division of rights and responsibilities among parties involved in the ownership and operation of the enterprise, such as co-owners and employees. The first group of issues might include, for instance, budgeting questions, a feasibility study and marketing analysis, determination of the number and types of employees necessary to operate the facility, price-setting and payment mechanics, and advertising decisions. The second category, relating to employees' and co-owners' rights and responsibilities, presumably would include such concerns as arranging employee compensation and benefits and, with respect to co-owners, agreement on such critical points as obligations to contribute capital or personally guarantee financing; sharing of profits and losses; decision-making processes and sharing of authority; transferability of ownership

interests; and buy–sell rights.

2. Legal Issues in Implementing the Business Plan

The Transplex hypothetical presents questions that will require input from several legal disciplines. There will certainly be a need for a choice of entity analysis involving, among other things, intertwining of business organization laws and federal, state, and local tax laws.³⁷ The process of raising capital will bring federal and state securities laws into play.³⁸ Employment law will also be critical in terms of such issues as analyzing whether Brad might be breaching any obligations to his current employer, negotiating and drafting employment agreements with Transplex employees,³⁹ negotiating and drafting organizational documents among the owners of the new business venture, and entering into contracts with construction contractors and various suppliers of goods and services. Then there is the need to identify and obtain all necessary licenses and permits. The business will have to comply with zoning laws and environmental laws, as well as health and safety and other labor-related laws.⁴⁰ There will be intellectual property issues to address.⁴¹ Succession and estate planning for the business and its owners should also be considered.⁴² As planning goes forward on the Transplex project, additional legal issues may arise; the list described above is by no means exhaustive.

3. Other Miscellaneous, But Important Matters

In the course of planning the proposed Transplex venture, a wide range of ancillary matters will also become important. For example, the nature of the business suggests a need for careful assessment of insurance requirements and securing of related

³⁷ For general descriptions of principal tax and non-tax factors involved in a choice of entity analysis, see, e.g., FRANKLIN A. GEVURTZ, *BUSINESS PLANNING* 56-113 (3d ed. 2001); THOMAS LEE HAZEN & JERRY W. MARKHAM, *CORPORATIONS AND OTHER BUSINESS ENTERPRISES* 18-23 (Standard ed. 2003); Richard A. Mann et al., *Starting from Scratch: A Lawyer's Guide to Representing a Start-Up Company*, 56 ARK. L. REV. 773, 790-805 (2004).

³⁸ See, e.g., GEVURTZ, *supra* note 37, at 573-696; Mann et al., *supra* note 37, at 829-39.

³⁹ See, e.g., Mann et al., *supra* note 37, at 806-17.

⁴⁰ See, e.g., OFFICE OF ADVOCACY, U.S. SMALL BUS. ADMIN., *LAWS AND REGULATIONS*, at <http://www.sba.gov/advo/laws> (last visited Oct. 21, 2004) (alerting those interested in starting small business to comply with such laws and regulations).

⁴¹ See, e.g., GEVURTZ, *supra* note 37, at 45-50; Mann et al., *supra* note 37, at 775-89.

⁴² See generally EDWIN T. HOOD ET AL., *CLOSELY HELD BUSINESSES IN ESTATE PLANNING* (2d ed. 2003) (exploring the many tax and other legal issues involved in addressing relationship between business and succession planning for a closely held business and the estate planning goals of its owners).

insurance coverage. In addition, the business will require payroll management and bookkeeping systems, ongoing tax reporting and payment arrangements, property maintenance and clean-up services, continuous marketing and advertising activities, and arrangements for the purchase and delivery of goods and services needed to operate the business. Many other miscellaneous issues not mentioned above may also require attention as further details of the business plan are developed.

B. Individuals Needed for Requisite Advising

Unfortunately for small business entrepreneurs, the number and complexity of business, legal and ancillary issues involved in the formation and operation of business ventures is not proportionate to the amount of dollars involved in the particular enterprise. The Transplex situation illustrates that even a relatively small business endeavor presents a number of issue-spotting and problem-resolution challenges. As in the case of Brad and Janet, the principals or founders of the business may excel in technical areas and/or have funds to fuel the venture, but often may have little or no familiarity with the many detailed aspects of designing a sound business plan, negotiating contract terms, creating an organizational structure, and complying with a maze of tax and other laws in establishing and conducting the business. It is not at all surprising that someone in Brad's situation will be seeking professional assistance in such matters.

How many advisors will Brad need to help him get the Transplex up and running? He could certainly use at least one lawyer. Indeed, the scope of legal issues described above suggests that he may need more than one, since some specialty areas of the law will certainly be involved. The business will likely need to employ one or more accountants to handle on-site bookkeeping and the preparation of financial and tax reports, and perhaps to engage in tax planning. Given Brad and Janet's lack of experience in operating their own business, they might also seek advice from business consultants familiar with budgeting, marketing, and finance. An expert in computer systems and information technology may also be an important resource. Other possibly important advisors might include individuals experienced in real estate development, insurance agents, systems analysts and advertising experts.

In short, sound business planning for Brad's project will almost

certainly require a team of qualified players.⁴³ The team could comprise a network of individuals from different firms, attempting to coordinate their efforts on Brad's behalf. Opponents of fully integrated MDPs tend to argue that the "one firm" approach is unnecessary, and that some attention to communication among the individuals from the different law, accounting, and other firms involved can supply the necessary coordination.⁴⁴ This line of reasoning is reflected in the work of Lawrence Fox, one of the most vocal and prominent MDP opponents, who asserts that the need for "one-stop shopping" is exaggerated and belittles the concept by referring to it as "making one telephone call instead of two."⁴⁵ Such an oversimplification is more than just hyperbole. It is, among other things, a reflection of the fact that the MDP debate has been largely waged as a turf battle between lawyers and accountants. The result has been insufficient attention to the practical challenges of obtaining multidisciplinary counseling often faced by clients of modest financial means and limited sophistication as consumers of professional services.

In Brad's situation, for example, the team of service providers—likely to consist of more than just lawyers and accountants—would work most efficiently if it initially met together with Brad, allowing him to explain his project to all of them at once, face-to face.⁴⁶ Such a meeting would have multiple benefits, in addition to the client's convenience. In terms of effective fact gathering and team building, a one-location, all-hands meeting is superior to the conference call or "e-meeting" alternatives because it allows for perception of demeanor and interactive questioning where the participants can visually as well

⁴³ See, e.g., Schlossberg, *supra* note 1, at 195 (stressing the need to expose law students in clinical programs that involve transactional work to the importance of collaborative multidisciplinary team approaches); see also *supra* note 17 and accompanying text.

⁴⁴ See Fox, *Accountants*, *supra* note 30, at 1104 (questioning the "so-called benefit" of one-stop shopping); Haddon, *supra* note 1, at 517 ("The opponents of change seemed to trivialize and even disparage clients' concerns about cost and their desire for one-stop shopping, and they emphasized that significant contractual opportunities and other possibilities for collaboration exist without permitting fee sharing.").

⁴⁵ Fox, *Accountants*, *supra* note 30, at 1104.

⁴⁶ Cf. Biamonte, *supra* note 2, at 1167-69 (summarizing efficiency and quality control benefits in coordinated settings discerned from testimony of small business and other witnesses before the MDP Commission); Brustin, *supra* note 17, at 788-96 (extolling the virtues of a holistic multidisciplinary approach in community settings involving a blending of professionals, such as lawyers, doctors, and social workers); Rapoport, *Multidisciplinary Practice After In re Enron*, *supra* note 29, at 446-47 (arguing that clients want the opportunity to tell their story once, avoid having issues missed, and "get the best advice possible from a synergy of professional opinions").

as verbally assess appropriate times to break and measure responses. Such personal interaction reduces the potential for miscommunication inherent in the alternative of separate meetings between Brad and the various service providers, or in a network approach where Brad explains the project to, say, a lawyer, who then, in separate telephone or other communications, explains it to the accountant, business consultant, insurance agent and other specialists. Physically assembling individuals with issue-spotting skills from multiple disciplines, at least at early-stage planning sessions, can also help prevent the inefficiencies that result when one advisor starts the client down a path of planning only to later find that considerations from another discipline (often the law) preclude following that path.

Some might argue that this type of meeting is overkill—that having several individuals together, many of whom may be charging on an hourly basis, is piling a lot of fees on the client, who may not necessarily need everyone there for an entire meeting. Certainly, care must be taken to engage in a cost-benefit analysis in determining which individuals should be asked to participate in the session, and to set and follow an agenda (that might, for example, include dismissing certain team members from the session when their continued presence ceases to be cost effective). Lawyers are exceptionally good at identifying the need for experts in other areas, and at setting and implementing an agenda for multidisciplinary cooperation.⁴⁷ Many fees are not just a question of the hourly rates; they are generally determined by multiplying those rates by the number of hours to do the job. If handled thoughtfully, multidisciplinary planning meetings ultimately save significant amounts of time and trouble, and thus tend to help keep fees manageable and avoid costly surprises.

It does not, of course, follow that the virtues of the “all hands” meeting require that the service providers all be members of a single firm. However, in many circumstances, a client would benefit if that were the case. Among other things, having one firm rather than

⁴⁷ See, e.g., Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 294-303 (1984) (observing that the business lawyer can be a “transaction cost engineer”); Poonam Puri, *Taking Stock of Taking Stock*, 87 CORNELL L. REV. 99, 108 (citing Gilson, *supra*, with approval, and noting that “lawyers are among the first service providers that entrepreneurs contact to hone a strategy, establish ties with other key industry players, and prepare the start-up for introduction to investors”); MACCRATE NY-MDP RPT., *supra* note 16, ch. 4.1 (“When the need arises, lawyers are quite capable of working effectively with other professionals, and frequently recommend that particular accountants, financial advisors, investment bankers, engineers, brokers, social workers, and others be engaged by their clients.”).

many provide Brad with the necessary start-up services would tend to reduce “overhead” expenses substantially, particularly when one considers such matters as consolidating administrative support, billing and collection systems, personnel, and such apparatus as computer and telephone systems. Avoiding duplication of such expenses (not to mention travel time) should result in lower rates and costs charged to consumers of business planning advice, many of whom will be struggling to budget for professional fees.⁴⁸ As the project progresses beyond the initial meeting, a fully integrated MDP could provide various other efficiencies and quality controls on an ongoing basis. The sharing of risks and rewards among members of an MDP would create incentives for the maintenance of a system of checks and balances designed to make sure that tasks are handled by appropriately qualified individuals and that all members of the team are doing their jobs properly.⁴⁹ Under current regimes, however, Brad would have trouble finding this type of business planning firm in the United States, because applicable state laws impose barriers to fully integrated MDPs.⁵⁰ The next section examines those obstacles in view of recent developments in both the UPL and MDP areas, suggesting that changes to the applicable rules are needed in order to provide entrepreneurs such as Brad with an opportunity to benefit from the services of such a firm.

III. REVISITING TRADITIONAL BARRIERS TO MDPs

A. UPL Statutes

1. Defining the “Practice of Law” in General

One of the concerns expressed with respect to the proposed formation of fully integrated MDPs is that they might create more instances in which nonlawyer participants would be engaging in the “practice of law,” in violation of state statutes and court rules limiting

⁴⁸ Rapoport, *Multidisciplinary Practice After In re Enron*, *supra* note 29, at 447 (“I’m sure that clients hope that the fees from a one-stop shop would reflect some economies of scale that come from shared overhead, eliminated redundancy, and a shorter learning curve.”). In other situations calling for multidisciplinary teams, the need for a one-stop shop may be even more acute, especially when indigent clients have to use public transportation to get to meetings with service providers. *See* Brustin, *supra* note 17, at 787.

⁴⁹ *See infra* notes 294-300 and accompanying text.

⁵⁰ *See generally* Daly, *Choosing Wise Men Wisely*, *supra* note 1, at 240-52 (providing useful background and an excellent summary of “The Ethical and Regulatory Barriers to MDPs in the United States” as they stood in 2000).

the authority to practice law to licensed attorneys.⁵¹ The widespread criticism of UPL provisions as rather vague and difficult to enforce complicates the task of assessing the relevance of this issue to the MDP debate.⁵² At the heart of the problem with these statutes is the difficulty in drafting a workable definition of the “practice of law.” Law permeates so many aspects of both personal lives and commercial affairs that, in one way or another, most individuals, whether or not they are lawyers, are knowingly or unknowingly encountering and interpreting laws on a daily basis. Although there may be consensus that at least some dealings with the law require the expertise of trained lawyers, and are therefore within the exclusive province of licensed attorneys, defining that province is much easier said than done.

A sampling of “catch all” components of some of the existing definitions of the practice of law bears witness to the problems of vagueness, circularity, and overbreadth that have plagued UPL provisions in this country. For example, several states’ statutes or court rules include within the definition of the practice of law such categories as: “the giving of any legal advice”;⁵³ “any action taken for others in any matter concerned with the law”;⁵⁴ and “the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require [sic] the knowledge and skill of a person trained in the law.”⁵⁵ Tautologies

⁵¹ See *supra* note 21; see also Daly, *Choosing Wise Men Wisely*, *supra* note 1, at 248 (observing that the rules prohibiting MDPs are “inextricably linked” to “the nationwide interdiction against the practice of law by lay persons”).

⁵² See, e.g., ABA MDP COMM’N 1999 BACKGROUND PAPER, *supra* note 3, at 6; COMM’N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS’N, RECOMMENDATION AND REPORT TO THE HOUSE OF DELEGATES 13 (July 2000), available at <http://www.abanet.org/cpr/mdpfinalrep2000.html> (last visited Oct. 21, 2004) [hereinafter ABA MDP COMM’N 2000 RECOMMENDATION & RPT.]; Quintin Johnstone, *Unauthorized Practice of Law and the Power of the State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795 (2003); McBryde, *supra* note 19, at 211-12; Terry, *A Primer on MDPs*, *supra* note 7, at 873.

⁵³ GA. CODE ANN. § 15-19-50 (2003); MD. CODE ANN., BUS. OCC. & PROF. § 10-101(h)(1) (2004).

⁵⁴ GA. CODE ANN. § 15-19-50.

⁵⁵ WASH. STATE COURT RULES, RULES OF GEN. APPLICATION, GEN. R. CT. 24 (2004); see also Letter from Department of Justice & Federal Trade Commission, to the Task Force on the Model Definition of the Practice of Law 1 (Dec. 20, 2002), available at <http://www.ftc.gov/opa/2002/12/lettertoaba.htm>, <http://www.abanet.org/cpr/model-def/ftc.pdf> [hereinafter DOJ/FTC Letter] (“Courts and bar agencies struggling to define the somewhat amorphous concept of the practice of law have come up with several different tests. For example, the ‘commonly understood’ test defines the practice of law as composed of activities that lawyers have traditionally performed [A]nother test used to define the practice of law focuses on the existence of an attorney–client relationship Other tests

such as these beg obvious and significant questions. Is *any* advice that can affect compliance with laws or affect legal rights or obligations *ipso facto* “legal advice”? Are not essentially *all* matters *concerned with* the law? Are there *no* matters involving legal principles on which a nonlawyer might have more skill and knowledge than a lawyer?⁵⁶

As a general proposition, the states’ definitions of the practice of law have been seriously flawed for decades. In the face of the proliferation of laws and regulations affecting virtually all industries and professions, many states have instituted projects to reconsider their “practice of law” definitions.⁵⁷ Some of these efforts are driven by the notion that an overly broad definition is anticompetitive and thus harms consumers in terms of cost and access to advice.⁵⁸ Others may be rooted in a desire to better define the practice of law so as to expedite the process of prosecuting nonlawyers, since such prosecutions are increasingly difficult under patently vague statutes.⁵⁹ Regardless of underlying motives, a review of some of the results of UPL initiatives over the last few years will provide a better understanding of some significant aspects of the MDP debate.

2. The ABA’s Unsuccessful Attempt at a Model Definition

Against a backdrop of lack of uniformity and difficulty in administering state UPL laws, in 2000 the ABA appointed a Task Force on the Model Definition of the Practice of Law.⁶⁰ In a “challenge statement” explaining the mission of the Task Force, ABA President Alfred P. Carlton pointed to “the revelation that there are an increasing number of situations where nonlawyers are providing

are based upon the client’s belief as to whether or not he or she is receiving legal services, whether the activity involves the application of legal knowledge to the specific situation of an individual, and whether the services provided affect the recipient’s legal rights.”) (footnotes omitted).

⁵⁶ Cf. *Seitzinger v. Cmty. Health Network*, 676 N.W.2d 426 (Wis. 2004). In *Seitzinger*, the majority interpreted bylaws at issue to require representation of a doctor by a licensed attorney in a peer review hearing, concluding that the hearing could be expected to “focus on legal issues” or require activities “that resemble the practice of law.” *Id.* at 438. In dissent, Chief Justice Abrahamson characterized these terms as “vague, broad and undefined phrases,” and argued that the concept that the activities they describe can be performed only by a state-licensed attorney “creates an unworkable rule of law.” *Id.* at 447 (Abrahamson, C.J., dissenting).

⁵⁷ See *supra* note 10.

⁵⁸ See DOJ/FTC Letter, *supra* note 55, at 2.

⁵⁹ See *infra* notes 61-62 and accompanying text.

⁶⁰ See TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, AM. BAR ASS’N, RECOMMENDATION AND REPORT 2-3 (adopted Aug. 11, 2003), available at http://www.abanet.org/cpr/taskforce_rpt_803.pdf (on file with author) [hereinafter ABA MODEL DEFINITION TASK FORCE RECOMMENDATION AND RPT.].

services that are difficult to categorize under current statutes and case law as being, or not being, the delivery of legal services.”⁶¹ He further observed, “[t]his growing gray area may be partially responsible for the spotty enforcement of unauthorized practice of law statutes across the nation and arguably the increasing number of attendant problems related to the delivery of services by nonlawyers.”⁶²

The ABA Task Force was, arguably, given a “protectionist” charge.⁶³ The emphasis seemed to be on deriving a definition that would make it easier to enjoin nonlawyers from engaging in activities perceived to be reserved exclusively for lawyers. On the other hand, the actual wording of the “challenge” was multifaceted, directing the Task Force “[t]o determine the best approach for the [ABA] to address whether to create a model definition of the practice of law that would support the goal to provide the public with better access to legal services, be in concert with governmental concerns about anticompetitive restraints, and provide a basis to effective enforcement of unauthorized practice of law statutes.”⁶⁴

In any event, the draft model definition (“ABA Draft Definition”) that the Task Force circulated in September 2002 was extremely broad. It contained a short definition of the “practice of law” similar to that found in the statutes quoted above,⁶⁵ focusing on applying legal principles and judgment to advise others on circumstances or objectives “that require the knowledge and skill of a person trained in the law.”⁶⁶ The ABA Draft Definition then proceeded to list the following four categories of actions that would be “presumed” to fall within such definition of the practice of law:

- (1) giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;

⁶¹ TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, AM. BAR ASS’N, CHALLENGE STATEMENT, at http://www.abanet.org/cpr/model_def_challenge.html (last visited Oct. 21, 2004) [hereinafter CHALLENGE STATEMENT]; see also ABA MODEL DEFINITION TASK FORCE RECOMMENDATION AND RPT., *supra* note 60, at 2-3.

⁶² CHALLENGE STATEMENT, *supra* note 61. President Carlton did assert, however, that since the ABA had adopted policies that related to and were dependent upon a definition of the practice of law without ever adopting such a definition, it had not rendered such policies “insubstantial or unenforceable when adopted by jurisdictions because of that void.” *Id.*

⁶³ Some observers would no doubt argue that a protectionist approach is completely consistent with a long tradition of trade protection in the self-regulation of the legal profession. See, e.g., Perlman, *supra* note 18, at 998 nn.121-25, and authorities cited therein.

⁶⁴ CHALLENGE STATEMENT, *supra* note 61.

⁶⁵ See *supra* notes 53-56 and accompanying text.

⁶⁶ ABA MODEL DEFINITION, *supra* note 10, at 1.

- (2) selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;
- (3) representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or
- (4) negotiating legal rights or responsibilities on behalf of a person.⁶⁷

One might have expected the breadth of these presumptions to trigger protest from the accounting profession and other trade groups providing services that customarily involve legal issues. Indeed, many did protest. For example, attacks on the broad language of the proposed definition and calls for exceptions for law-related work routinely performed by their constituents came from spokespersons for accountants,⁶⁸ paralegals,⁶⁹ law librarians,⁷⁰ human resource management services,⁷¹ and real estate professionals.⁷²

Notably, two high-profile governmental agencies—the United States Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”)—also took up the fight for nonlawyers. On December 20, 2002, the DOJ and FTC issued a joint letter to the ABA’s Task Force sharply criticizing its proposal.⁷³ In recommending that the ABA either substantially narrow or reject the draft definition, the DOJ/FTC Letter characterized the definition as “overbroad” and warned that its promulgation “could restrain competition between lawyers and nonlawyers to provide similar services to American

⁶⁷ *Id.*

⁶⁸ Memorandum from the American Institute of Certified Public Accountants, to the Task Force on the Model Definition of the Practice of Law (Dec. 20, 2002), *available at* <http://www.abanet.org/cpr/model-def/aicpa.pdf> [hereinafter AICPA Memorandum].

⁶⁹ *See* Letter from Karen Belcher & Stephen P. Imondi, National Federation of Paralegal Associations, to Arthur Garwin, ABA Task Force on the Model Definition of the Practice of Law (Dec. 18, 2002), *available at* <http://www.abanet.org/cpr/model-def/nfpa.pdf>; Letter from Susan D. Alden, Hawaii Paralegal Association, to Arthur Garwin, ABA Task Force on the Model Definition of the Practice of Law (Dec. 19, 2002), *available at* http://www.abanet.org/cpr/model-def/hawaii_paralegals.pdf.

⁷⁰ Letter from Robert L. Oakley, Washington Affairs Representative, American Association of Law Libraries, to the Task Force on the Model Definition of the Practice of Law (Feb. 04, 2003), *available at* <http://www.abanet.org/cpr/model-def/aall.pdf>.

⁷¹ *See* Letter from Susan R. Meisinger, Society for Human Resources Management, to Arthur Garwin, Center for Professional Responsibility, American Bar Association, *available at* <http://www.abanet.org/cpr/model-def/shrm.pdf>.

⁷² *See* Letter from James R. Maher, American Land Title Association, to Arthur Garwin, Center for Professional Responsibility, American Bar Association (Dec. 20, 2002), *available at* <http://www.abanet.org/cpr/model-def/alta.pdf>.

⁷³ DOJ/FTC Letter, *supra* note 55.

consumers.”⁷⁴ The DOJ and FTC predicted that if the ABA Draft Definition were adopted by states it would be “likely to raise costs for consumers and limit their competitive choices.”⁷⁵ Even though they recognized the legitimacy of the Task Force’s efforts to protect consumers from harm when nonlawyers attempt to provide services in “circumstances requiring the knowledge and skill of a person trained in the law,” the DOJ and FTC concluded that “the proposed definition is not in the public interest because the harms it imposes on consumers by limiting competition are likely much greater than any consumer harm that it prevents.”⁷⁶

In support of this conclusion, the DOJ and FTC offered several examples of activities that they apparently believed might be inappropriately included within the “practice of law” under the ABA Draft Definition. Among other things, the two agencies suggested that the following activities by nonlawyers should *not* be considered the unauthorized practice of law: explanation and negotiation of the terms of real estate contracts by realtors; selection and drafting of forms of living wills by hospital staff; interpretation of federal and state tax codes, family law codes, and general partnership laws by tax return preparers and accountants, and associated advice to their clients incorporating this “legal information”; and the giving of advice by investment bankers and other business planners to their clients that included “information about various laws.”⁷⁷

The DOJ/FTC Letter cites a purportedly significant difference between giving “advice or counsel” on legal matters and providing “legal information,” implying that the latter should not be deemed the “practice” of law.⁷⁸ However, examples of such “informational” activities, which the DOJ and FTC feared would be unjustifiably encompassed by the Draft Definition, include *interpretation* of laws and resulting rights and obligations.⁷⁹ Contrary to the agencies’ apparent intent, these examples suggest that attempts to draw a meaningful distinction between providing advice and counsel on legal matters and providing “legal information” are futile, unless the

⁷⁴ *Id.* at 2.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 4-5.

⁷⁸ *Id.* at 4.

⁷⁹ *See, e.g.*, DOJ/FTC Letter, *supra* note 55, at 4 (stating that “realtors routinely fill out and explain purchase and sale agreements . . . [T]hey may explain to consumers the *ramifications* of failing to have the home inspection done on time, the *meaning* of the mortgage contingency clause, and other portions of the agreement.”) (emphasis added).

so-called “information” is confined to merely stating that an applicable law exists. Even then, the assumption that a nonlawyer has identified all applicable law and all pertinent legal issues may in many cases present serious hazards to the consumer.

In the business transactions context, the details of doing business and complying with the law are so interconnected that many nonlawyers providing business advice must have some working knowledge of pertinent laws and prevailing interpretations of laws. Attempting to address this reality, some portions of the DOJ/FTC Letter suggest that a bright-line definition of the practice of law might be possible. Other portions of the Letter advocate a “rough justice” balancing of possible harms and benefits to clients where, by recognizing the competency of nonlawyers to handle certain law-related tasks, those professionals would be allowed to participate in areas in which they have demonstrated skill.⁸⁰ In the end, the DOJ and FTC did not propose a specific practice of law definition. The DOJ/FTC Letter simply rejected the ABA Draft Definition, asserting that the Task Force had drafted an overbroad and anticompetitive definition without any evidence in support of the public’s need to have nonlawyers excluded from many of the activities appearing to be within its ambit.⁸¹

Affected nonlegal industries, the DOJ, and the FTC were not the only critics of the ABA Draft Definition. In fact, significant negative commentary came from sections and committees within the ABA itself, including: the Section on Dispute Resolution;⁸² the Section of Antitrust Law;⁸³ the Real Property, Probate and Trust Section;⁸⁴ the Standing Committee on Pro Bono and Public Service;⁸⁵ the Standing

⁸⁰ *Id.* at 5 (citing, as examples, the advice that may be given by tenants associations experienced in landlord–tenant law, employees experienced in state labor law or safety regulations, income tax preparers and accountants on federal and state tax issues, and investment bankers and other business planners).

⁸¹ *Id.* at 2, 7.

⁸² Letter from Bruce Meyerson, Section of Dispute Resolution, American Bar Association, to Arthur Garwin, Center for Professional Responsibility, American Bar Association (December 20, 2002), *available at* <http://www.abanet.org/cpr/model-def/dispute.pdf>.

⁸³ SEC. OF ANTITRUST LAW, AM. BAR ASS’N, COMMENTS FROM THE SECTION OF ANTRITRUST LAW, *available at* <http://www.abanet.org/cpr/model-def/antitrust.pdf> (last visited Oct. 21, 2004).

⁸⁴ Letter from Dennis I. Belcher, Chair, Section of Real Property, Probate and Trust Law, American Bar Association, to Arthur Garwin, ABA Task Force on the Model Definition of the Practice of Law (March 3, 2003), *available at* <http://www.abanet.org/cpr/model-def/rppt.pdf>.

⁸⁵ Memorandum from Debbie Segal, Chair, Standing Committee on Pro Bono and Public Service, American Bar Association, to ABA Task Force on the Model

Committee on Legal Aid and Indigent Defendants;⁸⁶ the Standing Committee on Group and Prepaid Legal Services;⁸⁷ and the Standing Committee on the Delivery of Legal Services.⁸⁸ In addition, various organizations promoting increased access to affordable legal services for clients of low and moderate income characterized the ABA Draft Definition as inconsistent with that goal.⁸⁹ Both the quantity and quality of the criticism leveled at the Task Force's proposal (including numerous compelling arguments that the Draft Definition suffered from vagueness and circularity) attest to the difficulty of the task with which it was charged. This sentiment was well captured in the comments of the Association of Professional Responsibility Lawyers, which pointed out the over-inclusiveness of, and other problems with, the proposed language.⁹⁰ Opining that "it is neither possible nor desirable to adopt a *single* definition of the practice of law that will work even reasonably well in the many and varied contexts in which some definition might be useful," and suggesting "that the effort be abandoned as unneeded and unworkable,"⁹¹ the Association concluded:

[I]t is our considered view that no single definition of the practice

Definition of the Practice of Law (February 27, 2003), *available at* <http://www.abanet.org/cpr/model-def/pbps.pdf>.

⁸⁶ Letter from L. Jonathan Ross, Chair, Standing Committee on Legal Aid and Indigent Defendants, American Bar Association, to Lish Whitson, Chair, ABA Task Force on the Model Definition of the Practice of Law (January 21, 2003), *available at* <http://www.abanet.org/cpr/model-def/sclaid.pdf>.

⁸⁷ Letter from W. Anthony Jenkins, Chair, Standing Committee on Group and Prepaid Legal Services, American Bar Association, to Lish Whitson, Chair, ABA Task Force on the Model Definition of the Practice of Law (February 4, 2003), *available at* <http://www.abanet.org/cpr/model-def/gpls.pdf>.

⁸⁸ Memorandum from Mary K. Ryan, Chair, Standing Committee on the Delivery of Legal Services, American Bar Association, to Lish Whitson, Chair, ABA Task Force on the Model Definition of the Practice of Law (December 19, 2002), *available at* <http://www.abanet.org/cpr/model-def/scdls.pdf>.

⁸⁹ *See, e.g.*, Letter from Yvonne Martinez Vega et al., District of Columbia Legal Community Members, to Arthur Garwin, ABA Task Force on the Model Definition of the Practice of Law (February 5, 2003), *available at* <http://www.abanet.org/cpr/model-def/dclsc2.pdf>; Comments Submitted by Thomas M. Gordon, Senior Counsel, HALT, to ABA Task Force on the Model Definition of the Practice of Law (December 20, 2002), *available at* <http://www.abanet.org/cpr/model-def/halt.pdf>; Letter from Clint Lyons et al., National Legal Aid and Defender Association, to Lish Whitson, Chair, ABA Task Force on the Definition of the Practice of Law, *available at* <http://www.abanet.org/cpr/model-def/nlada.pdf>.

⁹⁰ Letter from W. William Hodes, Chair, & Anthony E. Davis, President, Association of Professional Responsibility Lawyers, to ABA Task Force on the Model Definition of the Practice of Law (December 17, 2002), *available at* <http://www.abanet.org/cpr/model-def/aprl.pdf>.

⁹¹ *Id.*

of law should be prepared or published by the ABA. The state courts and the state legislatures have developed a variety of definitions over a long period of time, tailored in many instances to meet specific situations. Although the problems of definition discussed in this letter have always been present in those efforts to one degree or another, the problems only get worse—not better—when an attempt is made to force all variations into a single nationalized mode.⁹²

Interestingly, the Association's perspective echoes the sentiments expressed by the ABA's MDP Commission some three years earlier, when, in the face of criticism that a definition the Commission had proposed⁹³ was overbroad, observed that it may not be advisable to attempt to draft a uniform practice of law definition.⁹⁴

In the end, the Task Force recommended that the attempt to craft a "model" definition be abandoned, and urged instead that every jurisdiction adopt its own definition of the practice of law.⁹⁵ The Task Force did offer some general advice to states in undertaking this task; namely, that each jurisdiction's definition "should include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity," and that each jurisdiction "should determine who may provide services that are included within the jurisdiction's definition of the practice of law and under what circumstances, based upon the potential harm and benefit to the public."⁹⁶ The ABA Task Force suggested that the determination of who may provide legal services "should include consideration of minimum qualifications, competence and accountability."⁹⁷ While well intentioned, these recommendations merely restate obvious and

⁹² *Id.*

⁹³ See COMM'N ON MULTIDISCIPLINARY PRACTICE, AM BAR ASS'N, REPORT, APP. A (1999), at <http://www.abanet.org/cpr/mdpreport.html> (last visited Oct. 21, 2004) [hereinafter ABA MDP COMM'N 1999 RPT.].

⁹⁴ ABA MDP COMM'N 2000 POSTSCRIPT, *supra* note 9, at 3 ("Given the complexity of the lawyer and nonlawyer services offered to clients today, it may be impossible to satisfactorily define the practice of law on a national level. The composition of such a definition may be best left to each individual jurisdiction . . ."); see also Terry, *A Primer on MDPs*, *supra* note 7, at 937 (reporting that "virtually every witness" asked about the practice of law definition at the MDP Commission hearings conceded that "there is no effective UPL definition").

⁹⁵ ABA MODEL DEFINITION TASK FORCE RECOMMENDATION AND RPT., *supra* note 60, at 1. The recommendations were adopted by the ABA House of Delegates in August 2003. See Homepage of Task Force on the Model Definition of the Practice of Law, at http://www.abanet.org/cpr/model_def_home.html (last visited Oct. 21, 2004).

⁹⁶ *Id.*

⁹⁷ *Id.*

broad propositions and goals, and provide further support for the conclusion that, at least outside of the litigation arena,⁹⁸ it may be impossible to craft a precise and balanced definition of the practice of law for purposes of confining such practice to licensed attorneys.

The difficulties encountered in defining the practice of law and in identifying the persons who may engage in such practice are evident from some of the statements and examples included in the ABA Task Force Report that accompanied its recommendations. The Task Force concluded, for example, that states were, in its view, better positioned to “weigh the factors provided in the framework [suggested by its general recommendations] in a manner that is best suited to resolving the harm/benefit equation for its citizens.”⁹⁹ It also noted that “[p]otential for harm is too quickly discounted by those who want to expand the field of who may provide services within the definition of the practice of law and too easily found by those who want to restrict the practice of law to lawyers.”¹⁰⁰ Suggesting an approach similar to that recommended by the DOJ/FTC Letter, the ABA Task Force explained:

The process of balancing harm and benefit is not an easy one. There is no simple formula. It requires an exercise of discretion and judgment based on the best available evidence. Each jurisdiction should weigh concerns for public protection and consumer safety, access to justice, preservation of individual choice, judicial economy, maintenance of professional standards, efficient operation of the market place, costs of regulation and implementation of public policy.¹⁰¹

Leaving aside the evolving issue of whether the ABA Task Force and the Association of Professional Responsibility Lawyers are correct in promoting a state-by-state approach to defining the practice of law, rather than a more uniform national standard,¹⁰² it is clear that

⁹⁸ See *infra* notes 108-59 and accompanying text.

⁹⁹ ABA MODEL DEFINITION TASK FORCE RECOMMENDATION AND RPT., *supra* note 60, at 3.

¹⁰⁰ *Id.* at 5, n.13.

¹⁰¹ *Id.* at 5.

¹⁰² See, e.g., Dzienkowski & Peroni, *supra* note 2, at 151 (speculating that continued efforts by state bars to maintain the prohibition of MDPs might “provoke a serious movement for a national bar”); Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 U. KAN. L. REV. 453 (1997) (suggesting bifurcation of the governance of admission to practice law based on distinction between federal and state law); Fred C. Zacharias, *Reform or Professional Responsibility as Usual?: Whither the Institutions of Regulation and Discipline*, 2003 U. ILL. L. REV. 1505 (predicting that a more open, nationally conscious, and coordinated approach to the regulation of the legal profession will be forthcoming in the twenty-first century). *But cf.* Painter, *supra* note 29, at 188-90 (recognizing that

anyone striving to craft a truly balanced and functional definition of the practice of law (with its corresponding UPL regime) faces a formidable task. Apparently hoping to bring a measure of pragmatism to this complex task, the ABA Task Force pronounced that “[t]he basic assumption of the Task Force is that jurisdictions will apply common sense in defining who may be authorized to provide services that are included within the definition of the practice of law and who does not need to be regulated.”¹⁰³

Curiously, as an example of the intended application of common sense, the Task Force offered the following: “[A]dvice given by one neighbor to another regarding zoning issues or a mechanic’s comments on warranty coverage is not conduct that needs to be regulated.”¹⁰⁴ It is inconceivable that the Task Force meant to suggest that zoning and warranty matters are always simple. Beyond that, the Task Force’s confidence in identifying this situation as not requiring regulation must be grounded in more than just the notion that it poses no material competition to the practicing bar. Is the intended message of the Task Force’s example simply that “small potatoes” matters do not merit regulatory oversight? One would hope not, as the advice in question might be of great economic or other significance to the advisee. Is the thinking that regulation is inappropriate because the advice-giving neighbor is not charging a fee or advertising his availability to give such advice? That will be of little consolation to the advisee if the advice is erroneous.

Perhaps the idea is that no need for regulation exists in the neighbor example because the advisee should have no reasonable expectation that he is getting thoughtful legal advice in this situation.¹⁰⁵ That reasoning is predicated on the questionable assumption that the “client” can appreciate the complexity of the matters involved and judge the experience level and expertise of the advice-giver. It would also seem inconsistent with the ABA’s general position that the public needs advice on legal matters from persons “trained in the law.”¹⁰⁶

national regulation of MDPs “is theoretically possible,” but finding more merit in the state-by-state initiatives suggested by Dean Powell, utilizing principles of “federalism and jurisdictional competition,” and advocating that states “experiment with their own approaches . . . with the protection of the public, not lawyers or accountants, foremost in mind”).

¹⁰³ ABA MODEL DEFINITION TASK FORCE RECOMMENDATION AND RPT., *supra* note 60, at 5.

¹⁰⁴ *Id.*

¹⁰⁵ *Cf.* Keatinge, *supra* note 6, at 723 (advocating the client’s understanding of the relationship as the best benchmark for defining the practice of law).

¹⁰⁶ *See* ABA MODEL DEFINITION TASK FORCE RECOMMENDATION AND RPT., *supra* note

Considering the celebrated concern in the MDP debate over the “core values” of independent professional judgment, avoiding conflicts, confidentiality, and, albeit belatedly, competence, it is difficult to comprehend why the ABA Task Force so readily condoned the neighbor’s dispensation of legal advice. The neighbor might lack the competence to provide counsel on legal issues and may even have a conflict of interest (for instance, with respect to the zoning issues). In addition, the neighbor may not have perceived any duty to hold the conversation in confidence. Needless to say, the advisee would be in better hands if he consulted a lawyer with experience in the legal matters involved and who was accustomed to avoiding conflicts of interest. The client might also receive better advice from an engineer employed by a real estate development company who had worked on a multitude of construction projects and who was familiar with the pertinent issues. Indeed, the engineer might in some cases give better advice than a licensed attorney with little experience in zoning matters.¹⁰⁷ Query whether common sense supports a system of UPL regulation that would find no violation by the neighbor who may be inexperienced on such matters (and perhaps have a conflict of interest), but would find a violation by the experienced engineer (unless he happens to be the neighbor). The ABA has left it to the states to contemplate such matters.

3. The Utah Legislature’s “Attention-Getter”

Ironically, the Utah legislature may have succeeded in putting forth a promising, pragmatic definition of the practice of law without actually intending to do so.¹⁰⁸ In May of 2003, legislation was enacted, to become effective on May 4, 2004, amending Utah’s prior UPL statute.¹⁰⁹ The new legislation provided that:

(1) The term “practice of law” means appearing as an advocate in

60, at 5-7 (discussing “Minimum Qualifications” and “Competence”).

¹⁰⁷ See MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. (2004). Cf. ABA MODEL DEFINITION TASK FORCE RECOMMENDATION AND RPT., *supra* note 60, at 5 (“While the Comment to [MRPC Rule 1.1] states that ‘[a] lawyer can provide adequate representation in a wholly novel field through necessary study,’ it is nevertheless true that there are nonlawyers whose specialized knowledge and experience may make them as competent as many lawyers in certain areas related to the law.”).

¹⁰⁸ The Executive Director of the Utah State Bar observed that at least some Utah legislators have described the referred-to legislation as “not really intended to define the practice of law.” Stephanie Francis Cahill, *What is Law Practice? Utah Defines a Lawyer’s Job to Meet Middle-Class Legal Needs*, A.B.A. J. EREPORT (March 28, 2003), at <http://www.abanet.org/journal/ereport/m28upl.html> (on file author); see *infra* notes 115-18 and accompanying text.

¹⁰⁹ See UTAH CODE ANN. § 78-9-101 (2003) (defining the unauthorized practice of law prior to the Utah legislature’s 2003 legislation).

any criminal proceeding or before any court of record in this state in a representative capacity on behalf of another person.

(2) Only persons who have been admitted by the supreme court of this state to practice law may practice or hold themselves out as licensed to practice law in this state.

(3) A person may not use “J.D.,” “Esq.,” “attorney,” or “attorney-at-law” on business cards, signs, advertisements, or official documents as those terms are used to indicate status as an attorney, unless licensed to practice law.¹¹⁰

It would be difficult for the DOJ, the FTC or other parties focused on avoiding unreasonable restraints on competition to find significant fault with this set of provisions (the “2003 Utah UPL Provisions”). The advocacy-based aspect of the definition seems reasonable in restricting participation as an advocate in civil or criminal litigation to trained and licensed attorneys, even though many professionals from different fields deal with interpretation of substantive laws on a regular basis, and might thereby be able to demonstrate competence in particular areas of the law. Trial lawyers need to be well-versed in not only the substantive areas of law at issue in a case, but also the often complex rules of procedure and evidence, and must excel in the special skills required to uncover, assemble and present facts in controversy.¹¹¹ They must also have the ability to see both sides of contested issues and anticipate all arguments the opposition might advance.¹¹² Moreover, litigation attorneys are often called upon to make on-the-spot judgments on matters of law that can instantly and significantly affect legal rights, such as whether to make an objection in open court, and on what grounds.

The second prong of the 2003 Utah UPL Provisions prohibits a person from holding himself out as an attorney, drawing a line that

¹¹⁰ 2003 Utah Laws 339 (codified at UTAH CODE ANN. § 78-9-102 (2003) and repealed by 2004 Utah H.B. 234).

¹¹¹ Cf. Green, *supra* note 24, at 1148 (“With limited exceptions, only lawyers may represent clients in courtroom settings and their training uniquely qualifies them to do so well.”); Matthew A. Melone, *Income Tax Practice and Certified Public Accountants: The Case for a Status Based Exemption from State Unauthorized Practice of Law Rules*, 11 AKRON TAX J. 47, 49 (1995) (generally arguing that UPL restrictions should not apply to income tax practice by certified public accountants, but electing not to address practice before judiciary bodies, stating, “A reasoned analysis of this area of practice requires a detailed analysis of the rules of attorney–client and work product privileges as well as the issue of whether certified public accountants can effectively circumnavigate the applicable rules of procedure.”).

¹¹² Transactional and other lawyers also need this key skill, and it is clearly one of the contributions they bring to the table in business planning, negotiations, and other client representation settings.

not even free market advocates should balk at, as it essentially amounts to a ban on false advertising and misrepresentation.¹¹³ The person holding himself out as an attorney is making a representation about his degree of formal legal training, and the public should not be misled about that degree of training. In addition, this “holding out,” like the preceding advocacy-based definition, presents a clear rule that should be relatively easy to enforce.

While the 2003 Utah Provisions are appealing in their bright-line nature and seeming ease of administrability, these very aspects present some areas of potential concern. Excluded from the “practice of law” under these provisions are such activities as representation before administrative bodies,¹¹⁴ spotting legal issues and determining legal requirements in planning transactions, negotiating and drafting complex legal documents, and advising clients on matters involving interpretations of and compliance with laws, regulations, and the associated liability considerations. There is reason to believe that the Utah legislature never seriously intended to exclude such activities from the definition. Informal legislative history indicates that enacting this narrow definition was simply a means to accelerate the efforts of a commission which had been appointed by the Utah Supreme Court to study a perceived lack of affordable legal services for middle-class citizens.¹¹⁵

While many bar members have applauded the goal of making legal services more affordable and available to persons of modest means,¹¹⁶ some questioned the propriety of what was perceived to be the Utah legislature’s forced-discussion approach. Lish Whitson, chairperson of the ABA Task Force on the Model Definition of the Practice of Law, commented in the spring of 2003, “I’ve read the law, and I was fairly appalled . . . it just seems to me that it’s a mischievous way to accomplish a goal. It’s one of those clever knee-jerk things

¹¹³ Cf. ABA MDP COMM’N 1999 RPT., *supra* note 93, at 4 (observing that in the United Kingdom there is no ban on nonlawyers practicing law comparable to the prohibitions in the United States, but there is a ban on falsely holding oneself out as a lawyer).

¹¹⁴ Within reasonable limits, nonlawyer representation of persons in certain types of administrative agency matters may be acceptable. The ABA Draft Definition, for example, highlighted as one instance of “practicing law” representing a person before an administrative agency which “acts in an adjudicative capacity,” suggesting that a more ministerial function might be less troublesome from a UPL perspective. See ABA MODEL DEFINITION, *supra* note 10, at 1.

¹¹⁵ See Cahill, *supra* note 108, at 1 (quoting Utah Representative Stephen Urquhart, himself a member of the Utah Bar and one of the sponsors of the legislation, as saying, “This is an attention-getter.”).

¹¹⁶ See, e.g., *id.* at 2 (quoting members of the Utah bar and other ABA activists expressing this sentiment); see also sources cited *supra* note 12.

that perhaps could have been better thought through.”¹¹⁷ In fact, in March 2004, the 2003 Utah UPL Provisions were repealed and prior (more traditionally flawed) Utah statutory UPL provisions reinstated.¹¹⁸ The purported legislative strong-arm tactics apparently succeeded in prompting action, as the Utah Supreme Court, on March 17, 2004, proposed a revised definition of the practice of law that appears to reflect a better appreciation for modern perspectives on access to legal advice. But, the proposed definition suffers from some of the same circularity and overbreadth problems as other UPL definitions.¹¹⁹

Even if the enactment and preemptive repeal of the 2003 Utah UPL Provisions were mischievous in intent, the provisions themselves were not appalling. With the addition of advocacy in administrative, as well as judicial proceedings, the Utah definition might arguably be workable and even superior to the circular, vague and consequently overbroad definitions found in most UPL provisions. After all, the

¹¹⁷ Cahill, *supra* note 108, at 2; *see also id.* at 1 (quoting the executive director of the Utah State Bar as saying, with respect to the Utah practice of law definition, that “it was intended to force the issue of creating greater access . . .”).

¹¹⁸ 2004 Utah H.B. 234 (enacted March 15, 2004) (repealing 2003 Utah Laws 339 and extending the expiration date of UTAH CODE ANN. § 78-9-101 (2003) to May 3, 2007).

¹¹⁹ *See* UTAH LAWYER AND DISCIPLINARY R. 6.1 (proposed March 17, 2004). This rule defines the practice of law as follows:

Rule 6.1 [Proposed]

(a) Except as set forth in subsection (c) of this Rule, only persons who are active members in good standing of the Utah State Bar may engage in the practice of law in Utah.

(b) For purposes of this Rule:

(1) The “practice of law” is the representation of the interests of another person by informing, counseling, advising, assisting, or advocating for that person through application of the law and associated legal principles to that person’s facts and circumstances.

(2) The “law” is the collective body of declarations by governmental authorities that establish a person’s rights, duties, constraints and freedoms and consists primarily of:

(i) constitutional provisions, treaties, statutes, ordinances, rules, regulations and similarly enacted declarations; and

(ii) decisions, orders and deliberations of adjudicative, legislative and executive bodies of government that have authority to interpret, prescribe and determine a person’s rights, duties, constraints and freedoms.

The rule also contains thirteen exceptions. R. 6.1(c)(1)-(13). The Utah Supreme Court’s definition is based in part upon the treatment of this issue by the Washington State Bar Association. *See* ADVISORY COMM. ON THE RULES OF PROF’L CONDUCT, UTAH SUPREME COURT, REPORT ON THE DEFINITION OF “THE PRACTICE OF LAW” 8, *available at*

<http://www.utcourts.gov/resources/rules/comments/LP%20Final%20Report.pdf> (Aug. 18, 2003).

2003 Utah UPL Provisions would have precluded nonlawyers from falsely holding themselves out as attorneys, and permitted only licensed attorneys to serve the traditional role of “barrister” in advocacy settings, a role for which trained attorneys are generally viewed as uniquely skilled.¹²⁰ The vast gray areas¹²¹ involving the “practice of law” outside of contested proceedings (for example, planning business transactions and negotiating and drafting contracts) would be left to the rough refinements of the market. If lawyers really do a better job in such areas than other professionals, consumers will recognize that fact, hire the lawyers, and pay them fees commensurate with their superior skills.¹²² Indeed, the free market approach was accepted during much of America’s history, as UPL bans did not become prevalent in the United States until the 1930s.¹²³ Now that they have existed for several decades, some

¹²⁰ Cf. Daly, *Monopolist, Aristocrat, or Entrepreneur?*, *supra* note 2, at 625-35 (observing that while there are great similarities, in terms of prominence in the “legal professional,” between “trial lawyers” in the United States and “barristers” in the United Kingdom, the role of “business lawyer” in the United States differs markedly from the role of “solicitor” in the UK and similar non-litigators in other Western European countries, and noting that the United States is rather unique in viewing the lawyer’s role as central in business deals); Jones & Manning, *supra* note 6, at 1171 (noting that the Canons of Professional Ethics adopted by the ABA in 1908 dealt with professional norms “primarily in litigation settings”); Christopher L. Noble, *Multidisciplinary Practice: A Construction Lawyer’s Perspective*, 33 J. MARSHALL L. REV. 413, 423 (2000) (suggesting that the MDP debate should include consideration of the diversity of relationships between lawyers and nonlawyers, based on the particular types of services and/or clients involved, and that a distinction might be made “between the solicitor-like services of the transactional lawyer and the barrister-like services of the trial lawyer”).

¹²¹ See Powell, *The Lesson of Enron*, *supra* note 28, at 1301 (describing what he calls “gray lawyers” as “lawyers who practice tax advising, business consulting, economic planning, business advising and the like,” and asserting that except for the fact that they hold law licenses and describe themselves as lawyers, they do not practice law or “at least, they do not wish to be regulated as though they are practicing law”); see also Bryant Garth & Carol Silver, *The MDP Challenge in the Context of Globalization*, 52 CASE W. RES. L. REV. 903, 914-16 (2002) (describing as “stealth MDPs” non-law professional service providers that have law-trained employees perform various consulting services traditionally performed by lawyers).

¹²² See, e.g., Honorable Charles L. Bricant, *Is It the End of the Legal World as We Know It?*, 20 PACE L. REV. 21 (1999) (suggesting that consideration be given to a narrower definition of the regulated practice of law that more closely resembles its original litigation/advocacy focus, and advocating for market choice regarding business and tax services that accountants might in some instances handle better than lawyers); Fischel, *supra* note 15 (also encouraging a more free market/free competition approach).

¹²³ See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 6-7 (1981) (noting, among other things, that of the few jurisdictions with pre-1930 UPL bans, “most dealt only with nonlawyer appearances in court or with legal activity by certain specified officials such as bailiffs, court clerks, and sheriffs”).

commentators exploring their effects have seriously questioned both the desirability and validity of modern bans, recommending that they be eliminated or substantially narrowed.¹²⁴

In practical terms, however, a completely free market approach to the delivery of legal services in twenty-first century America has fundamental shortcomings. Such an approach implicitly requires that many or most individuals will grasp the subtleties of issues that are often challenging to even the most sophisticated professionals, and be able to assess the ability of would-be advisors to address those issues. The free market approach also rests on an assumption that the availability of legal advice from nonlawyers is necessary to prevent many citizens from going without any advice in situations where it is needed. There is simply too much at stake when dealing with legal rights and obligations to trust that most members of the public, particularly those unaccustomed to paying for professional advice, will be in a sound position to distinguish competent from incompetent nonlawyer advisors on legal matters. Of course, they may also be unable to distinguish between competent and incompetent lawyers. But licensed attorneys generally have been subjected to a rigorous course of study before obtaining a law degree, have passed a bar examination, and have been monitored by disciplinary and accrediting agencies. These combined measures are expressly designed to produce some level of competence among legal practitioners.¹²⁵

In view of the vast range of transactional and other work that involves the interpretation of complex laws and regulations, and that falls outside of the 2003 Utah UPL Provisions' definition of the practice of law, the definition is too narrow. For example, the choice-of-business-entity issue confronting Brad and Janet in the hypothetical fact pattern described in Part II above is a frequently occurring issue for a business lawyer. The determination of the proper entity should depend on a balancing of various tax factors, non-tax business and legal issues, and practical considerations.¹²⁶ Though a familiar topic, choice of entity analysis is often not a simple task, and normally requires advice and assistance from multiple

¹²⁴ See, e.g., Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2599 (1999); Needham, *supra* note 21, at 1331.

¹²⁵ Cf. Needham, *supra* note 21, at 1330 (noting that the usefulness of the bar exam as a measure of competency has become controversial, but arguing that "requiring a bar exam at least assures that individuals passing the exam can write coherent sentences and perform basic legal analysis").

¹²⁶ See *supra* note 37 and accompanying text.

professionals on a variety of issues, both legal and nonlegal.

The Supreme Court of Ohio, in *Columbus Bar Ass'n v. Verne*,¹²⁷ recently addressed the question of whether choice of entity and entity formation work constitutes the practice of law. The case involved business structure assistance given by Verne, a certified public accountant ("CPA"), to two men operating a power-washing company. Verne recommended the formation of a limited liability company ("LLC") and drafted articles of organization for the formation of the entity, using a form available from the Ohio Secretary of State. Unfortunately, Verne apparently did not counsel the owners of the LLC to enter into a written "operating agreement" (the LLC equivalent of a partnership agreement) that would specify their respective rights and obligations and other pertinent matters regarding their business organization.¹²⁸ When the two owners had a "falling out," one of them sought the advice of an attorney (who also happened to be a certified public accountant) who, upon learning that Verne had done the entity formation work without a law license, filed a grievance with the Columbus Bar Association. The Ohio Board of Commissioners on the Unauthorized Practice of Law recommended that the Ohio Supreme Court issue an injunction enjoining Verne from the unauthorized practice of law and order reimbursement of costs and expenses.¹²⁹ Explaining its decision to grant the requested relief, the court cited prior Ohio authority for the proposition that "[f]or a layperson to draft documents creating a business entity on another's behalf is unquestionably the unauthorized practice of law."¹³⁰ In response to Verne's assertion that a CPA was competent to advise clients on the creation of entity organizational documents, the court stated:

While we recognize that certified public accountants perform a valuable function in advising on financial matters in the formation of a company, such as how best to structure a business entity for tax benefits, there are still many remaining issues that require legal analysis in choosing a business structure. This case highlights the dangers when those lines are blurred. In this case, respondent helped his clients choose a business structure, a decision that ordinarily requires a significant amount of legal

¹²⁷ 788 N.E.2d 1064 (Ohio 2003).

¹²⁸ *Id.* at 1064.

¹²⁹ *Id.* at 1065.

¹³⁰ *Id.* *But cf.* Fla. Bar *re* Advisory Op.—Nonlawyer Preparation of Pension Plans, 571 So. 2d 430, 432-33 (Fla. 1990) (rejecting opinion that would have precluded accountants, actuaries, and insurance underwriters from preparing and filing pension plans as permitted under ERISA).

judgment in addition to tax and other accounting considerations. Clients need to know the legal differences between and formalities of available structures and then be advised according to their best interests, taking into account personal and practical concerns, not just tax consequences. Where there is more than one principal involved in the venture, the existing and potential conflicts also must be assessed.¹³¹

The Ohio Supreme Court's analysis persuasively supports the proposition that the involvement of lawyers can be essential to a well-balanced choice of entity and entity formation project. In addition to the requisite substantive knowledge of legal matters, the court emphasized the need for the parties to be cognizant of potential conflicts of interest, which have been underscored by rules of attorney conduct that govern the actions of those acting as intermediaries between principals organizing a business entity.¹³²

Under the 2003 Utah UPL Provisions, Verne's work for the owners of the power-washing company would not have constituted the unauthorized practice of law, assuming he did not hold himself out as an attorney. The advice the clients received from Verne exemplifies the risks inherent in a UPL rule limited to prohibiting litigation by nonlawyers. Under the more traditional Ohio law,¹³³ as interpreted by that state's supreme court, Verne's work crossed the UPL line, even though the court acknowledged that, as a CPA, Verne had a legitimate role to play in the overall choice of entity analysis,

¹³¹ *Verne*, 788 N.E.2d at 1065.

¹³² See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 28 (2004); MODEL RULES OF PROF'L CONDUCT R. 2.2 cmt. 3 (1999).

¹³³ See, e.g., *Gustafson v. V.C. Taylor & Sons, Inc.*, 35 N.E.2d 435, 436 (Ohio 1941) (holding that real estate broker's filling in blank spaces on pre-printed real estate contract forms which had been prepared in the past by an attorney did not constitute the unauthorized practice of law because filling out the form agreement was "merely the clerical service of recording the stated agreement"); *Land Title Abstract & Trust Co. v. Dworkin*, 193 N.E. 650, 652 (Ohio 1934) ("The practice of law is not limited to the conduct of cases in court. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law.") (internal quotation marks omitted); *Cincinnati Bar Ass'n v. Davis*, 590 N.E.2d 916, 917-18 (Ohio 1992) (holding that in light of Ohio Supreme Court's definition of "practice of law," as set forth in *Land Title & Trust Co.*, preparing articles of incorporation for a doctor, assisting in the transfer of assets to the corporation formed, and participating as the doctor's representative in contract negotiations constituted the unauthorized practice of law). See also OHIO REV. CODE ANN. § 4705.07 (West 2004) (prohibiting individuals from holding themselves out or representing that they are an attorney or authorized to practice law).

especially with respect to tax implications.¹³⁴ The court in essence suggested that accountants are critical to tax analysis, when, in speaking of “tax and other accounting considerations,” it implied that working with the tax law is practicing *accounting* rather than practicing *law*.¹³⁵ Many tax lawyers would properly disagree. Indeed, courts and commentators have, in the UPL area, struggled for some time with the reality that tax consequences often turn on a blending of determinations based on not just tax accounting principles but also the application of non-tax laws to the facts presented.¹³⁶

How it is that giving tax advice—advice on the operation and interpretation of laws commonly acknowledged as exceedingly complex¹³⁷—has come to be accepted as work that accountants can do without significant fear of being prosecuted for engaging in the unauthorized practice of law¹³⁸ could be the subject of a separate article itself.¹³⁹ For purposes of this Article, a few points in that regard have a significant bearing on the MDP debate. To begin with, some commentators suggest that several decades ago the legal profession came to view tax return preparation work as not sufficiently profitable and willingly abdicated such work to accountants.¹⁴⁰ Perhaps this also

¹³⁴ *Verne*, 788 N.E.2d at 1065.

¹³⁵ *Id.*

¹³⁶ *See, e.g.*, Melone, *supra* note 111, at 60-82 (reviewing case law and discussing conflicting views on the extent to which interpretation of non-tax laws affects income tax practice and the relative ability of lawyers and certified public accountants to engage in such practice).

¹³⁷ *See, e.g.*, *Arrowsmith v. Comm’r of Internal Revenue*, 344 U.S. 6, 12 (1952) (Jackson, J., dissenting) (describing federal tax law as “a field beset with invisible boomerangs”); *Donahue’s Accounting & Tax Service, S.C. v. Ryno*, 674 N.W.2d 681 (Wis. Ct. App. 2003) (“[I]t is clear to this court that the [Internal Revenue Code] is incomprehensible without the assistance of a qualified expert in tax law.”).

¹³⁸ *See, e.g.*, *Agran v. Shapiro*, 273 P.2d 619 (Cal. Ct. App. 1954) (holding that the preparation of tax forms is not considered the practice of law); Daly, *Choosing Wise Men Wisely*, *supra* note 1, at 252-61 (citing and describing various difficulties in attempting to attack and refer to tax work by accounting firms as UPL violations, including the existence of federal preemption issues and fact that “UPL jurisprudence is a quagmire”); *Dzienkowski & Peroni*, *supra* note 2, at 106-11 (discussing ability of accountants to engage in such areas of federal tax practice as return preparation, tax advice and planning and tax controversy work under federal statutes, rules, and regulations that preempt state UPL restrictions and noting lack of successful UPL complaints against Big Five accounting firms for their expanding delivery of tax-related services).

¹³⁹ *See, e.g.*, Alwin & Eckerly, *supra* note 6; Michael J. Herzog, *Tax Dispute Resolution: The Time Is Ripe to Allow Certified Public Accountant Access to the Tribunal*, 18 J.L. & COM. 355 (1999); Melone, *supra* note 111; Schwab, *supra* note 29.

¹⁴⁰ *See Dzienkowski & Peroni*, *supra* note 2, at 106 n.122; Lalli, *supra* note 17, at 286 (observing that “accountants emerged to prove to the market that they could do the job more efficiently than lawyers”).

reflected a general apprehension among some lawyers regarding complex “number crunching.”¹⁴¹ Given the natural relationship between tax planning and return preparation work, this reluctant attitude toward return preparation evolved into *de facto* relinquishment of any monopoly lawyers may have been able to claim at the expense of accountants in the field of tax advice.¹⁴²

Many law schools do not list federal tax law as a required course.¹⁴³ And, as the American Institute of Certified Public Accountants noted in its criticism of the ABA Draft Definition of the practice of law, the multi-state bar exam does not test federal tax law.¹⁴⁴ Yet, American law schools typically offer numerous elective tax courses, and many offer an LL.M. degree in taxation.¹⁴⁵ The country boasts many accomplished and well respected tax lawyers. A market clearly exists for the services of tax lawyers because tax laws are complicated, are often difficult to apply equitably to similar but arguably distinct fact patterns, and frequently present a daunting challenge when it comes to planning a transaction and predicting the ultimate tax consequences should the government question the purported treatment of the transaction.

Tax planning, then, is more than literal application of tax accounting rules to “run the numbers,” although that computational task is often critical. The excesses of off-balance sheet financial accounting revealed in recent major audit failures,¹⁴⁶ coupled with the

¹⁴¹ Cf. Gevurtz, *supra* note 37, at 50 (including in his *Business Planning* text for law students a subsection entitled “Overcoming the Fear of Numbers: An Introduction to Valuation”).

¹⁴² See Dzienkowski & Peroni, *supra* note 2, at 106 n.122; see also Alwin & Eckerly, *supra* note 6, at 257 n.3 (identifying several business planning and family planning “practice areas” as being “shared by accountants and lawyers”). While the giving of tax planning and advice by accountants seems to have been an area free from successful UPL prosecution, preparation by accountants of documents to implement tax planning advice is more likely to be characterized as UPL. See, e.g., Verne, 788 N.E.2d at 1064; Dzienkowski & Peroni, *supra* note 2, at 111-12.

¹⁴³ See WILLIAM B. POWERS, A STUDY OF CONTEMPORARY LAW SCHOOL CURRICULA 12 (1986) (indicating that only about 29% of the 124 law schools studied between 1974 and 1975, and only about 31% of those studied between 1984 and 1986 listed taxation as a required course). See also Summer Duke and David Achtenberg, unpublished report (on file with author) conducted at University of Missouri-Kansas City School of Law on required courses of selected law schools (2002) (showing that only two of the forty-four law schools studied listed federal taxation as a required course).

¹⁴⁴ See AICPA Memorandum, *supra* note 68, at 7.

¹⁴⁵ See AM. BAR ASS'N, POST J.D. PROGRAMS BY CATEGORY, available at <http://www.abanet.org/legaled/postjdprograms/postjdc.html> (last visited Oct. 21, 2004) (listing 29 law schools as offering LL.M. degrees in taxation).

¹⁴⁶ See, e.g., Anthony J. Luppino, *Stopping the Enron End-Runs and Other Trick Plays: The Book-Tax Accounting Conformity Defense*, 2003 COLUM. BUS. L. REV. 35; RAPOPORT &

role of prominent accounting firms in promoting aggressive tax shelter “products,”¹⁴⁷ suggest that accountants might benefit from greater exposure to the common-law anti-abuse doctrines that are familiar to tax lawyers,¹⁴⁸ such as business purpose, substance over form, and step transactions.¹⁴⁹ This is not to say that there are no accountants with expertise in the tax law, or that there are no lawyers who are good with numbers. The point is that accountants working together with lawyers on business transactions involving significant tax considerations—i.e., most business transactions in the United States, may produce better overall advice for their clients than either working separately. Delivering sound business planning advice requires knowledge of various tax and other laws, familiarity with accounting principles, and facility with numbers. The power-washing owners in *Verne* would have had a better chance of getting an operating agreement tailored to their needs if Verne had been in an office where he consulted with an attorney in the first instance. A lawyer trained in business organizations law would presumably have known that the operating agreement is the central document establishing the rights and obligations of the organization’s members. The articles of organization usually require only a minimal amount of information, and the “default rules” supplied by statutes for instances in which an agreement among the members is not discernible on key issues (such as those addressing voting and distribution rights) may be inappropriate for a particular entity.¹⁵⁰ A trained practitioner would accordingly “tailor” the operating agreement to the parties’

DHARAN, *supra* note 29.

¹⁴⁷ See, e.g., Ben Wang, *Supplying the Tax Shelter Industry: Contingent Fee Compensation for Accountants Spurs Production*, 76 S. CAL. L. REV. 1237 (2003).

¹⁴⁸ See, e.g., Joseph Bankman, *The Business Purpose Doctrine and the Sociology of Tax*, 54 SMU L. REV. 149, 152 (2001) (observing that lawyers are, in general, more accustomed to analyzing anti-abuse standards than are accountants because “the impulse in accounting is to resolve difficulties with rules rather than standards”); see also Luppino, *supra* note 146, at 161-62 (discussing provisions of the Sarbanes–Oxley Act of 2002 that recommended a study regarding the possibility of U.S. financial accounting and reporting practice moving to a more “principles-based” system).

¹⁴⁹ See generally Symposium, *Business Purpose, Economic Substance, and Corporate Tax Shelters*, 54 SMU L. REV. 3 (2001); Luppino, *supra* note 146, at 83 n.110.

¹⁵⁰ See, e.g., ROBERT W. HAMILTON & JONATHAN R. MACEY, CORPORATIONS, INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 30 (8th ed. 2003) (“In the absence of a written agreement, the relationship between the partners will be governed by the provisions of the applicable state partnership statute. It is extremely unlikely that the provisions of this statute will reflect the expectations and understandings among the partners in most respects.”); CHARLES R.T. O’KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 9-11 (4th ed. 2003) (discussing various types and effects of “default” rules in state business organization statutes).

particular business needs and understandings.

The plight of the clients in *Verne* demonstrates the benefits, and indeed the necessity, of an interdisciplinary approach to modern business planning. The clients in *Verne* needed advice from an accountant *and* an attorney. A key issue, explored throughout the remainder of this Article, is determining whether fully integrated MDPs might deliver such interdisciplinary service in a cost effective manner without causing more harm than good to the public.

4. Implications of the Recent UPL Initiatives on the MDP Debate

Apart from Utah's recent activity, states with bar committees or other bodies working on revised practice of law definitions have in varying degrees attempted a balancing of interests of the type suggested by the ABA Task Force when it abandoned its model definition project.¹⁵¹ Nevertheless, despite the good faith efforts of a number of eminently qualified organizations and individuals, short of taking an approach along the lines of the 2003 Utah UPL Provisions, any practice of law definition is destined to be circular and vague, at least to some degree. UPL enforcement will still require the type of case-by-case judgments that courts have historically had to dispense in carving out exceptions as customs change.

Indiana's recent experience with UPL reform is indicative of this predicament. As the culmination of a project started well before the formation of the ABA Task Force, and completed approximately one

¹⁵¹ See Koszewski Memo, *supra* note 9 (reporting, among other things, that significant and recent practice of law definition proposals have been generated in Indiana, Kansas, Massachusetts, Nebraska, Utah and Wyoming). According to Committee Chairman John Conlon, the draft definition produced by the Indiana Bar Association's UPL Committee, reprinted at 47 RES GESTAE 9 (Sept. 2003) [hereinafter Indiana Draft Definition], was approved, with some modification, by the Indiana Bar Association's House of Delegates on April 30, 2004, and has been sent to the Indiana Supreme Court as a recommended change to its attorney Admission and Discipline rules. E-mail from John Conlon, to Anthony Luppino (May 6, 2004) (on file with author). In addition, the Nebraska Court of Appeals is currently considering a proposed definition that was filed February 20, 2004 [hereinafter Nebraska Draft Definition] (copy on file with author); the Wyoming State Bar has proposed a practice of law definition that is currently being considered by the Wyoming Supreme Court [hereinafter Wyoming Draft Definition] (copy on file with author); a Kansas Bar Association committee, in its UPL report, *see* KAN. UPL COMM. RPT., *supra* note 10, has proposed that its Board of Governors recommend the committee's draft definition to the Kansas Supreme Court [hereinafter Kansas Draft Definition] (copy on file with author); and a Massachusetts Bar Association Task Force circulated for comment a proposed definition of the practice of law [hereinafter Massachusetts Draft Definition]. MASS. UPL TASK FORCE RPT., *supra* note 10, Ex. A.

year after the Task Force's circulation of its draft definition, the Indiana State Bar Association's Unauthorized Practice of Law Committee in September 2003 issued its own draft definition of the practice of law, "with the ABA's recommendation and balancing test in mind."¹⁵² The Indiana Bar committee's draft definition contains a number of helpful provisions allowing nonlawyers to undertake such activities as selling legal documents approved by a lawyer; representing others before administrative agencies in prescribed situations; acting as neutral mediators, arbitrators, conciliators, or facilitators; doing paralegal work within applicable guidelines; and certain other specified activities, along with "activity determined by [the Indiana Supreme Court] to be a permissible activity for a nonlawyer."¹⁵³ Many of the constituencies who protested against the ABA Draft Definition would find comfort in these safe harbors against potential UPL problems.

The Indiana draft definition of the practice of law, however, evinces the same propensity for circular and vague language as the traditional (and widely criticized) definitions discussed above.¹⁵⁴ Its "general definition" of the practice of law is, "ministering to the legal needs of another person for consideration given," and gives as nonexclusive examples such activities as "advice on a legal right," "negotiation or settlement of a legal right," and "selection, preparation or completion of a legal document."¹⁵⁵ The chairman of

¹⁵² See John A. Conlon, *Defining the Practice of Law: Can Gray Be Turned into B&W?*, 47 RES GESTAE 7 (Sept. 2003).

¹⁵³ Indiana Draft Definition, *supra* note 151.

¹⁵⁴ See *supra* notes 53-56 and accompanying text.

¹⁵⁵ Indiana Draft Definition, *supra* note 151. With respect to preparing legal documents, there is an exception for "selection of and/or completion of a legal document previously approved by a lawyer by filling in the blanks where the activity requires only common knowledge regarding the required information and general knowledge of the legal consequences." *Id.* (emphasis added). Similar general problems plague the definitions recently proposed in Kansas, Massachusetts, Nebraska, and Wyoming. See Kansas Draft Definition, *supra* note 151 (generally defining the practice of law as "ministering to the legal needs of another person and the application of legal principles and judgment with regard to the circumstances or objectives of another person which require knowledge of legal principles or the use of legal skill or knowledge," and setting forth some non-comprehensive, broad examples of inclusion, along with some exceptions similar to those in the Indiana draft definition); Massachusetts Draft Definition, *supra* note 151 (generally defining the practice of law as the "application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law," and also containing broad presumptions as to inclusion in the practice of law similar to those in the ABA Draft Definition, but with some helpful exceptions, such as for certain specified types of mediation, activities in connection with collective bargaining rights or agreements, and *pro bono* service); Nebraska Draft Definition, *supra* note 151 (containing many safe harbors, including

the Indiana Bar Association's UPL committee in effect reaffirmed the position of the ABA's MDP Commission and the Association of Professional Responsibility Lawyers¹⁵⁶ that no single, easily administrable definition is achievable. In a statement accompanying the publication of its draft UPL provisions, the chairman was asked "[whether] this proposed definition of the practice of law (and its exceptions) [would] turn a gray area into a black & white one?" The chairman quite reasonably replied:

No, but neither would any of the other definitions of the practice of law that have been recently promulgated in other states. Many questions on what constitutes the unauthorized practice of law will always turn on the facts involved in specific matters. Nevertheless, the UPL Committee does believe that the proposed definition will address many basic questions and provide as much guidance to the bar and the public as is practical to give in rule form.¹⁵⁷

From this exchange, one could conclude that the states presumably will continue to muddle through the issue, understanding that there will be no perfect definition, but at least sensitive to the need to carve out exceptions to bans on nonlawyers doing work involving the law when public policy considerations warrant such exceptions. Notwithstanding their inherent limitations, the recent and ongoing attempts at improved definitions of the practice of law, and UPL exceptions for certain specified service providers, have significant value. Most importantly, they are causing participants and critics with many perspectives to reexamine what lawyers do, and do not do, better than nonlawyers, and to explore ways to make affordable legal services available to currently underserved segments of the public.

Several observations can be made with respect to what the recent UPL initiatives add to the MDP debate. First, these projects tell us that it is neither feasible nor desirable to craft a definition that

some fairly generous ones that would permit certified public accountants to give tax, management, and financial advice that stops short of drafting legal documents and/or provide "legal" advice outside of those specified areas, and including broad references to "the application of legal principles and judgment" and "giving advice and counsel to another entity or person as to the legal rights of that entity or person or the legal rights of others for compensation, direct or indirect"); Wyoming Draft Definition, *supra* note 151 (generally defining the practice of law to include "providing any legal advice for any other person, firm or corporation, with or without compensation, or the provision of professional legal advice or services where there is a client relationship of trust or reliance").

¹⁵⁶ See *supra* notes 90-94 and accompanying text.

¹⁵⁷ Conlon, *supra* note 152, at 7.

completely excludes nonlawyers from providing services that have legal implications or involve issues of legal compliance. Outside of the litigation arena, and particularly with respect to transactional work, it is extraordinarily difficult to definitively say which tasks do or do not constitute the “practice of law.” Thus, although some commentators on the MDP issue have in the past suggested that enforcement of UPL prohibitions could by itself sufficiently regulate multidisciplinary practice, it has become clear that this is not the case.¹⁵⁸ Second, because the legal profession purports to be conscientious about core values, it cannot, in good faith, ignore the strong statements made in opposition to broad practice of law definitions by those who support increasing the availability of affordable, law-related services to low-income consumers. Third, cases such as *Columbus Bar Ass’n v. Verne*¹⁵⁹ suggest that consideration should be given to the possibility of refining the regulatory regime to distinguish situations in which nonlawyers alone give advice on legal matters from those in which they are collaborating with licensed attorneys. As explored further in Part IV, below, freeing individuals from the threat of UPL prosecution or other disciplinary action in the latter situation, where it is shown that the licensed attorney was in a position to protect the client’s interests through quality control measures, is a feasible approach. Taken together, these observations suggest that permitting fully integrated MDPs, and especially those with an emphasis on planning and implementing business transactions, could provide clients with quality, affordable services while at the same time mitigating the fears of harm to consumers which presumably underlie bans on the unauthorized practice of law. To test that proposition, in addition to UPL rules that are being revisited in many jurisdictions, other rules governing the legal profession that stand in the way of the formation of such MDPs must be examined.

B. Attorney Rules of Professional Conduct Precluding MDPs

1. MRPC 5.4 and the ABA’s Commission on
Multidisciplinary Practice

Apart from UPL statutes, the centerpiece of the ban in the United States on fully integrated MDPs is MRPC 5.4, the pertinent substance of which is mirrored in attorney conduct rules in virtually

¹⁵⁸ See *supra* notes 21, 51.

¹⁵⁹ 788 N.E.2d 1064 (Ohio 2003); see *supra* notes 127-36 and accompanying text.

all states.¹⁶⁰ While other parts of the Model Rules are implicated in the MDP debate,¹⁶¹ provisions contained in Rule 5.4 speak directly to the ownership and control issues at the heart of the controversy. MRPC 5.4(a) generally precludes a lawyer from sharing legal fees with a nonlawyer.¹⁶² Rule 5.4(b) prohibits a lawyer from forming a partnership with a nonlawyer “if any of the activities of the partnership consist of the practice of law.”¹⁶³ Rule 5.4(c) provides that a lawyer may not permit a person who recommends, employs, or pays the lawyer to direct or regulate the lawyer’s professional judgment in rendering the associated legal services.¹⁶⁴ Finally, MRPC 5.4(d) prohibits a lawyer from practicing with or in a professional corporation or other association authorized to practice law for profit if any nonlawyer owns an equity interest therein or if any nonlawyer is a director or officer or holds a position of similar responsibility therein or otherwise has the “right to direct or control the professional judgment of the lawyer.”¹⁶⁵ The obvious “core value”

¹⁶⁰ See *supra* note 3. New York’s limited deviation from MRPC 5.4, discussed *infra* notes 275-76 and accompanying text, shares the attributes of the Model Rule precluding fully integrated MDPs. The District of Columbia variation examined by the ABA’s MDP Commission is also limited, and does not make room for the type of fully integrated MDP addressed herein. See *supra* note 3 and *infra* note 274 and accompanying text.

¹⁶¹ For examples of the expositions of other conduct rules pertinent to the MDP context (such as the rules on maintaining client confidences), see *Future of the Profession: A Symposium on Multidisciplinary Practice*, 84 MINN. L. REV. 1083 (2000); Dzienkowski & Peroni, *supra* note 2.

¹⁶² MODEL RULES OF PROF’L CONDUCT R. 5.4(a) (2004). Rule 5.4(a) states:

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
- (1) an agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;
 - (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
 - (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
 - (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

Id.

¹⁶³ *Id.* R. 5.4(b).

¹⁶⁴ *Id.* R. 5.4(c).

¹⁶⁵ *Id.* R. 5.4(d). Rule 5.4(d) does contain a limited exception whereby “a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration.” *Id.* R. 5.4(d)(1).

focus of these proscriptions is on the lawyer's maintenance of independent professional judgment.¹⁶⁶

Through its references to "legal fees," the "practice of law," and "legal services," MRPC 5.4 suffers from the definitional problems associated with UPL statutes. Rule 5.4 has nonetheless stood as an effective impediment to the formation of fully integrated MDPs.¹⁶⁷ This result is not surprising, as the rule puts the burden on *lawyers* to demonstrate that they are not sharing legal fees or performing legal services in the prohibited settings.¹⁶⁸ As a practical matter, their very status as lawyers will often make it more difficult to establish that their activities do not involve the practice of law than might be the case with "gray area" services provided by nonlawyers.¹⁶⁹ Dean Burnele Powell has criticized what he describes as "gray area lawyers" for purporting to practice such areas as "tax," but not "law," in big accounting firms.¹⁷⁰ As noted above, the MDP Commission on which Dean Powell served referred to these individuals as "vigorously maintaining that they are providing nonlegal consulting services," so

¹⁶⁶ *But cf.* Green, *supra* note 24, at 1144 (observing that Rule 5.4 may be motivated by the economic self-interest of lawyers as opposed to a long-standing core values rationale); Burnele V. Powell, *Flight from the Center: Is it Just or Just About Money?*, 84 MINN. L. REV. 1439, 1444-45 (2000) (noting that a substantial amount of anti-MDP testimony before the ABA's MDP Commission was directed at "the economic implications of carving up the nation's legal business").

¹⁶⁷ The key provisions of Rule 5.4 in the context of the MDP debate have remained the same since the rule was originally adopted by the ABA House of Delegates in 1983. *Compare* MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983), *with* MODEL RULES OF PROF'L CONDUCT R. 5.4 (2004) (reflecting that the only changes since the adoption of the original version of Rule 5.4 have been the amendment of Rule 5.4(a)(2) to conform with MODEL RULES OF PROF'L CONDUCT R. 1.7 (1990) regarding the sale of a law practice; the 2002 amendments adding clause (4) to Rule 5.4(a) regarding sharing of court-awarded legal fees with non-profit organizations; and clarifying that the prohibitions in Rule 5.4(d)(2) apply to holders of positions in unincorporated law firms with similar responsibilities to the directors and officers of incorporated firms).

¹⁶⁸ MODEL RULES OF PROF'L CONDUCT R. 5.4 (2004).

¹⁶⁹ This may explain why commentators have so sharply attacked lawyers in accounting firms for purporting to practice "tax" rather than law, even though accountants have been given substantial latitude in giving tax advice without widespread fear of UPL prosecution. *Compare* Powell, *Back to the Future*, *supra* note 4, at 1384 n.40, *with supra* notes 136-42 and accompanying text (discussing permissible tax practice by accountants). *See also* Green, *supra* note 24, at 1143 (discussing the reasoning in several New York State Bar ethics opinions to the effect that although accountants could render certain tax services without violating UPL bans, a lawyer performing the same service would be deemed to be thereby engaged in the practice of law).

¹⁷⁰ *See* Powell, *Back to the Future*, *supra* note 4, at 1384 n.40; Powell, *Looking Ahead*, *supra* note 19, at 111 n.50.

as to stay outside of the “regulatory tent.”¹⁷¹ Some lawyers may be drawing such distinctions in circumstances where the firm’s dominant services are perceived to be in accounting or other nonlegal disciplines. In other settings, however, most lawyers would be either understandably reluctant to make fine points to try to avoid Rule 5.4 problems, or simply unwilling to give up profitable activities that would fall within most working definitions of the practice of law. It therefore makes sense that Rule 5.4 was the focal point of the ABA’s Commission on Multidisciplinary Practice.

Just as the charge later given to its Task Force on the Model Definition of the Practice of Law had some “protectionist” overtones,¹⁷² at least one ABA description of the mission assigned in 1998 to its Commission on Multidisciplinary Practice can be characterized as territorial in its motivation. The ABA’s Center for Professional Responsibility website explains that the Commission was “directed to study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal advice to the public.”¹⁷³ That language could be read to support the views of those who see economic protectionism as a recurring theme in the UPL and MDP debates.¹⁷⁴ Fortunately, the MDP Commission instead appropriately followed the path enunciated by then-ABA President Philip Anderson, who said in August of 1998 that it had “a mandate to look at these issues from the standpoint of the public’s best interests” and “must set aside the financial interests of the profession and ensure that the public interest is served.”¹⁷⁵ The very distinguished members of the Commission¹⁷⁶ concluded that it was indeed their charge to seriously explore the possibility of MDPs

¹⁷¹ See *supra* note 5.

¹⁷² See *supra* notes 61-64 and accompanying text.

¹⁷³ COMM’N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS’N, ABOUT THE COMMISSION, at http://www.abanet.org/cpr/mdp_abt_commission.html (last visited Oct. 21, 2004).

¹⁷⁴ See, e.g., Denkla, *supra* note 124; DOJ/FTC Letter, *supra* note 55; Fischel, *supra* note 15; Green, *supra* note 24.

¹⁷⁵ News Release, Am. Bar Ass’n, ABA President Philip S. Anderson Appoints Commission on Multidisciplinary Practice (August 4, 1998), available at <http://www.abanet.org/media/aug98/multicom.html> (last visited Oct. 21, 2004); see also ABA MDP COMM’N 1999 BACKGROUND PAPER, *supra* note 3, at 8 (“As President Anderson has emphatically pointed out, the mandate of this Commission is to study issues relating to multidisciplinary practice from the standpoint of *the public’s best interests.*”).

¹⁷⁶ See COMM’N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS’N, MEMBERS OF THE COMMISSION ON MULTIDISCIPLINARY PRACTICE, at <http://www.abanet.org/cpr/multicommembers.html> (last visited Oct. 21, 2004).

which, with proper regulation, could provide quality services to the public.¹⁷⁷ The well-chronicled work of the MDP Commission demonstrates that it proceeded to investigate the MDP issue with impressive diligence.¹⁷⁸ Commentators and observers have praised the openness of the Commission's deliberations, its helpful dissemination of pertinent background information, and its generally perceptive identification and framing of the key issues for examination.¹⁷⁹

The MDP Commission's recommendations were, on the other hand, not as well-received as the process leading to those recommendations, and were ultimately rejected.¹⁸⁰ The actions taken by the Commission and the ABA House of Delegates during the Commission's approximately two-year tenure highlighted the tensions inherent in the MDP debate. The Commission's 1999 Recommendation and Report, unanimously supported by the Commission members, proposed detailed modifications to MRPC 5.4 and other aspects of the Model Rules to allow fully integrated MDPs owned by lawyer and nonlawyer service providers, with a special layer of regulation for MDPs controlled by nonlawyers.¹⁸¹ After careful study, the MDP Commission concluded, much like the Kutak Commission nearly two decades earlier,¹⁸² that MDPs should be allowed and regulated.

¹⁷⁷ ABA MDP COMM'N 1999 BACKGROUND PAPER, *supra* note 3, at 3-4.

¹⁷⁸ For examples of the many reports of the Commission and related materials, see generally AM. BAR ASS'N, CENTER FOR PROF'L RESPONSIBILITY, MULTIDISCIPLINARY PRACTICE, at <http://www.abanet.org/cpr/multicom.html> (last visited Oct. 21, 2004).

¹⁷⁹ See, e.g., Dzienkowski & Peroni, *supra* note 2, at 127-34 (generally praising both the composition and work of the MDP Commission); AM. BAR ASS'N, REPORT OF ILLINOIS, NEW JERSEY AND NEW YORK STATE BAR ASSOCIATIONS 2 (2000), available at <http://www.abanet.org/cpr/mdp-report10f.html> (last visited Oct. 23, 2004) [hereinafter RESOLUTION 10F RECOMMENDATION RPT.] (accompanying the recommendation of Resolution 10F and stating that "[t]he Commission provided a forum where all advocates, pro and con, could be heard, encouraged study by others, engaged the academy along with the bench and the bar, and developed new methods for conducting a national and international debate through its very informative website").

¹⁸⁰ RESOLUTION 10F, *supra* note 8, ¶¶ 6-8.

¹⁸¹ See COMM'N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS'N, RECOMMENDATION (1999), at <http://www.abanet.org/cpr/mdprecommendation.html> (last visited Oct. 21, 2004) [hereinafter ABA MDP COMM'N 1999 RECOMMENDATION]; COMM'N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS'N, REPORT TO HOUSE OF DELEGATES APP. A (1999), at <http://www.abanet.org/cpr/mdpappendixa.html> (last visited Oct. 21, 2004).

¹⁸² For reports on the work of the Kutak Commission and the ABA's rejection of that commission's pro-MDP recommendations in the context of MRPC 5.4 debates, see, e.g., Daly, *Choosing Wise Men Wisely*, *supra* note 1, at 241-43; Jones & Manning, *supra* note 6, at 1192-96.

In reaching this conclusion, the MDP Commission made findings and observations that are directly applicable to business planning firms designed to serve entrepreneurs. The Commission reasoned that the attorney rules of conduct should be loyal to core values of the legal profession, but should not “unnecessarily inhibit the development of new structures for the more effective delivery of legal services and better public access to the legal system.”¹⁸³ After analyzing approximately sixty hours of testimony and voluminous written materials gathered from a number of sources, including “small business clients,” the Commission found “that there is an interest by clients in the option to select and use lawyers who deliver legal services as part of a multidisciplinary practice (MDP).”¹⁸⁴ It determined that, with appropriate safeguards, this client interest could be satisfied in a fully integrated MDP without compromising core values “that are essential for the protection of clients and the proper maintenance of the client-lawyer relationship.”¹⁸⁵ The Commission also observed that despite the fact that much of the MDP debate focuses on large accounting firms and large law firms, “there is a substantial interest in forming MDPs by lawyers in solo and small firm practices.”¹⁸⁶ This is a particularly important point, given that American Bar Foundation statistics indicate that, despite the modern proliferation of large law firms, nearly seventy percent of the attorneys in private practice in the United States are sole practitioners or practice in firms of ten or fewer attorneys.¹⁸⁷

¹⁸³ ABA MDP COMM’N 1999 RECOMMENDATION, *supra* note 181, ¶ 1.

¹⁸⁴ ABA MDP COMM’N 1999 RPT., *supra* note 93, at 1.

¹⁸⁵ *Id.* at 1-2.

¹⁸⁶ ABA MDP COMM’N 1999 REPORTER’S NOTES, *supra* note 4, at 6.

¹⁸⁷ CLARA N. CARLSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1995, at 25 (1999) (indicating that in 1995, 69.3% of U.S. lawyers in private practice were practicing solo or in firms of ten or less); BARBARA A. CURRAN & CLARA N. CARLSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S, at 25 (1994) (indicating that in 1991, 67.2% of U.S. lawyers in private practice were practicing solo or in firms of ten or less); AM. BAR ASS’N, PRE-PUBLICATION STATISTICS FOR 2000 (on file with author) (indicating that in 2000, 69.9% of U.S. lawyers in private practice were practicing solo or in firms of ten or less). *Cf.* Biamonte, *supra* note 2, at 1161 (similarly noting the volume of solo and small law firms in the United States, and suggesting that special MDP rules could be fashioned allowing for lawyer-controlled small firm MDPs, citing potential benefits to small law firms and small businesses); Poser, *supra* note 1 (advocating a small-scale, fully integrated MDP model that, in addition to other requirements, would be limited to thirty “professional” owners); Wolfram, *Comparative Multi-Disciplinary Practice*, *supra* note 7, at 976 (suggesting that MDP proposals may have been better received by the bar in Canada than in the United States because firms in Canada have remained “comparatively small” and Canadian lawyers are thus more apt to accept the notion of combinations with competent nonlawyers).

En route to its 1999 recommendation to allow, but regulate, fully integrated MDPs, the Commission explored the history of MRPC 5.4. It noted that the rule's proscriptions were not included in the ABA's original Canons of Professional Ethics in 1908, but rather entered the Canons some twenty years later, in precatory language that did not become mandatory rules of conduct until the ABA's adoption of the Model Rules of Professional Conduct in 1969.¹⁸⁸ The Reporters Notes to the 1999 Report and Recommendation cited the view of the Kutak Commission that the prohibitions in MRPC 5.4 were only "tenuously related" to substantial ethical concerns about relationships between lawyers and nonlawyers.¹⁸⁹ Other observers who have studied the evolution of MRPC 5.4 have similarly noted its lack of a compelling basis, from a client-protection perspective, for its bans on fee-sharing and partnerships between lawyers and nonlawyers.¹⁹⁰ Nevertheless, the MDP Commission did not advocate repeal of Rule 5.4. Instead, it recommended modification of its prohibitions in a manner that would allow partnerships between lawyers and nonlawyers by preserving the ethical responsibilities of lawyer participants.¹⁹¹

The key terms of the Commission's 1999 Recommendation included a requirement that a multidisciplinary practice comprised of lawyers and nonlawyers have "as one, but not all" of its purposes, or that it hold out to the public, that it will provide legal services, as well as nonlegal services, to clients.¹⁹² The Commission also recommended that MDPs—in connection with the delivery of legal services—be subject to the same conflict of interest, imputation, and other ethical rules as those that apply to law firms.¹⁹³ Other recommendations included a ban on the delivery of legal services by nonlawyers in the MDP (accompanied by statements making it clear that its recommendation is not intended to override UPL rules);¹⁹⁴ a provision that a lawyer in an MDP is not excused from observing the rules of professional conduct by reason of a "nonlawyer supervisor's resolution of a question of professional duty";¹⁹⁵ a requirement that

¹⁸⁸ ABA MDP COMM. 1999 RPT., *supra* note 93, at 2.

¹⁸⁹ ABA MDP COMM'N 1999 REPORTER'S NOTES, *supra* note 4, at 4.

¹⁹⁰ See, e.g., Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 600-14 (1989); Green, *supra* note 24, at 1133-55.

¹⁹¹ ABA MDP COMM'N 1999 RPT., *supra* note 93, at 2; ABA MDP COMM'N 1999 RECOMMENDATION, *supra* note 181, ¶¶ 4-7.

¹⁹² ABA MDP COMM'N 1999 RECOMMENDATION, *supra* note 181, ¶ 3.

¹⁹³ *Id.* ¶¶ 7-8.

¹⁹⁴ *Id.* ¶ 4.

¹⁹⁵ *Id.* ¶ 6.

lawyers in the MDP alert clients to the potentially varying obligations of lawyers and nonlawyers in the firm with respect to confidential information and potential effects on attorney–client privilege;¹⁹⁶ a continued prohibition on the holding of equity interests in the MDP by persons other than the lawyer and nonlawyer service providers;¹⁹⁷ and a system of court-supervised oversight and audits of MDPs controlled by nonlawyers.¹⁹⁸ The accompanying Report and Reporter’s Notes leave little doubt that the Commission’s 1999 Recommendation was based on principled study and analysis, and a balancing of interests loyal to the direction provided by ABA President Anderson.¹⁹⁹

The Commission’s progress over twelve months was apparently too much, too fast, for some elements of the legal profession. Under pressure from various bar associations, the Commission requested that the ABA House of Delegates defer voting on the 1999 Recommendation.²⁰⁰ That request was in effect granted, when the House of Delegates adopted a resolution indicating that there would be no changes to the Model Rules of Professional Conduct to permit MDPs, “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.”²⁰¹

The MDP Commission thereafter undertook substantial further study, in consultation with various bar associations and other representatives of the legal profession. It acknowledged and addressed criticism of various aspects of its proposed regulatory system for MDPs, and published an item-by-item response on significant issues in question.²⁰² At the outset of that presentation, the Commission addressed its failure to cite “competence” as a core value in its 1999 Recommendation, in which it had followed the lead of MDP opponents in focusing on the core values of loyalty, confidentiality, and independence of judgment.²⁰³ In response, the

¹⁹⁶ *Id.* ¶ 9.

¹⁹⁷ *Id.* ¶ 13.

¹⁹⁸ ABA MDP COMM’N 1999 RECOMMENDATION, *supra* note 181, ¶ 14.

¹⁹⁹ See generally ABA MDP COMM’N 1999 RPT., *supra* note 93; ABA MDP COMM’N 1999 REPORTER’S NOTES, *supra* note 4.

²⁰⁰ See ABA MDP COMM’N 2000 UPDATED BACKGROUND RPT., *supra* note 5, at 1.

²⁰¹ *Id.* (quoting the resolution adopted by the ABA House of Delegates on August 10, 1999).

²⁰² ABA MDP COMM’N 2000 UPDATED BACKGROUND REPORT, *supra* note 5, at 3-7.

²⁰³ *Id.* at 4. *But cf.* Dzienkowski & Peroni, *supra* note 2, at 141 nn.308-09 (citing comments from some MDP opponents that suggest that lawyers in MDPs might suffer a loss of competence in their “legal work” as they became involved in “other business

Commission simply explained that it had not intended to “denigrate the importance of competence,” and had assumed it was “implicit” in its Recommendation, and should be listed in any future recommendation and report. The Commission thus regrettably missed an opportunity to more fully discuss the prominent role competence should play in the MDP debate. Taking into account the complex, interdisciplinary nature of modern practice, and particularly modern transactional work, a strong argument can be made that multidisciplinary practice may be necessary to avoid *incompetence*.²⁰⁴ The example of Brad’s Transplex start-up venture set forth in Part II, above, demonstrates the need for a coordinated team of individuals, consisting of both lawyers and nonlawyers. The mix of issues likely involved in the Transplex project implicates not only several areas of law (such as, among others, business organizations, securities regulation, tax, intellectual property, zoning, environmental regulation, and employment law), but also reveals a need for expertise in many other areas, including accounting, insurance, marketing, mechanical engineering, and systems management.²⁰⁵ One way or another, a lawyer attempting to “quarterback” the Transplex project would need to assemble and coordinate the efforts of a team of specialists.

An attorney may in fact be required to enlist the services of specialists when the need to address issues outside of his or her expertise would prevent the attorney from efficiently and competently serving all of the client’s interests.²⁰⁶ The existence of this expertise problem is corroborated by the MDP Commission’s fact gathering, in which, as noted above, it uncovered a strong interest in

activities”).

²⁰⁴ See *supra* note 1 (citing many sources that speak to the pressing need for interdisciplinary education of law students); see also *supra* note 17 (citing the many sources in the MDP literature explaining that lawyers are often not capable of addressing complex interdisciplinary problems without the assistance of experts from multiple disciplines). Cf. Kevin C. McMunigal, Comment, *Multidisciplinary Practice and Conflict of Interest*, 52 CASE W. RES. L. REV. 995, 995 (2002) (“Far from being unethical, one might well argue that the ethical mandate of competence should require lawyers to draw on other disciplines if their clients’ problems call for it.”).

²⁰⁵ See *supra* notes 37-42 and accompanying text.

²⁰⁶ See GEVURTZ, *supra* note 37, at 39-50. Gevurtz acknowledges the ability of an attorney under MRPC 1.1 to ethically take on issues in an unfamiliar practice area when the ability to become competent is reasonable under the circumstances, but cites authority for the proposition that there may be a duty to bring in a specialist when “a reasonably careful and skillful practitioner would do so” and that failing to do so would, in a negligence action, subject the attorney to be held to the standard of care and skill “ordinarily used by specialists in good standing in the same or similar locality and under the same circumstances.” *Id.* at 45.

MDPs among lawyers practicing in solo and small law firms.²⁰⁷ In dealing with the complexities of many business transactions, lawyers may often be *required* to engage in some form of multidisciplinary practice, a point that should not be overlooked in discussions of the alternatives available to attorneys in fulfilling their competency obligation.

Following its unfortunately abbreviated discussion of competence as a core value, the MDP Commission turned to a frequent claim made by MDP opponents—an alleged lack of “empirical evidence” that the public needs MDPs. Its response to that claim was threefold. First, it argued that no useful method would exist to definitively establish the need for MDPs until they had been allowed to operate and become market-tested.²⁰⁸ Second, it pointed to testimony and materials supporting the conclusion that a need existed.²⁰⁹ Third, in an effort to use MDP opponents’ fear of the then “Big Five” accounting firms’ aggressive tactics against them, the Commission suggested that the accounting giants’ success in recruiting and marketing the services of lawyers (who may be walking a fine line in terms of UPL issues) is in fact empirical evidence of a market for MDPs.²¹⁰ Again, the Commission could have said more. In this instance, it might have invoked the “common sense” that the ABA Task Force on the Model Definition of the Practice of Law would later recommend to states considering UPL reforms.²¹¹ It is not difficult to intuit, for example, that an entrepreneur trying to start a business under temporal and financial constraints could benefit from a “one-stop shop.” Fees for such a firm’s services would reflect the overhead of one firm rather than several, communications among the key service providers would be streamlined, and, as discussed further in Part IV below, the owners of the firm would share the risk-based concern that all services be performed competently and to the client’s satisfaction. In addition, one might argue that if fully integrated MDPs are unnecessary, they will not survive, and the list of core value disasters cited by MDP opponents

²⁰⁷ See *supra* note 187 and accompanying text.

²⁰⁸ ABA MDP COMM’N 2000 UPDATED BACKGROUND RPT., *supra* note 5, at 4. See also Powell, *Looking Ahead*, *supra* note 19, at 111 (similarly asserting that claims by MDP opponents that the regulation of MDPs, if permitted, would be ineffective, is merely an “easily recognized rhetorical device, which never became more sophisticated than the demand that the Commission prove a negative,” and that the MDP concept merits real-world testing rather than pessimistic speculation).

²⁰⁹ ABA MDP COMM’N 2000 UPDATED BACKGROUND RPT., *supra* note 5, at 4.

²¹⁰ *Id.*

²¹¹ See *supra* notes 102-03 and accompanying text.

would never materialize. In short, for a variety of reasons, the argument that fully integrated MDPs should be prohibited until a need for them is empirically demonstrated fails the test of common sense.

After its additional year of study, and taking into account the criticisms of its 1999 Recommendation, the MDP Commission returned to the ABA House of Delegates with what has been characterized as a “compromise” proposal.²¹² The 2000 Recommendation was shorter and less specific than its 1999 predecessor, leaving many details of the mechanics of regulation to the states.²¹³ The most significant substantive difference between the Commission’s 1999 and 2000 Recommendations was that the latter limited its recommendation to permit MDPs to arrangements in which “the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services.”²¹⁴ The 2000 Recommendation and Report does not provide a precise definition of “control and authority.” Instead of a “majority ownership” or similar test, it favors a facts and circumstances approach that might be more easily adaptable to the varied particulars of different sized firms or disparate types of multidisciplinary arrangements.²¹⁵

Unlike its 1999 proposal, the Commission’s 2000 Report indicates that its 2000 Recommendation was not unanimously supported, at least with respect to a few major features. The 2000 Report states that some members would have included a specific requirement of majority ownership by lawyers (with a state-by-state option to require supermajority ownership), and would require that a “primary purpose” of the MDP be the delivery of legal services.²¹⁶ Such apparent disagreements among Commission members could, in any event, be resolved at the individual state level. Although it was a watered down version of its 1999 Recommendation, the 2000 proposal retained the central conclusion that the legal profession needed to respond to various forces of change,²¹⁷ and that permitting MDPs should be a part of that response. Criticism of the 1999

²¹² See, e.g., Powell, *Looking Ahead*, *supra* note 19, at 110 (referring to the MDP Commission’s 2000 Recommendation as “a compromise recommendation based on the self-regulating forces of the marketplace”).

²¹³ See ABA MDP COMM’N 2000 RECOMMENDATION & RPT., *supra* note 52, at 6 (noting, for example, that although its previously proposed audit and regulatory procedures were left out of the 2000 Recommendation, states may want to seriously consider the advantages and disadvantages of such procedures).

²¹⁴ ABA MDP COMM’N 2000 RECOMMENDATION & RPT., *supra* note 52, at 1.

²¹⁵ *Id.* at 2

²¹⁶ *Id.*

²¹⁷ *Id.* at 7.

Recommendation was directed primarily at perceived threats to the core value of “professional independence” if lawyers were directed by nonlawyers. The 2000 Recommendation attempted to address this criticism by including a condition of lawyer “control and authority” of the type which the Commission had previously rejected.²¹⁸

The compromise was not enough. In a lopsided vote at its July 2000 meeting, the ABA House of Delegates instead adopted Resolution 10F, which had been offered by several state and local bar associations and included, among other things, a clear statement that “[t]he law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised.”²¹⁹ The Resolution also called for the refinement of state definitions of the practice of law and for enforcement of UPL bans.²²⁰ Other provisions were consistent with the message that MDPs were not to be legitimized.²²¹ Beyond that, states were encouraged to discipline lawyers practicing in *de facto* MDPs, and to prosecute more vigorously UPL violations through Resolution provisions that may have been aimed, at least in part, at facilitating states’ prosecution of the Big Five accounting firms.²²² Finally, the Resolution dismissed the MDP Commission “with gratitude for its hard work” and “commendation for its substantial contributions to the profession.”²²³

A number of commentators sharply attacked the action taken by the House of Delegates in July of 2000. Many argued that the “core values” rationale was greatly exaggerated, and was an insufficient basis for depriving the public of the option to pursue the potential

²¹⁸ ABA MDP COMM’N 1999 RPT., *supra* note 93, at 2-3.

²¹⁹ RESOLUTION 10F, *supra* note 8, ¶ 8. Resolution 10F was recommended by the Illinois, New Jersey, and Ohio State Bar Associations, the Florida Bar, and two county bar associations. *Id.* The Report accompanying the recommendation of Resolution 10F indicates that it heavily relied on New York’s MacCrate Report, MACCRATE NY-MDP RPT., *supra* note 16. See RESOLUTION 10F RECOMMENDATION RPT., *supra* note 179, at 1.

²²⁰ RESOLUTION 10F, *supra* note 8, ¶¶ 5-6.

²²¹ These include a recitation to the effect that sharing fees and ownership or control of the practice of law by nonlawyers are “inconsistent with the core values of the legal profession,” and a resolution recommending study of possible amendments to the MRPC to assure safeguards relating to strategic alliances and contractual arrangements with nonlawyers. RESOLUTION 10F, *supra* note 8, ¶ 7 and second resolution.

²²² See ABA MDP COMM’N 2000 RECOMMENDATION & RPT., *supra* note 52, at 12 (discussing lack of UPL enforcement against Big Five and other consulting-type firms).

²²³ RESOLUTION 10F, *supra* note 8.

benefits of MDPs.²²⁴ Several commentators asserted that invocation of core values was thin camouflage for economic protectionism.²²⁵ Regardless of motive, the record of the MDP Commission's work, the criticism of its recommendations from various quarters, and the text of Resolution 10F all suggest that the single biggest obstacle to fully integrated MDPs is the fear of compromising the core value of professional independence, intertwined with the separately stated core value of loyalty through the avoidance of conflicts of interest.²²⁶ There are certainly issues to address in other areas as well, such as confidentiality and attorney–client privilege. Still, the central area of debate has been over the extent to which the presence of nonlawyer owners might pressure lawyers in an MDP to compromise their professional independence in delivering legal services.²²⁷ The next section explores that pivotal issue.

2. A Hard Look at Pressures on Professional Independence

MDP opponents seem convinced that nonlawyers in MDP settings, and accountants in particular, would force lawyers to sacrifice their professional independence for the sake of the bottom line.²²⁸ The implication is that lawyers are more principled, and less interested in profit, than accountants or other service providers.²²⁹ The anti-MDP literature is not at all clear on exactly how dismissal of the lawyer's ethical obligations at the behest of money-grubbing nonlawyer partners would uniquely manifest itself in fully integrated MDPs. The MDP Commission explicitly raised the issue of the "selective" nature of the MDP opponents' arguments in this key area, citing some common examples of lawyers having to deal with threats to their independent judgment in other practice environments.²³⁰

²²⁴ See, e.g., Crystal, *supra* note 12; Green, *supra* note 24; Jones & Manning, *supra* note 6, at 1199.

²²⁵ See, e.g., Crystal, *supra* note 12; Fischel, *supra* note 15; Green, *supra* note 24.

²²⁶ See, e.g., ABA MDP COMM'N 2000 RECOMMENDATION & RPT., *supra* note 52, at 4-5; see also *supra* note 16.

²²⁷ See ABA MDP COMM'N 2000 UPDATED BACKGROUND RPT., *supra* note 5, at 6 ("The most common concern expressed about MDPs is that working in such a practice setting will inevitably lead to the erosion of the lawyer's professional independence.").

²²⁸ See, e.g., Fox, *Dan's World*, *supra* note 16, at 1540-41.

²²⁹ See *supra* note 31 and accompanying text.

²³⁰ See ABA MDP COMM'N 2000 UPDATED BACKGROUND RPT., *supra* note 5, at 6 ("This concern is highly selective, however. It ignores other practice settings in which the problem is more frequent and more severe. Among these settings are full time employment by a single client . . . employment as an associate under the direction of a partner . . . and membership in a partnership in which difficult ethical

Accordingly, as other MDP commentators have appropriately observed,²³¹ it is useful to consider in more detail some of the pressures affecting a lawyer's decision-making in a typical American law firm—a business organization that shares at least one characteristic with both accounting firms and many envisioned MDPs: it is decidedly *for profit*.²³²

Associate attorneys and junior partners in law firms are frequently under pressure from senior law firm partners to produce billable and collectible hours.²³³ They are also encouraged to originate new business. Even senior partners in a law firm are judged in terms of some combination of billable work and “rainmaking.”²³⁴

issues are frequently resolved by a managing partner or an executive committee and in which compensation is dependent on billings.”). Even without citing the many additional examples discussed below, the MDP Commission saw enough undue selectivity in this line of reasoning by MDP opponents to cause it to expressly solicit comments “on whether it should suggest that a separate rule addressing professional independence be adopted to apply to all lawyers in all practice settings regardless of the manner in which they are compensated.” *Id.*

²³¹ See, e.g., Andrews, *supra* note 190, at 602 (“[T]here is no reason to suppose that corporations or laymen engage in the ‘sordid’ business of making money any more than do traditional law firms.”); James W. Jones, *Focusing the MDP Debate: Historical and Practical Perspectives*, 72 TEMP. L. REV. 989, 996 (1999) (arguing that the core value issues cited by MDP opponents, including professional independence, “are all issues that arise in the ordinary practice of law, particularly in large, multi-office or international firms”); Jones & Manning, *supra* note 6, at 1199-1201 (“Indeed, in an era of large and rapidly growing law firms with the attendant economic pressures they create, the focus on threats to a lawyer’s independence ‘from within’ would seem equally important to threats ‘from without.’”); Poser, *supra* note 1, at 123-24 (“A better way to consider the issue of independent judgment is to recognize the threats to its existence in traditional firms. Private law firms are for-profit businesses and the pressures this creates are substantial.”); Swan, *supra* note 4, at 402 (citing the report of the District of Columbia Bar Special Committee on Multidisciplinary Practice, *infra* note 277, for the proposition that there is no “evidence that in a multidisciplinary practice the business pressures qualitatively diverge from those in a modern law firm (or the legal department of a business organization)”); see also Dzienkowski & Peroni, *supra* note 2, at 139 (asserting that there is no evidence that lawyers working for government agencies, as corporate in-house counsel, or for trade associations or other nonprofit organizations compromise their independent judgment to a greater extent than lawyers practicing in law firms).

²³² See, e.g., *Howard v. Babcock*, 863 P.2d 150, 159 (Cal. 1993) (“[C]ontemporary changes in the legal profession . . . make the assertion that the practice of law is not comparable to a business unpersuasive and unreflective of reality.”); CAL. MDP RPT., *supra* note 2, at 13 (citing *Howard v. Babcock* as an example of the recognition that “the ‘special’ role of lawyers does not immunize them from the realities and economics of the professional market place”).

²³³ See generally HAMILTON & MACEY, *supra* note 150, at 41-57 (discussing law firm compensation factors, and noting the importance of billable hours and origination of new business, and the popularity of “sweat bonuses” for billable hours that exceed a specified threshold amount).

²³⁴ See *id.* at 50 n.9, 54 n.1.

While compensation structures may vary from firm to firm, with some giving more credit for *pro bono* work, firm management service, or other non-billable time, it would be a rare law firm that did not place primary emphasis on lawyer time and originations billed and collected.²³⁵

A lawyer who is not careful, honest, and principled in these circumstances might succumb to various temptations, such as cutting corners on the completion of transactional work on a project being billed as a flat fee rather than on an hourly rate basis; logging more hours than appropriate on a matter;²³⁶ proposing premature settlement of a case taken on a contingency fee; curtailing research in the face of a risk that a client might balk at (and refuse to pay) the bill for the additional research needed to allow full analysis of an issue; straining to find no conflict of interest in accepting new engagements from parties with some interests adverse to existing clients;²³⁷ or ignoring evidence of possible wrongdoing by an important client or a senior partner.²³⁸ These are just a few examples in the context of lawyers working for lawyers. If there were no legitimate fear that senior attorneys might, intentionally or not, pressure attorneys working for them to make wrong decisions, the Model Rules of Professional Conduct would not need to include special provisions regarding a “subordinate” lawyer’s reliance on a supervising attorney’s “reasonable resolution of an arguable question of professional duty.”²³⁹

Lawyers working in law firms may feel pressures from sources outside the firm as well. The primary danger is that clients might want to engage in illegal or improper activity, with the direct participation or passive acquiescence of the attorney. Less

²³⁵ See *id.* at 41-57.

²³⁶ See, e.g., Jones & Manning, *supra* note 6, at 1198 (noting pressure to “keep the billable hours up”); Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 HOFSTRA L. REV. 879, 916 (2002) (positing in her oft-cited commentary on billing fraud in law firms that “[r]ewarding people for billing huge numbers of hours, or for bringing in work that leads others to bill huge numbers of hours, is tacit institutional encouragement to write down phony hours”); Poser, *supra* note 1, at 124.

²³⁷ Cf. ABA MDP COMM’N 2000 UPDATED BACKGROUND RPT., *supra* note 5, at 6.

²³⁸ *Id.*

²³⁹ MODEL RULES OF PROF’L CONDUCT R. 5.2(b) (2004); see also ABA MDP COMM’N 2000 UPDATED BACKGROUND RPT., *supra* note 5, at 6. Similarly, the “up-the-ladder” reporting rules recently promulgated by the Securities and Exchange Commission might not have included special relief for subordinate attorneys from follow-up obligations on reports of evidence of material violations of law. See Standards of Professional Conduct for Attorneys Appearing and Practicing before the Commission in the Representation of an Issuer, 17 C.F.R. § 205.5 (2004).

egregiously, perhaps, the client might, attempting to facilitate the closing of a business transaction, prod the attorney to give an opinion, or to take a position on compliance with a regulation or in a legal proceeding, with which the lawyer is not comfortable.²⁴⁰ These are only a few examples of potential conflict between a client's desires and a lawyer's professional judgment. The economic pressure may be significant, especially if the client accounts for a large percentage of the firm's or lawyer's income.²⁴¹

Business lawyers may face additional complications if transactional clients offer them a "piece of the deal" in lieu of a cash fee, in gratitude for the lawyer's work, or just because the client needs investors.²⁴² The potential for conflicts of interest that might compromise professional judgment in matters pertaining to that business is obvious. Interpreting the requirements of various aspects of the Model Rules of Professional Conduct, the ABA Standing Committee on Ethics and Professional Responsibility has issued a Formal Opinion condoning such investment where the terms are fair and reasonable, appropriate disclosures are made, the client is given the opportunity to be advised by independent legal counsel regarding such investment, the lawyer concludes that independent professional judgment can be maintained, and the client consents.²⁴³ Commentators have questioned the extent to which lawyers representing companies in which they hold an equity interest can indeed maintain professional independence, particularly in such matters as disclosures in a securities regulation context.²⁴⁴ ABA

²⁴⁰ Cf. Jones & Manning, *supra* note 6, at 1199 (noting possible pressures by senior partners on young associates to reach a result in an opinion or memorandum "that is more likely to the liking of a large client of the law firm").

²⁴¹ See ABA MDP COMM'N 2000 UPDATED BACKGROUND RPT., *supra* note 5, at 9 (noting that, even apart from multidisciplinary settings, where a law firm depends on one client for "a substantial portion of its revenues," resulting "[f]ear of antagonizing the client may interfere with the exercise of independent professional judgment by the firm's lawyers").

²⁴² See, e.g., Jones & Manning, *supra* note 6, at 1198-99; Poser, *supra* note 1, at 124 (noting that contingency fees and acquisition of an interest in a client's business pose risks to independent judgment).

²⁴³ ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 418 (2000) (applying, principally, the rules and considerations reflected in MODEL RULES OF PROF'L CONDUCT R. 1.5 (Fees), R. 1.7 (Conflict of Interest: General Rule), R. 1.8 (Conflict of Interest: Prohibited Transactions), and R. 2.1 (Advisor)).

²⁴⁴ See, e.g., Royce De R. Barondes, *Professionalism Consequences of Law Firm Investments in Clients: An Empirical Assessment*, 39 AM. BUS. L.J. 379 (2002); Christine Hurt, *Counselor, Gatekeeper, Shareholder, Thief: Why Attorneys Who Invest in Their Clients in a Post-Enron World Are "Selling Out," Not "Buying In,"* 64 OHIO ST. L.J. 897 (2003). But cf. Donald C. Langevoort, *When Lawyers and Law Firms Invest in Their Corporate Clients' Stock*, 80 WASH. U. L.Q. 569 (2002); Puri, *supra* note 47 (acknowledging the existence

Formal Opinion 418 apparently viewed the threat to professional independence as outweighed by other concerns. It indicated, for instance, that part of the rationale for allowing these arrangements is to assist start-up businesses that may have little cash at the outset to pay legal fees.²⁴⁵ This is more than a bit ironic, in that at approximately the same time Opinion 418 was issued, the ABA House of Delegates adopted Resolution 10F, grounding its argument for continued prohibition of fully integrated MDPs (despite testimony suggesting that such MDPs could deliver more cost-effective services to small start-up businesses) largely on perceived threats to a lawyer's professional independence.²⁴⁶

A lawyer working in a law firm might also be compromised by nonlawyers outside of the firm providing services to the law firm's clients—in other words, the same individuals with whom lawyers might “partner” in fully integrated MDPs, if they were allowed. A client's accountant, financial planner, or business consultant may very well be in a position to influence the client to give more work to the lawyer or to direct the client's legal work to a different law firm. At the same time, the accountant or other nonlawyer service provider could be a referral source with respect to prospective law firm clients, and might expect referrals in return. The firm lawyer may therefore experience some pressure to get along with those nonlawyers, perhaps by recommending them to their clients even if the quality of their work is questionable.²⁴⁷

One of the reasons that the legal profession lays claim to high ethical standards—lawyer jokes notwithstanding—is that lawyers are trained to identify and resist these various temptations and pressures. It is a matter of individual integrity. The ABA MDP Commission and numerous commentators have noted that the focus of the disciplinary rules for professional conduct has traditionally been on the *individual*

of potential conflicts, but concluding that such arrangements should be thoughtfully regulated, rather than banned).

²⁴⁵ ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 418, at 1 (2000) (“From the client's perspective, the lawyer's willingness to invest with entrepreneurs in the start-up company frequently is viewed as a vote of confidence in the enterprise's prospects. Moreover, a lawyer's willingness to accept stock instead of a cash fee may be the only way for a cash-poor client to obtain competent legal counsel.”).

²⁴⁶ Formal Opinion 418 was issued July 7, 2000. *Id.* Resolution 10F was adopted July 11, 2000. *See* Gibeaut, *supra* note 8.

²⁴⁷ *Cf.* Jones & Manning, *supra* note 6, at 1199 (properly observing that, independent of nonlawyers, similar conflicts threaten a lawyer's judgment when pressured to refer work to another lawyer in the same law firm, even if that lawyer is not necessarily the “best” person to handle the client matter in question).

lawyer.²⁴⁸ MDP opponents have failed to explain, at least to any meaningful extent, why there would be a significant impairment of a lawyer's ability to maintain independent professional judgment under pressures in the MDP context as compared with those already present in law firm practice.²⁴⁹ The affected decisions in terms of the delivery of legal services would presumably be the same, and in both cases there could be adverse financial consequences from disagreeing with those exerting the pressure. Surely MDP opponents, who seem to be quite confident in the abilities of lawyers generally, cannot be presuming that accountants in the MDP will argue more persuasively than senior law firm partners. Perhaps the assumption of MDP opponents is that, on average, the senior lawyers are expected to be more principled watchdogs and buffers between junior lawyers and outside forces than would be senior accountants or other nonlawyer proprietors of MDPs. This reasoning will be addressed below, along with descriptions of possible safeguards in the context of a business planning MDP that would be designed to ensure that all of the owner/service providers have incentives to make the right decisions on matters of professional judgment and duty.²⁵⁰

²⁴⁸ See, e.g., ABA MDP COMM'N 1999 RPT., *supra* note 93, at 2; Dzienkowski & Peroni, *supra* note 2, at 203; Jones & Manning, *supra* note 6, at 1209; see also Mary C. Daly, *Teaching Integrity in the Professional Responsibility Curriculum: A Modest Proposal for Change*, 72 FORDHAM L. REV. 261 (2003); Lalli, *supra* note 17, at 300-01; David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279 (2003); Burnele V. Powell, *The Limits of Integrity or Why Cabinets Have Locks*, 72 FORDHAM L. REV. 311 (2003); Deborah L. Rhode, *If Integrity Is the Answer, What Is the Question?*, 72 FORDHAM L. REV. 333 (2003).

²⁴⁹ Cf. Alwin & Eckerly, *supra* note 6, at 264 (“[MDP opponents] offer no empirical support for the theory that lawyers will succumb to the pressures of nonlawyer management.”); Green, *supra* note 24, at 1154-55 (arguing that the assumption that lawyers would be “too weak to withstand the influence of their nonlawyer collaborators” is both “unwarranted” and “at odds with the most fundamental assumption of lawyer professionalism and self-regulation”); Poser, *supra* note 1, at 125 (similarly arguing that if we assume under current ethical rules that lawyers can maintain their independence and look out for the best interests of their clients, “there is little reason to think that lawyers will buckle under pressure exerted by nonlawyer colleagues”). See also Letter from Professor Robert W. Gordon, to the American Bar Association MDP Commission (May 21, 1999), available at <http://www.abanet.org/cpr/gordon.html> (last visited Oct. 21, 2004) (urging the Commission to ask whether multidisciplinary practices would “add” significant new pressures, and whether benefits of MDPs might outweigh the probable costs or risks of added pressures).

²⁵⁰ See *infra* notes 261-72 and accompanying text (discussing the suggestion by MDP opponents that lawyers are inherently more principled than accountants); *infra* Part IV.B (proposing a model system of safeguards for a business planning MDP).

3. Looking Beyond Matters of Form Regarding Independence and Confidentiality

As discussed in the previous section, under currently permitted multidisciplinary collaborations, accountants and other nonlawyers who are part of a team representing common clients may threaten a lawyer's independent professional judgment. To assume that partnering such nonlawyer service providers with the lawyer and his or her law partners will make those pressures significantly worse is elevating form over substance.²⁵¹ In fact, a better argument can be made that by directly sharing the risk of adverse consequences from breach of the lawyer's professional duties, the nonlawyer business partners would be *less* likely to try to influence the lawyer to commit such breaches.²⁵²

Similar form over substance reasoning occurs in arguments over confidentiality and attorney-client privilege, another "core values" concern commonly expressed by MDP opponents.²⁵³ In a business planning project, for instance, a team of individuals will be called upon to review plans, as illustrated by the Transplex example in Part II, above.²⁵⁴ There will be frequent discussions among the client, the lawyers, and the nonlawyers on the team, which may very well involve proprietary or other information that the client would like to keep confidential. The extent to which preserving confidentiality of client information is in the best interest of the public is, however, debatable.²⁵⁵ In addition, amidst allegations of major corporate

²⁵¹ Cf. Jones & Manning, *supra* note 6, at 1200 ("The broad proscriptive provisions of Rule 5.4 represent a glorification of form over substance that cannot be justified on the basis of preserving the professional independence of lawyers."); Terry, *A Primer on MDPs*, *supra* note 7, at 923 ("Rather than using rules about legal forms as a proxy for our true concerns, U.S. regulators should focus on the underlying issues.").

²⁵² See *infra* Part IV.B.3.

²⁵³ See, e.g., ABA MDP COMM'N 1999 RPT., *supra* note 93, at 3 (summarizing concerns expressed in these areas); Jones & Manning, *supra* note 6, at 1194-95, 1202-03 (noting that the Kutak Commission had pointed to existing disciplinary rules as adequate protection of confidentiality, regardless of the form of practice and seeing "no reason" to differentiate between an MDP and a law firm with respect to confidential client information); Michael W. Price, Comment, *A New Millennium's Resolution: The ABA Continues Its Regrettable Ban on Multidisciplinary Practice*, 37 HOUSTON L. REV. 1495, 1518-19 (2000) (similarly observing that confidentiality and privilege issues are complicated by interactions with nonlawyers in many existing practice settings, and that current rules should be adaptable to MDPs, perhaps via clarifying amendment).

²⁵⁴ See *supra* notes 37-43 and accompanying text.

²⁵⁵ See, e.g., Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary?*, 15 GEO. J. LEGAL ETHICS 477 (2002) (discussing the history of attorney-client confidentiality and privilege in the United States, and highlighting the difficult balancing of interests that merits continued questioning of the limits of the breadth of these

financial fraud, there has been a controversy of particular interest in the business transactions arena.²⁵⁶ In fact, both the Securities and Exchange Commission²⁵⁷ and the ABA²⁵⁸ have recently taken action aimed at expanding the range of “permissive disclosure” by attorneys of clients’ financial wrongdoing.

Whatever the limits of confidentiality and privilege may evolve to be, the associated duties should remain on individual attorneys. Disclosure of MDP client information to nonlawyers should raise the same confidentiality and privilege issues for lawyers in MDPs as currently exist in law firms or in collaborations with persons outside

concepts); *see also* Crystal, *supra* note 12, at 757-58 (arguing that historical analysis does not support “strict confidentiality, noting, for example, that the ABA’s 1908 Canons required disclosure of unrectified fraud in various circumstances”). *But cf.* Lawrence J. Fox, *It Takes More Than Cheek to Lose Our Way*, 77 ST. JOHN’S L. REV. 277 (2002) (urging strenuous resistance to proposals contained in a preliminary report of the ABA’s Task Force on Corporate Responsibility to facilitate permissive disclosure, and in some cases require disclosure of corporate fraud, characterizing confidentiality as “the second leg of the tripod of core values that support our professional ethic,” and arguing that the proposals in question would make it more difficult for lawyers to represent their clients).

²⁵⁶ *See, e.g.*, Peter C. Kostant, *Breeding Better Watchdogs: Multidisciplinary Partnerships in Corporate Legal Practice*, 84 MINN. L. REV. 1213, 1249 (2000) (arguing that strict duties of confidentiality and attorney–client privilege “make transactional lawyers less effective as reputational intermediaries and therefore harm their honest clients”); Peter C. Kostant, *Sacred Cows or Cash Cows: The Abuse of Rhetoric in Justifying Some Current Norms of Transactional Lawyering*, 36 WAKE FOREST L. REV. 49 (2001) (discussing the role of confidentiality rhetoric in facilitating corporate fraud); Richard W. Painter, *Lawyers’ Rules, Auditors’ Rules and the Psychology of Concealment*, 84 MINN. L. REV. 1399 (2000) (exploring the underlying motivations for concealment of information by lawyers and others, with particular focus on audited companies and the differing duties of lawyers and auditors, and suggesting in the MDP context that waiver of confidentiality by a sophisticated business client may be of benefit to both the public and the client); Recommendation of ABA Task Force on Corporate Responsibility to Modify MRPC Rule 1.6, as adopted by resolution of ABA House of Delegates August 11-12, 2003, *available at*

<http://www.abanet.org/leadership/2003/journal/119a.pdf> (last visited Oct. 21, 2004) (explaining reasons for expansion of the “Ethics 2000” amendments to add information regarding financial crimes or frauds to Rule 1.6’s short list of permitted disclosures of confidential client information).

²⁵⁷ *See* 17 C.F.R. § 205.3(d) (2004) (authorizing attorneys representing an “issuer”—generally a public company filing reports under the Securities Exchange Act of 1934—to disclose to Securities and Exchange Commission, without issuer’s consent, confidential information to the extent that attorney reasonably believes necessary to prevent perjury, fraud on Commission, material violation of law likely to cause substantial financial injury to issuer or investors, or to rectify consequences of such material violation in which attorney’s services were used).

²⁵⁸ MODEL RULES OF PROF’L CONDUCT R. 1.6 (2004); *see also* Painter, *supra* note 29, at 186-87 (arguing that failure of the ABA to modify MRPC 1.6 to permit disclosures of ongoing or prospective client crime or fraud would put into public question the propriety of the legal profession’s “core values” with respect to confidentiality).

of law firms. To safeguard the attorney's duties and the client's understanding of the issues involved, the types of disclosures and warnings about differing duties with respect to confidential information and possible effects on attorney-client privilege suggested by the MDP Commission in its 1999 Recommendation for the operation of fully integrated MDPs,²⁵⁹ should be given in both the MDP context and in situations where the collaborating service providers are not owners of the same firm. Although access to files and electronic data may present some additional challenges in protecting attorney-client communications in a fully integrated MDP,²⁶⁰ those mechanical issues can be addressed by appropriate procedures which should be well within the capabilities of lawyers to design and monitor.

When substance is placed ahead of form, it becomes clear that diligence by individual attorneys is what ultimately makes the ethics rules work and drives the delivery of quality legal services to clients. Business lawyers are accustomed to advising clients on how to structure their business organizations to limit incentives for malfeasance by co-owners or employees and to protect proprietary information. As will be described in Part IV below, diligent lawyers should be capable of building into firms—including firms in which they hold ownership interests along with nonlawyers—a system of checks and balances to ensure compliance with the substance of their individually-based ethical rules, regardless of the form of the business arrangement.

4. Sears, Tow-Truck Drivers, Nest Foulers, and the Fear of a Circus

It has been reported that the Kutak Commission's efforts to have MRPC 5.4 modified to permit MDPs suffered a fatal blow in 1983 when a supporter of those efforts answered "yes" when asked if,

²⁵⁹ ABA MDP COMM'N 1999 RECOMMENDATION, *supra* note 181, at 1; ABA MDP COMM'N 1999 RPT., *supra* note 93, at 3. *But cf.* Michael W. Loudenslager, *Cover Me: The Effects of Attorney-Accountant Multidisciplinary Practice on the Protections of the Attorney-Client Privilege*, 53 BAYLOR L. REV. 33 (2001) (arguing that multidisciplinary practice has the potential to erode confidentiality and attorney-client privilege despite the safeguards suggested by the MDP Commission, and that jurisdictions that take action to allow multidisciplinary practice should also consider enacting testimonial accountant-client privilege statutes).

²⁶⁰ See Michael Traynor, *Some Open Questions About Attorney-Client Privilege and Work Product in a Multidisciplinary Practice*, 36 WAKE FOREST L. REV. 43, 47 (2001) (raising questions about storage of confidential information and work product and asserting that it may be "no easy task" for MDPs to develop and maintain adequate safeguards).

under the pending proposal, Sears could own a law firm.²⁶¹ Some commentators have explained that the ABA House of Delegates' rejection of the Kutak Commission's recommendation was based on purported threats to professional independence, concern that lawyers would not be able to be "professional," and the fear of a "fundamental but unknown effect on the legal profession" if Sears, or other large retailing, tax preparation, or accounting firms, owned organizations that employed lawyers and dispensed legal advice.²⁶² Similarly, the MDP Commission's 1999-2000 work was tainted by allusions to lawyers in partnership with the likes of tow-truck drivers.²⁶³ The rhetoric advanced by MDP opponents has been an interesting blend of sky-is-falling predictions that lawyers will lose the ability to maintain their integrity when associated with nonlawyers, and rather elitist pronouncements about the "legal profession."

While other professions and trades have been included in MDP opponents' lists of allegedly horrible prospective nonlawyer partners, a special place has clearly been reserved for accountants. One of the most oft-cited works in the MDP debate is Lawrence Fox's article, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*.²⁶⁴ Recently fueled by major deficiencies in audits of Enron and other large publicly held companies,²⁶⁵ the assaults on the "accounting profession" make unfounded generalizations about accountants, again focusing inordinately on the handful of "Big" auditing firms. For example, referring to Arthur Andersen's audit failure in the case of Enron as "vindication" of the arguments of MDP opponents, Fox questions the ability of lawyers to "succeed in an MDP environment when the accountants so dramatically failed."²⁶⁶ Such a blanket conclusion is unsupported by facts, especially since the problems and failures of accounting giants like Arthur Andersen are not analogous to and will not threaten the potential success of smaller firms and

²⁶¹ See Levinson, *supra* note 8, at 140.

²⁶² See, e.g., Andrews, *supra* note 190, at 594-95; Daly, *Choosing Wise Men Wisely*, *supra* note 1, at 242 (recounting the Kutak Commission's experience and fear that Sears, Montgomery Ward, H & R Block, and the "Big" accounting firms would end up competing with law firms).

²⁶³ See Dzienkowski & Peroni, *supra* note 2, at 198-200 (citing and discussing oral testimony before the MDP Commission raising this prospect, as well as the prospect of partnerships with undertakers, beauticians, and other tradespersons who, from the perspective of those offering the testimony, might be seen as demeaning the legal profession).

²⁶⁴ Fox, *Accountants*, *supra* note 30.

²⁶⁵ See generally RAPOPORT & DHARAN, *supra* note 29.

²⁶⁶ Fox, *MDPs Done Gone*, *supra* note 26, at 547, 555.

their clients. These attacks on the accounting profession also ignore the reality that certified public accountants have strict codes of professional conduct.²⁶⁷ It is certainly true that recent shortcomings of some “Big Five” auditors have revealed the need for revamped systems of regulation of the audit function and for consideration of the promulgation of accounting principles.²⁶⁸ Similarly, aggressiveness by the major accounting firms in promoting tax shelter “products” has inspired enhanced disclosure requirements and governmental scrutiny of tax shelters.²⁶⁹ Even so, it is simply unfair and hypocritical to condemn the accounting profession as a whole for the problems which made those measures necessary.

Reflecting on the treatment of accounting and other professions in the anti-MDP literature, one would think Shakespeare had written, “The first thing we do, let’s kill all the *nonlawyers*.”²⁷⁰ MDP opponents imply that partnerships between individuals from various professions would turn the delivery of legal services into something of a circus, which would be inattentive to “core values” that only lawyers can truly understand. Public opinion polls notwithstanding,²⁷¹ the legal profession is indeed a noble one, and conscientious attorneys should be proud to be part of a tradition of important contributions to the administration of civilized society.²⁷² To become licensed attorneys, these individuals have undertaken intense study and have been carefully trained in the nuances of a formal set of ethical rules.

²⁶⁷ The AICPA’s Code of Professional Conduct, which includes provisions on integrity, objectivity, conflicts of interest (under Rule 102), and confidential client information (under Rule 301) can be accessed at <http://www.aicpa.org/about/code/comp.htm> (last visited Oct. 21, 2004). See also Alwin & Eckerly, *supra* note 6, at 272 (noting that CPA examination has section that includes business law and professional responsibility).

²⁶⁸ For discussion of this author’s view of the historical background and an overview of recent Congressional and SEC responses to major public company auditing failures by large accounting firms, see Luppino, *supra* note 146.

²⁶⁹ See, e.g., Treas. Reg. § 1.6011-4 (2004); Wang, *supra* note 147.

²⁷⁰ The actual line, from WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH, act 4, sc. 2, is, “First thing we do, let’s kill all the lawyers,” and is often quoted, misleadingly out of context, as if it were a lawyer joke.

²⁷¹ See Rhode, *supra* note 248, at 333 n.2 (noting that lawyers “barely edge out used car salesmen” in public opinion polls on rankings for honesty).

²⁷² Indeed, Shakespeare’s line, quoted *supra* note 270, actually speaks to the importance of lawyers in warding off tyranny. Compare the noble role of lawyers as stewards of the law, as suggested by President Kennedy’s statement, “Law is the adhesive force in the cement of society, creating order out of chaos and coherence in place of anarchy.” President John F. Kennedy, Address at Ninetieth Anniversary Convocation of Vanderbilt University (May 18, 1963), *quotation available at*, John F. Kennedy Quote Page, <http://home.att.net/~jrhc/jfk.html>. (last visited Oct. 21, 2004).

Although lawyers are sometimes criticized and ridiculed because they are often messengers of bad news—such as when business lawyers have to tell a group of hard-charging entrepreneurs about a series of regulatory impediments that they must overcome before they can realize their dream—astute clients recognize that good lawyers facilitate their compliance with complex rules and regulations in achieving their goals, and are an important part of their team of advisors. But none of this justifies the arrogance—or what James Jones and Bayless Manning appropriately termed “professional hubris”²⁷³—involved in arguing that lawyers are the only team members who can fully appreciate the importance of candor, honesty, loyalty, and the associated need to avoid conflicts of interest. These would not be “core values” if they were not comprehended by and important to the public generally.

There are, of course, both scrupulous and unscrupulous nonlawyers, just as there are both scrupulous and unscrupulous lawyers. That reality necessitates that a fully integrated MDP be organized in a fashion designed to deliver high quality service and avoid impropriety by providing potential rewards for proper behavior and personally adverse consequences for improper behavior. The final section of this Article suggests a model for a business planning MDP, as an example of a firm that can provide clients with a viable option for the receipt of multidisciplinary services with safeguards to protect fundamental values in the delivery of services to the public.

IV. A BUSINESS PLANNING MDP PROPOSAL

A. *Identifying an Appropriate Framework*

Since the ABA House of Delegates adopted Resolution 10F in July of 2000, much has been written about the need to keep the MDP debate alive. No state has yet, however, implemented rules permitting fully integrated MDPs engaged in the delivery of a variety

²⁷³ See *supra* note 33; see also CAL. MDP RPT., *supra* note 2, at 12 (urging that special dual role of lawyers as both service providers to clients and officers of the court “does not imply that lawyers are more important or valuable than other professionals”); Denckla, *supra* note 124, at 2594 (arguing that “lawyers have no exclusive claim to integrity despite the operation of disciplinary rules which ostensibly enforce good behavior”); Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy and Unethical Profession*, 52 VAND. L. REV. 871, 909 (1999) (“Being an ethical lawyer is not much different from being an ethical doctor or mail carrier or gas station attendant.”). *But cf.* William J. Wertz, *The Ethics of Large Law Firms—Responses and Reflections*, 16 GEO. J. LEGAL ETHICS 175, 182 (2002) (challenging Schlitz’s assertion and arguing that “[m]orality for lawyers, especially advocates, is, in special ways, deep, complicated and inherently ambiguous”).

of legal and other services. The District of Columbia has retained its special version of MRPC 5.4, allowing nonlawyers to own and have managerial positions in firms operating in that jurisdiction that “[have] as [their] sole purpose providing legal services to clients,”²⁷⁴ thereby allowing nonlawyers to share in law firm profits in a limited context. New York has modified its Code of Professional Responsibility to allow “contract model” MDPs (termed “strategic alliances”) within narrow parameters.²⁷⁵ But these New York provisions have been criticized as doing little more than officially condoning the status quo in terms of limited contractual collaborations among lawyers and nonlawyers.²⁷⁶ The District of Columbia²⁷⁷ and some states are still studying the MDP issue, though many MDP projects have been stalled since the adoption of Resolution 10F.²⁷⁸ Among the more notable ongoing initiatives is an effort by the California State Bar to promote a “Demonstration Project” that would test the concept of a fully integrated (or “pure form”) MDP along the lines presented in its Task Force’s 2001 California MDP Report.²⁷⁹

Reluctance to permit fully integrated MDPs is depriving the public of a valuable option. As some of the literature has appropriately pointed out, it is eminently reasonable to expect that the best service providers will seek the respect and profit-sharing

²⁷⁴ D.C. RULES OF PROF’L CONDUCT R. 5.4 (1996).

²⁷⁵ N.Y. COMP. CODES R. & REGS. tit. 22, pt. 1200 (2002).

²⁷⁶ See Powell, *Back to the Future*, *supra* note 4, at 1380-84 (sharply criticizing the New York provisions as lacking substance in terms of being truly interdisciplinary, and as merely codifying limited relationships between lawyers and “subordinate” professionals already permitted under the ABA’s Model Rules of Professional Conduct).

²⁷⁷ The District of Columbia Court of Appeals is in possession of a recommendation approved by the District of Columbia Board of Governors on May 14, 2002, that would, through amendments to Rules 1.7 and 5.4 of the D.C. Rules of Professional Conduct, allow a form of fully integrated MDP owned by lawyers and other “professional” service providers, whether controlled by lawyers or nonlawyers, but has not yet acted on the recommendation. Koszewski Memo, *supra* note 9. The Board of Governors’ conclusion and recommendations, as well as the text of the proposed amendments to Rules 1.7 and 5.4, are available at http://www.dcbbar.org/inside_the_bar/structure/reports/index.cfm. (last visited Oct. 21, 2004) [hereinafter “D.C. RECOMMENDATION & RPT.”]. See also Swan, *supra* note 4 (discussing the D.C. Recommendation & Rpt. principally in the context of financial planning).

²⁷⁸ Koszewski Memo, *supra* note 9.

²⁷⁹ See CAL. MDP RPT., *supra* note 2; see also Wolfram, *Comparative Multi-Disciplinary Practice*, *supra* note 7, at 982-84 (recognizing importance and potential of California MDP Report, but cautioning that there are both positive and negative factors to consider in assessing likelihood of California Bar proposal leading to allowance of integrated MDPs).

rewards associated with being co-owners.²⁸⁰ The public interest is ill-served by confining multidisciplinary practice to situations in which either the nonlawyers must be employees or otherwise under the control of the lawyers, or in which cumbersome contractual arrangements segregate the lawyers from the nonlawyers.²⁸¹ Perhaps the need to allow partnering among service providers from different disciplines would be more readily apparent if the focus were turned away from “mega” law firms and the now Big Four accounting firms. Mega-firm Arthur Andersen’s performance on auditing and consulting matters for Enron, which was then one of the largest companies in the world, simply does not speak to the prospects of success of solo and small law, accounting, and consulting firms that might merge to form an entity owned and managed by a limited number of principals who were all accomplished in their professions and possessed sound business judgment.

This does not mean that separate regulatory frameworks are needed for large and small MDPs. Nor does it mean that the MDP Commission was right in proposing in its 1999 Recommendation that a special regulatory system is necessary for MDPs controlled by nonlawyers as opposed to lawyers. It is possible to devise one set of rules that is loyal to three guiding principles: (1) providing clients with the opportunity to receive efficient, high quality, collaborative multidisciplinary advice; (2) avoiding conflicts of interest to the same extent as with law firms; and (3) utilizing incentives to encourage individuals in the MDP to operate in compliance with attorney conduct rules, including the implementation of adequate measures to protect the “core values” of competence, independent professional judgment, and confidentiality.²⁸² The next section will describe in

²⁸⁰ See, e.g., Powell, *Looking Ahead*, *supra* note 19, at 128 (“A rule that prohibits lawyers and other professionals from working with clients as equals represents a nostalgia that neither we nor our clients can any longer afford.”); Price, *supra* note 253, at 1511 (noting that “‘employee’ status is unlikely to attract the most talented and valuable professionals to a law firm,” and suggesting that co-owned MDPs would have a better chance of attracting such individuals).

²⁸¹ See *supra* note 4; see also CAL. MDP RPT., *supra* note 2, at 1 (explaining reasons for formation of California MDP Task Force by observing that limitations on lawyers fee-sharing and acting as “co-principals” with nonlawyers “may have become hindrances in delivering effective legal services to the consuming public”).

²⁸² Cf. CAL. MDP RPT., *supra* note 2, at iii (finding that effective maintenance of core values can be accomplished “through continued individual accountability of lawyers for fulfilling their professional responsibilities in all respects and through a required certification process for entities which seek to engage in a ‘pure form’ of MDP”); D.C. RECOMMENDATION & RPT., *supra* note 277, at 3 (concluding that fee-sharing among lawyers and other professionals would not be against public policy or unethical if conditions involving informed disclosure to clients, and lawyers in the

some detail how a business planning MDP, as a test case, could be allowed to operate under these general parameters. While it is more likely that members of a smaller firm can comply with the proposed rules more easily than a mega firm, any sized group that could comply with the rules should have the opportunity to do so.

B. Regulating the Business Planning MDP

The states' versions of MRPC 5.4 should be modified to permit lawyers to participate in an MDP that provides a mix of legal and other services to clients in connection with business planning and business transactions, and in which at least one of the owners is a licensed attorney (hereinafter a "Business Planning Firm"). For this purpose, "business" could be broadly defined to include any for-profit or not-for-profit activity involving the provision of goods or services to others, as well as investment activity for a client's own account or the accounts of others. Particular jurisdictions, however, may want to use a more narrow definition on a pilot-project basis. Subject to the UPL rules described below, the Business Planning Firm would be permitted to deliver any services reasonably related to the conduct of any such business, as well as such ancillary services as litigation or advocacy before administrative agencies relating to business matters of firm clients, tax return preparation, and estate planning.

The Business Planning Firm could choose its entity structure from the types of business organizations that the applicable state law permits for law firms. There would be no requirement that legal services be the primary services delivered by the firm, nor that the firm accept only clients seeking legal advice as at least part of the services to be obtained from the firm. Some clients might engage the firm solely for what they perceive as legal advice, while others may seek accounting services, business consulting, or a combination of services. Due to the interpretational difficulties associated with the definition of the unauthorized practice of law and limitations on client expertise discussed in the UPL context above,²⁸³ a system that requires clients of a Business Planning Firm to distinguish between "legal" and "nonlegal" services, or to "opt" in or out of attorney-client relationships in a formal way,²⁸⁴ would *not* be a part of the regime

MDP retaining independence and remaining subject to and "effectively held responsible for" compliance with their professional conduct rules).

²⁸³ See *supra* Part III.A.

²⁸⁴ This was suggested, for example, in the California MDP Report for fully integrated MDPs. CAL. MDP RPT., *supra* note 2, at 28. It should be noted that the California MDP Report called for a revisiting of the definition of the "practice of law" as well, but did not offer a definition, other than to add a favorable reference to UPL

proposed herein.

The Business Planning Firm and its owners and managers would be subject to the following basic restrictions and requirements, and on an annual basis each licensed attorney in the firm would have to submit to the appropriate regulatory body a certificate designed to evidence the level of compliance with these rules.

1. Permissible Owners

Under the proposed regulatory structure, the firm would be allowed to have as its owners only individuals reasonably expected to personally participate in the delivery of permissible legal or other services to firm clients. There would be no set limit on the number of such owners in a qualifying firm. As the Transplex hypothetical in Part II above demonstrates, the owners of the Business Planning Firm might include such diverse service providers as lawyers, accountants, financial planners, insurance advisors, engineers, business and marketing consultants, information technology experts, and systems analysts. As the ABA MDP Commission noted in connection with its 1999 Recommendation, confining ownership in MDPs to just “professionals” or “licensed professionals” may be too restrictive and begs definitional questions.²⁸⁵ The public should be permitted options as to an attractive mix of service providers.

The MDP Commission’s 2000 Recommendation would have limited ownership to “recognized professions or other disciplines that are governed by ethical standards.”²⁸⁶ This type of condition would add little to the regulatory scheme. There are societal expectations of ethical behavior in business dealings regardless of the extent to which ethical standards are published. Confining participation in MDPs to individuals from trades or professions that have formally

provisions that were then under consideration by the State of Washington. *Id.* at 39. For a pertinent excerpt from the Washington definition, see *supra* text accompanying note 55.

²⁸⁵ See ABA MDP COMM’N 2000 RECOMMENDATION & RPT., *supra* note 52, at 4; ABA MDP COMM’N 1999 REPORTER’S NOTES, *supra* note 4, at 8; see also CAL. MDP RPT., *supra* note 2, at 25-26 (proposing that MDP participants be confined to licensed professionals who have a code of professional ethics or professional responsibility compatible with core values of the legal profession); D.C. RECOMMENDATION & RPT., *supra* note 277, at Comments [7] & [8] (explaining that its proposed rule confines ownership in MDPs to individuals performing “professional services” without precise definition of that term leaving that to common law, but noting that the term “is intended to encompass learned callings that require mastery of a recognized field of academic knowledge and practice”).

²⁸⁶ ABA MDP COMM’N 2000 RECOMMENDATION & RPT., *supra* note 52, ¶ 1; D.C. RECOMMENDATION & RPT., *supra* note 277, at Comment [7] (similarly explaining that its MDP proposal bans passive investment).

memorialized the importance of competence, honesty, and loyalty is unnecessary and unduly limiting. If protection of the perceived “core values” of the legal profession is the issue, a better approach would be for states to impose a rule that lawyers are not permitted to share fees or be co-owners in entities with nonlawyers unless the nonlawyers have participated in a program introducing them to the ethical rules governing attorneys, perhaps also requiring periodic continuing education. In any event, the lawyers in the Business Planning Firm—whether owners or employees of the firm—would be bound by all applicable attorney conduct rules, several of which are highlighted below, and be subject to discipline for engaging in or facilitating violation of those rules.

Consistent with the MDP Commission’s views on the ownership of MDPs generally, under the Business Planning Firm model envisioned herein, the rules would prohibit “passive equity owners.”²⁸⁷ Limiting the owners of the Business Planning Firm to include only actual service providers circumscribes a group with the common goal and responsibility of delivering good service to clients. If individuals or entities who are not delivering services to clients, but to whom the managers and service providers within the Business Planning Firm would owe fiduciary duties, were permitted to own equity interests in the firm, conflicts of interest would routinely arise, similar to the conflicts between duties to customers and other constituencies and duties to maximize profits for shareholders which have long been the subject of controversy in the area of corporate governance.²⁸⁸ Although prohibiting passive equity investors may limit sources of capital for the Business Planning Firm,²⁸⁹ protecting the interests of clients through avoidance of conflicting loyalties is an overriding consideration. Suggestions that potential conflicts between the fiduciary duties owed to firm clients and those owed to passive investors would be assuaged by general conflict avoidance precepts,

²⁸⁷ *Id.*; ABA MDP COMM’N 1999 RPT., *supra* note 93, at 3; ABA MDP COMM’N 1999 RECOMMENDATION, *supra* note 181, ¶ 13; *see also* CAL. MDP RPT., *supra* note 2, at vi (opining that passive investment in MDP or other legal practice should not be permitted).

²⁸⁸ *See generally* HAMILTON & MACEY, *supra* note 150, at 643-59.

²⁸⁹ *See, e.g.*, Dzienkowski & Peroni, *supra* note 2, at 196-98 (advocating relaxation of ban on “passive investment” in order to allow MDPs to have flexible capital structure); Fischel, *supra* note 15, at 968 (similarly advocating permission to raise equity capital, but cautioning against potential problems with financing litigation in perhaps a more socially undesirable way); Matheson & Adams, *supra* note 19, at 1301 (arguing that law firms could operate more efficiently with equity capital, and that equity investors could help fund contingency fee case expenses, creating greater access to legal services for otherwise underrepresented plaintiffs).

and by requiring MDPs to deliver to the lawyers in it “written assurances” that “professional judgment will not be impaired,”²⁹⁰ are simply unpersuasive.

2. Unauthorized Practice of Law

Nonlawyers in the Business Planning Firm would be subject to rules similar to those of the 2003 Utah UPL Provisions,²⁹¹ with some modification. Specifically, nonlawyers would not be allowed to represent clients in judicial proceedings or in administrative proceedings, unless applicable state law specified to the contrary. Nonlawyers could not hold themselves out as lawyers.²⁹² Nor could they give legal opinions to non-client third parties—only lawyers in the Business Planning Firm would be permitted to do so. The firm’s nonlawyers would be free from UPL prosecution for any other work on client matters, even those involving interpretation of laws, so long as the firm had among its owners one or more attorneys licensed to practice law in each jurisdiction in which the firm does business. Outside of the Business Planning Firm (or such other types of MDPs in which the jurisdiction permits licensed attorneys to practice), the UPL rules applicable to nonlawyers could be more traditional (and broad), if the jurisdiction so desires. Within the MDP, the lawyer participants would be charged with supervising and monitoring the competence of the persons delivering services that involve interpretation of laws.

The personal exposure aspects of the liability sharing rules described in Section 3 below, along with market forces, would provide an incentive for the Business Planning Firm’s owners to ensure that the firm’s lawyers were sufficiently involved in the giving of any advice regarding interpretation of complex laws. The firm’s owners would naturally be inclined to see that law-intensive work was done by or under the supervision of lawyers, and that work requiring accounting expertise was done by or under the supervision of the firm’s accountants, and so on as to the other areas of service. The expectation that the owners and managers of a Business Planning Firm would institute systems to provide for interdisciplinary communication (and perhaps education through in-house seminars), and a sensible division of work is substantiated by the absence of two

²⁹⁰ See, e.g., Dzienkowski & Peroni, *supra* note 2, at 197 (describing such an alternative).

²⁹¹ See *supra* note 110 and accompanying text.

²⁹² For examples, see clauses (2) and (3) of the 2003 Utah UPL Provisions, *supra* text accompanying note 110.

potential problems that might hinder the delivery of competent multidisciplinary services in the case of services provided by separate firms. First, lawyers and nonlawyers within the same firm would have less of an economic incentive to stretch the limits of their competency to avoid losing revenues to another firm in which they hold no profit-sharing interest.²⁹³ Second, because their reputation and economic interests are united in a single organization, the lawyers and nonlawyers within the Business Planning Firm would be less inclined to ignore suspicions that an individual advising the client on certain matters might not be properly handling such matters.

3. Control, Authority, and Liability Sharing

Under the proposed MDP rules, there would be no requirement that lawyers control the Business Planning Firm by percentage ownership or otherwise, and no mandate that a separate legal department be maintained within the firm.²⁹⁴ A jurisdiction adopting the Business Planning Firm model should also take steps to eliminate any requirement that accountants be in control of the firm.²⁹⁵ Such strict requirements would unnecessarily inhibit a firm's organizational flexibility. Nonetheless, every lawyer in the MDP would be bound by all of the rules of attorney conduct, including those requiring the lawyer's exercise of independent professional judgment and maintenance of the confidentiality of client information.²⁹⁶ Ethical rules regarding subordinate attorneys would remain in place,²⁹⁷ and rules comparable to MRPC Rule 5.1 (Responsibilities of Partners, Managers, and Supervising Lawyers)

²⁹³ Even if a colleague within the firm then did the work, it is likely that the individual who brought in the business would, in compensation determinations, receive some credit for "originating" the work. *See supra* notes 233-34 and accompanying text.

²⁹⁴ *See* ABA MDP COMM'N 2000 RECOMMENDATION & RPT., *supra* note 52, at 2-3 (recommending some form of control by firm's lawyers for all fully integrated MDPs and suggesting that department structures be implemented in larger firms); *see also* Dzienkowski & Peroni, *supra* note 2, at 176 (arguing that fully integrated MDPs should have separate legal departments). *Cf.* D.C. RECOMMENDATION & RPT., *supra* note 277, at Comment [9] (explaining that its MDP proposal does not require control by lawyers or segregation of legal units, but suggesting that there might be advantages in such areas as "professional oversight" and minimizing privilege or other disputes turning on the capacity in which client services are performed).

²⁹⁵ *See* Biamonte, *supra* note 2, at 1182 (discussing testimony before MDP Commission indicating that approximately twenty states had statutes requiring that certified public accountants practice in firms owned by at least 51% CPAs).

²⁹⁶ *See* ABA MDP COMM'N 1999 RECOMMENDATION, *supra* note 181, ¶ 5.

²⁹⁷ *See supra* note 239 and accompanying text.

and Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) would impose obligations on the firm's lawyers to monitor the conduct of other lawyers *and* nonlawyers to prevent ethics violations.²⁹⁸

A key element of the proposed framework would be the prospect of personal responsibility for malpractice or violations of law.²⁹⁹ A state could consider applying special liability sharing rules to MDPs. Liability for malpractice with respect to services delivered by the firm—whether or not involving interpretations of law—might fall jointly and severally on the MDP owners, if such a rule applied to law partnerships generally. Alternatively, a state could impose rules similar to those found in some “limited liability partnership” statutes whereby a supervisor, lawyer or not, would be personally liable not just for the supervisor's own wrongdoing, but also for actions or omissions of individuals under the supervisor's direction or control, regardless of the type of services involved.³⁰⁰ Similarly, each lawyer in the Business Planning Firm could be held responsible for violations of applicable ethics rules that he knew of, or reasonably should have prevented. Such a system of personal liability (which includes risks of economic loss and suspension or revocation of a lawyer's license to practice) should provide significant incentives for lawyers in a Business Planning Firm to reach agreement with other owners with respect to the establishment and maintenance of a system of checks and balances in connection with the delivery of legal opinions and other services involving interpretation or application of laws and compliance with attorney conduct rules. It would also encourage owners to exercise care in determining with whom they will partner.

²⁹⁸ MODEL RULES OF PROF'L CONDUCT R. 5.1, R. 5.3 (2004); *see also* Matheson & Adams, *supra* note 19 (noting the importance of MRPC Rule 5.3 in the MDP context in addressing confidentiality concerns). *Cf.* D.C. RULES OF PROF'L CONDUCT R. 5.4(b)(3) (1996) (requiring lawyers with financial or managerial interest in permitted MDPs to “undertake to be responsible for the nonlawyer participants to the same extent as if the nonlawyer participants were lawyers under [D.C. RULES OF PROF'L CONDUCT R. 5.1]”); D.C. RECOMMENDATION & RPT., *supra* note 277, at Comment [6] (citing Rule 5.3 and explaining that under its MDP proposal lawyers would be required to take “reasonable measures” to ensure that nonlawyers involved do not cause violations of the lawyers' ethical obligations).

²⁹⁹ *Cf.* ABA MDP COMM'N 2000 RECOMMENDATION & RPT., *supra* note 52, at 4 (arguing that incentives to adhere to “control and authority” principle in the MDP Commission's 2000 Recommendation would include possibility of civil liability for breaches of duties related to independent judgment, conflicts of interest, confidentiality, or standards of practice).

³⁰⁰ *See generally* HAMILTON & MACEY, *supra* note 150, at 60-66 (discussing various versions of “limited liability partnership” statutes, including versions that leave a partner potentially liable for not only the partner's own negligence and other wrongdoing, but also for negligence and other wrongdoing by individuals under the partner's direct supervision and control).

4. Conflicts of Interest

A lawyer would not be permitted to participate as an owner in the Business Planning Firm unless all owners agreed that the firm would abide by the conflicts of interest rules, including the “imputation” rules that are generally applicable to lawyers and law firms. These rules would be applied, however, with respect to *all* firm clients whether or not they are viewed as receiving legal services. The MDP Commission’s 1999 Recommendation appeared to limit the application of the conflicts rules to “the delivery of legal services.”³⁰¹ Such a limitation unwisely assumes that a suitable definition of “legal services” can be drafted. The problems associated with drafting and applying such a definition would create undue complexity.³⁰² The broad application of conflict rules in the fashion herein proposed would have substantial positive effects with respect to preserving loyalty, and, for those concerned, would discourage the now Big Four accounting firms from expropriating the legal profession.³⁰³

5. Audit Services

Under the proposed model, lawyers would be prohibited from owning an interest in a Business Planning Firm that provided audit services to any client of the firm, unless audit services were the *only* services the firm provided to such a client. In addition, lawyers would be prohibited from owning an interest in a Business Planning Firm that had among its owners anyone who, through a separate firm or any other vehicle, provides or receives income from audit services for any client who engages the Business Planning Firm for *any* non-audit services. These prohibitions would apply whether or not the client in question was a public company with auditors subject to the auditor independence rules promulgated by the Securities and Exchange Commission.³⁰⁴ The point is that the roles and disclosure obligations of auditors (certifying financial disclosures and information about the client for the benefit of investors or other third parties) and attorneys working (perhaps with other service providers) on transactions that may be subject to audit (and zealously representing the *client’s* interests on such transactions), are simply not sufficiently aligned to justify permitting in-house audits of clients receiving other

³⁰¹ See ABA MDP COMM’N 1999 RECOMMENDATION, *supra* note 181, at 1. Cf. D.C. RECOMMENDATION & RPT., *supra* note 277, at Conclusion 6 (similarly focusing on conflicts where legal services are being provided).

³⁰² See ABA MDP COMM’N 1999 REPORTER’S NOTES, *supra* note 4, at 5.

³⁰³ See Biamonte, *supra* note 2, at 1184-85.

³⁰⁴ See 17 C.F.R. § 210.2-01 (2004).

services.³⁰⁵

One might argue that the prohibitions against audit services should apply only if the “other” service the Business Planning Firm client is receiving are “legal services.” However, the problems in defining the practice of law would come into play if the “no audit” rule were applied to only those clients who receive “legal” services. Imposing a complete ban on audits with respect to all Business Planning Firm clients who receive *any* non-audit services may limit, but certainly should not eliminate, the universe of accountants interested in joining such firms, given the wide range of tax, bookkeeping, and other financial services on which accountants have expertise. They may have to forego some audit work under this regime, but, at the same time, they will have the opportunity to attract other work from clients interested in efficient, multidisciplinary service on their business transactions.

6. Confidentiality and Attorney–Client Privilege

As noted above, the strength of the public’s interest in the “core value” of confidentiality has been questioned by at least some noted commentators in recent years.³⁰⁶ High-profile corporate fraud scandals may prompt further revisiting of the underpinnings of client confidentiality and attorney–client privilege, especially in the context of business transactions. Those prospective ethical considerations aside, for the substance over form reasons noted above,³⁰⁷ the lawyers in a Business Planning Firm would, in dealing with nonlawyers in the firm, be subject to the same confidentiality obligations as apply in dealing with nonlawyers generally. As suggested in the MDP Commission’s 1999 Recommendation, the lawyers in the Business Planning Firm would be obligated “to make reasonable efforts to ensure that [each firm client] sufficiently understands that the lawyer and nonlawyer may have different obligations with respect to disclosure of client information and that the courts may treat the client’s communications to the lawyer and nonlawyer differently.”³⁰⁸ As with the other rules proposed above, the individual lawyers in the

³⁰⁵ See, e.g., ABA MDP COMM’N 2000 UPDATED BACKGROUND RPT., *supra* note 5, at 7 (characterizing the two roles as “incompatible”). *But cf.* Painter, *supra* note 256 (suggesting that perhaps disclosure obligations of attorneys should be brought more in line with those of auditors).

³⁰⁶ See *supra* notes 255-56.

³⁰⁷ See *supra* Part III.B.3.

³⁰⁸ ABA MDP COMM’N 1999 RECOMMENDATION, *supra* note 181, ¶ 9. *Cf.* D.C. RECOMMENDATION & RPT., *supra* note 277, at Comment [2] (advocating similar disclosure).

MDP would be personally responsible for implementing appropriate engagement letters, file storage (paper and electronic), and other procedures reasonably designed to ensure compliance with the lawyer's ethical obligations, including obligations with respect to confidential information and attorney–client privilege.

7. Segregation of Client Funds

A jurisdiction's rules on the handling of client funds would be fully applicable to lawyers in the Business Planning Firm. This is consistent with the approach suggested to the MDP Commission by the ABA Commission on IOLTA ("Interest on Lawyer Trust Accounts").³⁰⁹

8. Advertising, Solicitation, and Fees

The lawyers in the Business Planning Firm would have to institute and abide by rules for the nonlawyers in the firm to comply with provisions comparable to Rules 7.1, 7.2, and 7.3 of the MRPC, relating to communications that make representations of services offered, advertising, and solicitation.³¹⁰ In addition, all fees for services that only firm lawyers can provide—generally litigation and providing opinions to third parties—would have to be reasonable under rules comparable to MRPC 1.5,³¹¹ with individual jurisdictions deciding whether or not to extend Rule 1.5 to fees for all other firm services. As with other burdens placed directly or indirectly on lawyer and nonlawyer members of the Business Planning Firm under the suggested model described herein, compliance with these rules, whether or not some participants might view them as burdensome, would be a price to pay for the marketing and profit-sharing benefits of the fully integrated MDP format.

9. Mechanics of Implementing the Framework and Monitoring MDPs

From the legal profession's perspective, changes to counterparts of MRPC 5.4 and other rules of attorney conduct would be implemented at the state level. Unlike the MDP Commission's 1999 Recommendation³¹² and the California Bar's suggested model,³¹³

³⁰⁹ ABA MDP COMM'N 2000 UPDATED BACKGROUND RPT., *supra* note 5, at 5.

³¹⁰ MODEL RULES OF PROF'L CONDUCT RR. 7.1-7.3 (2004). *See also* Price, *supra* note 253, at 1521-22 (advocating such an approach and opining that this approach was implicit in the MDP Commission's recommendations).

³¹¹ MODEL RULES OF PROF'L CONDUCT R. 1.5 (2004).

³¹² ABA MDP COMM'N 1999 RECOMMENDATION, *supra* note 181, ¶ 14. *See also*

there would not be a court-supervised special certification and audit system for the Business Planning Firm as an entity *per se*.³¹⁴ Rather, individual certifications would be required of lawyers seeking annual renewal of their law licenses. The renewal forms would require disclosure of nonlawyers' ownership interests in the firm, and answers to a series of questions designed to uncover non-compliance with the basic rules described above. The regulatory system would thus be predicated on the ability to discipline lawyers who commit or permit violations of the aforementioned rules.

Licensing requirements and codes of conduct governing accountants and other nonlawyer service providers represented in the Business Planning Firm would also have to conform to these rules. If the rules of conduct of a given trade or profession represented in the Business Planning Firm permit activity that would violate the revised rules of attorney conduct, each lawyer in the firm would be responsible and subject to discipline for any such activity that the lawyer knew of, or, through reasonable efforts, should have prevented.³¹⁵ The guiding principles of delivering high quality interdisciplinary service to clients, avoiding conflicts of interest, and taking individual responsibility for complying with legal and ethical requirements should be common to all service providers seeking to participate in a Business Planning Firm. Moreover, while this Article has argued that permitting Business Planning Firms would be beneficial in view of the present difficulties in distinguishing legal from other services in the rendering of business planning advice to entrepreneurs, the principles and rules suggested herein would be adaptable to MDPs aimed at other public needs.

Sydney M. Cone, III, *Five Years Later: Reconsidering the Original ABA Report on MDP*, 29 LAW & SOC. INQUIRY 597 (2004) (arguing that the ABA's MDP Commission should have explored in much more detail a system of entity-level licensing of MDPs).

³¹⁴ CAL. MDP RPT., *supra* note 2, at 36-37.

³¹⁴ Malpractice insurance carriers would likely, however, ask entity level questions in connection with renewals of coverage, targeted at making sure both the lawyers and nonlawyers in the firm were taking appropriate measures to assure competence, avoidance of conflicts of interest, and compliance with ethical and other obligations. This would be a helpful supplement to self-policing by the firm's owners.

³¹⁵ *Cf.* CAL. MDP RPT., *supra* note 2, at 17 (arguing that any resulting limitation on business practices of lawyers and nonlawyers in a "pure form" MDP under its model of overlapping, cumulative core values would "come as a 'cost of doing business' together"). *See also* Cone, *supra* note 312, at 612 (suggesting that if conflicting licensing rules of regulated professions were involved "resolution in favor of the strictest rule would often be both proper and readily applicable").

CONCLUSION

Modern business planning and business transactions in the United States are unavoidably complex and essentially multidisciplinary endeavors. A large and thoughtful body of literature strongly supports the notion that allowing fully integrated MDPs is a sensible and overdue measure. The “core values” arguments made by MDP opponents, though identifying important concerns, are inconsistent and elevate form over substance. The MDP debate in the United States has appropriately continued beyond the July 2000 dismissal of the MDP Commission by the ABA House of Delegates. The recent difficulties in creating fair and manageable definitions of the practice of law are relevant to the MDP issue, as they speak to the blurring of lines between the work of lawyers and that of other providers of services to business clients. The UPL experiences, as well as the lessons from Enron and other recent major audit failures, suggest the desirability of more integrated interaction and mutual understanding, rather than more distance, between lawyers and nonlawyers collaborating on projects for business clients.

This Article has presented a model for a Business Planning Firm as an example of a fully integrated MDP that can both provide high quality interdisciplinary services to entrepreneurs and preserve core values traditionally honored by the legal profession. The model, which should be readily adaptable to other types of fully integrated MDPs, proposes a system of regulation that has two key themes. It is in part based on confidence in the inherent integrity of most individual attorneys and other service providers, and in part on incentives, including both potential for personal rewards and risks of personal liability, designed to promote self-policing of MDP participants as a safeguard against temptations to sacrifice “core values.” While individual jurisdictions no doubt would have to work through several details in addition to, or in modification of, some aspects of the framework suggested in this Article in order to implement such a regulatory regime, it is hoped that jurisdictions will find that work worthwhile and in the public interest.