Multidisciplinary Practices:
A Case for Small Firms

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Economics of Law Practice

November 7, 2001

"The vast majority of multidisciplinary practices would be [small firm] practices."[1]

I. INTRODUCTION

The question of permitting multidisciplinary practices (MDPs) has become a hotly debated issue in the United States legal arena in recent years. Viewpoints vary widely on the subject. Many are of the opinion that the multidisciplinary practice is the inevitable legal business model of the future.[2] Others believe MDPs will lead to the degradation of the legal profession.[3]

It is unusual for a client to have a problem that a lawyer alone can address and solve. Clients often bring complex and multifaceted issues to their lawyers. Business, estate or tax planning, are excellent examples of services that require or at least benefit from the expertise of non-legal professionals.

Under the current regulatory scheme, lawyers and non-lawyers[4] cannot share fees.[5] Consequently, clients with multi-

faceted problems cannot engage one professional service organization, but must retain a law firm and an accounting firm, insurance brokerage, financial services firm, real estate brokerage, or any one of a host of other professionals. This situation increases the client's costs and creates multiple entry points for miscommunication between organizations.

The introduction of MDPs into the marketplace will change that. A multidisciplinary practice has the potential to deliver a broad variety of professional services, providing its clients with one-stop shopping. MDPs allow lawyers and non-lawyer professionals to communicate more openly and work together to address client issues. Clients are better served by having experts from various professions addressing the problem consistently and comprehensively. Clients may also save by being able to purchase professional services in a package rather than ala carte.

This paper considers the issues surrounding multidisciplinary practice and the implications for small law firms. It begins with an introduction of the concept of MDPs followed by a review of the current regulatory scheme.[6] To better understand the current state of MDPs, this paper reviews the history of the MDP in the United States and other countries.[7] It also examines the American Bar Association's stance on MDPs and recommends action that the organization should take to promote the practices of small firms. However, a comprehensive debate of the merits of and objections to MDPs will not be conducted, as a plethora of scholarship exists on

the subject.[8] This paper assumes that multidisciplinary practices in one form or another are a part of the inevitable evolution of the legal profession.[9]

Far from being a threat to small firms and solos, MDPs may be the preferable avenue of professional growth for such practitioners. Accordingly, this paper reviews the various MDP business models that may be available to law firms. In addition, the most favorable MDP business models for small firms operating under various regulatory schemes are examined.[10]

II. The Backdrop

A. What is a Multidisciplinary Practice?

One author has defined an MDP as "a partnership owned by lawyers and non-lawyer professionals from other disciplines who work together to solve client problems."[11] In its commission report on the subject, the American Bar Association has defined an MDP as:

> a partnership, professional corporation, or other association or entity that includes lawyers and non-lawyers and has as one, but not all of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services.[12]

For the purposes of this paper, the term MDP will refer to a partnership or other business organization collectively owned by

lawyers and non-lawyers in which only the lawyers provide legal services to clients.

Currently, all U.S. jurisdictions except the District of Columbia prohibit the formation of a multidisciplinary practice.[13] Despite the prohibitions, MDPs exist across the United States. Many lawyers work for accounting and management consulting firms, real estate agencies, banks and lending institutions, and financial planning companies.[14] Consequently, these lawyers operate outside jurisdictional bans on MDPs. Technically, they only provide legal advice to employees of their company rather than its clients.

Law firms also hire non-lawyers as employees or as third-party contractors to perform non-legal services for its clients. These employees are not technically bound by a jurisdictions ethical rules. However, their lawyer employers must comply with ethical rules governing lawyers and non-lawyer subordinates.[15]

B. The Potential Benefits of MDPs

The impetus behind the MDP movement is the realization that consumers of legal services would prefer to retain a firm that can provide one-stop shopping for a variety of professional services. Many areas of legal practice complement other professional services. For instance, estate planning may involve the use insurance products. Legal business planning complemented by accounting and management consulting services is another example. MDP clients would presumably enjoy more comprehensive service if they were able to gather all of the

necessary professionals together, all focused on the client's issues.

Another benefit of the one-stop shopping concept of MDPs is the potential cost savings to clients. A client will no longer need to pay allocated overhead costs for multiple professional service firms.[16] In addition, an MDP firm may be able to offer to its clients a semi-customized package of services at a lower cost. Consequently, the client may be able to consult with experts that might not otherwise be accessible or affordable, resulting in a better solution to the client's problem.

A multidisciplinary practice offers many potential benefits to lawyers as well. An advantage from a lawyer's perspective is the ability to associate and practice with other non-lawyer professionals. This would allow, for example, a lawyer to practice with a financial planner and insurance broker to build full service estate planning boutique firm. Such an arrangement would allow lawyers greater freedom in choosing career paths or entrepreneurial opportunities. In addition, such arrangements would provide an additional source of capital (i.e., non-lawyer partnership contributions) previously unavailable to entrepreneurial lawyers.

Such benefits would not run solely to large law and accounting firms, but would be available to small firms as well.[17] For small firms, one of the most significant benefits of an MDP may be the ability to expand their firm's expertise without greatly increasing the number of lawyers in the firm. For instance, to build expertise in financial planning in a

traditional law firm would normally require the commitment of greater resources to hire or partner with a lawyer with the requisite credentials. In an MDP, the firm could hire a certified financial planner without paying the premium demanded by a lawyer with financial planning certification.[18]

Although acceptance of MDPs has grown, significant resistance remains. As the next section points out, MDP detractors raise several issues in their opposition. Like lawyers in general, lawyers in small firms are also divided on the issue of MDPs. Some see MDPs as the demise of the small firm.[19] Still others see it as the inevitable progression of the small firm practitioner. Although the much of attention in the legal media has been on organizations such as the Big Five accounting firms,[20] the largest potential growth (in terms of sheer numbers) may lie with small firms.

C. Current State of MDPs

All U.S. jurisdictions, with the exception of the District of Columbia, currently prohibit multidisciplinary practices. Those jurisdictions employ some variation of Rule 5.4 of the ABA Model Rules of Professional Conduct, which states in part:

> (a) A lawyer or law firm shall not share legal fees with a non-lawyer....
>
> (b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

> (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
>
> (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
>
> (1) a non-lawyer owns any interest therein...;
>
> (2) a non-lawyer is a corporate director or officer thereof; or
>
> (3) a non-lawyer has the right to direct or control the professional judgment of a lawyer.[21]

Essentially, Model Rule 5.4 prevents lawyers from forming partnerships with non-lawyers if the firm will provide any measure of legal services.

The District of Columbia is an aberration in its treatment of MDPs. It permits firms to have non-lawyer partners.[22] However, two restrictions have limited the effectiveness of this more permissive rule: (1) the firm may only provide legal services (i.e., the non-lawyer may only provide legal support services),[23] and (2) the firm must limit its practice to D.C. (i.e., the firm cannot have non-lawyer partners if it has offices outside of D.C.).[24] Given these restrictions, D.C. law firms have been slow to take advantage of this limited permission to form MDPs.[25]

D. The History of MDPs in the United States

The history of the ABA's opposition to MDPs is a long one. However, when it issued the first Canons of Professional Ethics in 1908, the ABA did not address the issue of MDPs.[26] It was not until 1928 that the ABA promulgated Canons 33, 34, and 35, which prohibited MDPs.[27] Although the language has changed, these provisions are, in large part, substantively the same as the modern rules. Canon 33 prohibited "[p]artnerships between lawyers and member of other professions or non-professional persons should not be formed or permitted where a part of the partnership business consists of the practice of law."[28] Canon 34 addressed fee sharing: "[n]o division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."[29] Canon 35 dealt with lawyers' professional independence: "[T]he professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer.... [T]he lawyer should avoid all relations which direct the performance of his duties in the interest of such intermediary."[30]

These new rules were not popular, however, and the American legal profession objected to the prohibition.[31] At that time, fee sharing and partnerships between lawyers and non-lawyers was not viewed as being unethical.[32] In fact, F.W. Grinnell, a member of the Canons drafting committee, stated in his minority report that "aside from professional policy...there is nothing inherently 'unethical' in the formation of partnerships between

lawyers largely engaged in certain kinds of work and... some other form of expert."[33] Despite the protests, the ABA broadly interpreted the prohibitions contained within the Canons, prohibiting nearly all forms of partnerships between lawyers and other professionals.[34] These restrictions even prohibited a lawyer providing advice to non-legal employer regarding a client's affairs, a practice acceptable today or at least overlooked.[35]

The ABA replaced the Canons of Ethics with the Model Code of Professional Responsibility in 1969, but many of the prohibitions paralleled its predecessor.[36] The portions of the Model Code pertaining to MDPs now read:

> DR 3-102 Dividing Legal Fees with a Non-Lawyer
>
> (A) A lawyer or law firm shall not share legal fees with a non-lawyer....[37]
>
> DR 3-103 Forming a Partnership with a Non-Lawyer
>
> (A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.[38]

Although the ABA altered the language, most of the substantive provisions of the previous prohibitions remained in the Model Code.

In 1983, the ABA replaced the Model Code with the Model Rules of Professional Conduct. Again, "despite the technical changes, the general prohibitions on MDPs, fee splitting, and non-lawyer oversight were continued."[39] The restrictions were

now largely consolidated into Model Rule 5.4.[40] Since the promulgation of the Model Rules, Model Rule 5.4 has been adopted in various forms in all 50 states.[41]

The recent debate concerning MDPs actually began with the drafters of the Model Rules in 1981. At that time the ABA Commission on Evaluation of Professional Standards (commonly referred to as the Kutak Commission) "considered and rejected the traditional view that practicing lawyers should be prohibited from entering into business associations with non-lawyers."[42] Accordingly, the Kutak Commission drafted a very different Model Rule 5.4, which stated:

> A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a non-lawyer . . . such as a business corporation, insurance company, legal services organization or government agency, but only if the terms of the relationship provide in writing that:
>
> (a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
>
> (b) information relating to the representation of a client is protected as required by [the rule on confidentiality of information];
>
> (c) the arrangement does not involve advertising or personal contract with prospective clients

prohibited by [the advertising and soliciting rules]; and

(d) the arrangement does not result in charging a fee that violates [the rule on fees].[43]

The proposed rule was revolutionary in its thinking; it would have essentially allowed law firms to sell stock or partnership shares to the general public. Unfortunately for proponents of MDPs, the ABA House of Delegates wholly rejected the proposed rule when presented in the final draft of the Model Rules in 1982.[44] The proposed rule was subsequently rewritten into its current form.

After another decade of debate within the U.S. legal community, the ABA launched the Commission on Multidisciplinary Practice in 1998. Its objective was to reexamine multidisciplinary practice and make recommendations, if any, on changes to the Model Rules.[45] In February 1999, the Commission recommended to the ABA House of Delegates a "relaxation of the prohibitions against sharing legal fees and forming a partnership or other association with a non-lawyer when one of the activities is the practice of law."[46] Among its fifteen proposals in the Recommendation, the Commission pressed for fee sharing and the delivery of legal services in a multidisciplinary practice.[47]

After being tabled for further evaluation, the issue was finally taken up in July 2000. At that time, the ABA supported a proposal reiterating the current ban on MDPs; the House of

Delegates subsequently supported the ban and rejected the Commission's recommendations.

E. MDPs Around the World

It should be noted that the issue of MDPs is not just a domestic affair. Many nations around the world have addressed the issue of MDP or are in the midst of doing so. In fact, the Big Five have made significant inroads into the legal profession in a number of other countries, such as Australia, Canada, France, Spain, and the Confederation of the Independent States of the former Soviet Union.[48] In visiting these countries, the reader sees the concept of the MDP gaining acceptance around the world. This worldwide trend provides assurance that it is not only the U.S. marketplace that sees advantages in permitting the formation of MDPs.

1. Canada

In many ways, the status of MDPs in Canada mirrors the United States. The Big Five has pushed for relaxation of ethical rules currently prohibiting MDPs.[49] Like their counterparts in the U.S., Canada’s legal societies and bar associations have also decried the need to protect the legal professions core values.[50] However, the Canadian Bar Association (CBA) has a more progressive attitude than the ABA, and it has recommended professional conduct rules that would permit fully integrated MDPs.[51] The International Practice of Law Committee (commissioned by the CBA) has even issued a report stating that “[l]awyers should be able to offer their services in any

business entity delivering services, so long as those services conform with applicable regulatory or other legal requirements."[52] In addition, most of Canada's legal societies are affirming the CBA's position. Legal societies have stated "the Bar should focus on ensuring that [MDPs] are regulated so as to protect the public"[53] and that "[a]ttempting to ensure lawyer control or a predominance of legal services is not practical, will restrict lawyers' choices and potential and will be view as lawyers simply protecting their 'turf.'"[54]

2. Germany

Since the late 1940s Germany has permitted lawyers and accountants to form MDPs.[55] In recent years, changes in the rules allow lawyers to form MDPs with an enumerated list of professionals, including auditors, sworn-in accountants, tax advisers, and tax assistants.[56]

3. France

In France, the legal profession has experienced a number of changes. Among the changes, French rules now permit accounting firms to utilize captive law firms.[57] Despite the continued separation of the entities, they may deliver service in unified manner to a shared client base.[58]

4. United Kingdom

Although the rules in the United Kingdom do not currently permit fee sharing or partnerships between lawyers and non-lawyers, reforms in the 1980s have allowed them to develop close

relationships and form alliances.[59] In fact, such alliances may offer “package prices” for the provision of legal and non-legal services.[60] Like France, the U.K. now permits accounting firms to create or acquire “captive” firms to exclusively service their client base.[61] In addition, the recent debate has generated support for further relaxation of the ethical rules to permit MDPs, although in a more limited form than discussed in the U.S. and Canada.[62]

F. Overview of the Issues

Before a firm can consider providing legal services within a multidisciplinary practice, lawyers and non-lawyers alike must recognize and cope with the issues that have prevented MDPs from becoming a feature in the United States’ legal landscape. This section addresses the primary issues raised by opponents of MDPs as the obstacles to their acceptance. Proponents' responses to these objections are discussed in conjunction with some procedures or precautions lawyers may take to address these issues under various regulatory schemes.

1. Confidentiality and Privilege

One core values pillar of the legal profession are confidentiality and the shield of attorney-client privilege. The Model Rules of Professional Conduct state that a lawyer must hold client secrets inviolate.[63] The protection of privilege is intended to promote candor and openness in attorney-client communications.[64] Once privilege is properly invoked, documents

and other communications under its cloak are immune from discovery.[65]

Confidentiality of client communications is a fundamental element in establishing and maintaining attorney-client privilege.[66] Other licensing professions, however, do not require the same level of protection of their clients' secrets.[67] Nor do courts necessarily extend the same protections. The ABA's Commission on Multidisciplinary Practice raises the issue of confidentiality and attorney-client privilege as one of the impediments to removing the ban on MDPs.[68] Specifically, opponents are concerned MDPs will lead to erosion of this protection.[69] There is a fear that "courts will not recognize the attorney-client privilege in cases where client communications to the lawyer are disclosed to other employees of the MDP who do not provide legal services."[70]

Other commentators do not believe that the formation of MDPs will result in the erosion of attorney-client privilege.[71] In practice, confidentiality is often ignored.[72] Although the formation of MDPs may upset current presumptions regarding confidentiality, many courts are de-emphasizing the requirement that communications be made in confidence in order to allow the invocation of attorney-client privilege.[73] Although an abolishment of the confidentiality requirement may seem unlikely, it is foreseeable that the circle of confidentiality will be extended to non-lawyer MDP partners.[74] When it became necessary, just such an extension was granted to include

lawyers' secretaries, paralegals, and certain other third parties without sacrificing attorney-client privilege.[75]

While such a change may take time to develop, such a concern need not necessarily prevent MDP formation. In this case, it would appear that educating clients, non-lawyer partners and employees of this issue may help to alleviate this concern. MDP lawyers should inform the client of the possibility of waiver of attorney-client privilege of communications in the presence of or disclosure to non-lawyer partners and employees in the firm. If the client wants to guarantee the privilege,[76] the lawyer and the client may structure their communications with non-lawyers to preserve confidentiality.

To truly resolve this issue, however, the ABA should promulgate revised rules eliminating confidentiality as a necessity for the establishment and preservation of privilege. It is the protection of privilege, not confidentiality, which encourages open and honest communication between attorney and client.[77] Such a change would have the added benefit of eliminating the costly and difficult procedure of demonstrating communications were privileged during discovery.[78]

2. Professional Independence

Another pillar of the legal profession is principle of professional independence, which requires that "lawyers base their decisions on the rule of law rather than on client demands, external pressures, or profit motives."[79] The concern

with MDPs is the belief that non-lawyers may influence the lawyer's provision of legal advice.[80] The fear is that control over a firm by non-lawyers automatically limits lawyers' independence. No longer are lawyers focused solely on legal issues, but now they must "consider other client needs such as business strategy, medical problems, or family issues...."[81] Model Rule 5.4 (prohibiting fee sharing) was designed to shield lawyers from non-lawyer partners exerting financial pressure intended to influence the lawyer's legal advice.[82]

Such arguments assume lawyers cannot exercise independent judgment in the provision of legal services.[83] It also presumes that traditional law firms render service without thought of financial concerns.[84] "In reality, law firms have always had to weigh the ethical duties to clients with the financial interests of the firm."[85] Lawyers already contend with these issues. MDPs are unlikely to present lawyers with new pressures unseen in traditional law firms.

When the professional rules of conduct eventually permit MDPs, a requirement that MDP partnership agreements include a lawyer independence clause may mitigate this concern. Such a provision would permit a lawyer to provide legal services independent of financial pressures and other considerations. It must also state that a lawyer may not be punished in any way in response to her provision of legal advice and provide remedies for any retaliatory acts. In the absence of MDP reform, firms forming MDPs via contractual arrangement or strategic alliances may insert similar provisions in their contractual agreements.

3. Loyalty

Opponents of MDPs also raise the issue of client loyalty, another core value in the legal profession, as another obstacle. Generally, non-legal professionals "view loyalty as an individual matter and as entirely subjective, whereas the legal profession views loyalty as a firm-wide matter and one to be judged objectively."[86] Consequently, the MDP may erode the legal profession's concept of client loyalty.[87]

Regulation of MDPs by the ABA may mitigate concerns over client loyalty. The extension and enforcement of rules similar to those governing the supervisory duties of a lawyer over non-lawyer subordinates (Model Rule 5.3) may alleviate concerns over conflicting standards of loyalty.[88] The ABA should promulgate rules requiring non-lawyer professionals in MDPs to subscribe to the legal profession's standards for client loyalty and accept oversight.

4. Avoidance of Conflicts of Interest

Another concern with MDPs is negotiating the differences between professional standards regarding conflicts of interest. One of the most easily recognizable (and perhaps most difficult to overcome) examples of this issue is the contrasting standards utilized by accountants and those of lawyers. The standards used by accountants are much more liberal. They need only to recognize direct conflicts of interest, meaning two or more clients having directly adverse interests.[89] Lawyers, however, must also identify clients with indirect conflicts of interest.[90]

In addition, accountants become concerned when their interests are "too closely aligned with the client." Lawyers, on the other hand, are apprehensive of close relationships to third parties with countervailing interests to that of their clients.[91] In addition, accountants may overcome all conflicts of interest by gaining the consent of both parties, whereas lawyers must recognize instances of "nonconsentable conflicts."[92]

Perhaps the simplest solution to this dilemma is the voluntary compliance of accountants and other non-lawyer professionals in MDPs with the ABA's conflicts of interest standards. This answer, however, may remove a number of potential clients from a firm's roster, which would otherwise be serviceable by its non-legal partners and employees. Another resolution may be to "require a complete financial separation between entities that provide auditing services and entities that provide business valuation, consulting, and legal services."[93] Such a solution would require contractual alliances as permitted under the current regulatory scheme in some circumstances.

5. Unauthorized Practice of Law

Opponents of MDPs also raise several other issues (not all of which are addressed here), including client solicitation, pro bono, and, most significantly, the unauthorized practice of law (UPL). Every state has incorporated a UPL provision into its statutory scheme.[94] These statutes prevent lawyers from practicing in jurisdictions where they are not admitted to the

bar and non-lawyers from rendering legal advice. Opponents fear that MDPs will encourage UPL and lead to further encroachment upon the legal profession by non-lawyers.

That fear has lead to great criticism of the practices of lawyers in the employ of the Big Five accounting firms. Many believe that those lawyers are engaged in UPL under the current regulatory scheme.[95] Attorneys working for the Big Five and other non-legal employers insist that they are merely acting as business consultants. As added insurance, it is standard practice for such firms to "provide their clients with a disclaimer stating that their work does not constitute a valid legal opinion."[96] Despite opponents' criticisms, the Big Five's practices parallel those occurring in national, regional, and local real estate brokerages, tax consultancies, and financial planning companies.

As with many of the issues raised, the regulation of non-lawyers working in such practices may overcome the concerns of unauthorized practice of law by non-lawyers in MDPs. As proposed by the Kutak Commission, non-lawyers' MDP activities could be regulated under the legal ethics scheme and require them to perform to standards required of lawyers.

III. Small Firms and the Rise of Multidisciplinary Practices

A. Implications of MDP for Small Firms

As discussed above, there have been many issues raised in opposition to permitting the formation of MDPs.[97] Many in the U.S. legal community have reexamined these arguments (as have

their counterparts in countries around the world) and learned that these issues are not insurmountable. MDP proponents dismiss many of these objections as economic protectionism of the legal profession and opposition by large law firms represents anticompetitive behavior.[98] Opposition also stems from the irrational belief that lawyers and their ethical rules are inherently better than other professionals.[99] Non-lawyers are sometimes viewed as a potential corrupting influence on the integrity of lawyers.[100]

This author believes that a significant portion of the opposition stems from lawyers' sincere concern for the ethical integrity of the legal profession. However, much of the apprehension towards MDPs may be attributed to economic protectionism.[101] With many of the largest accounting and management-consulting firms positioned to compete with traditional law firms should MDPs receive the nod, many firms have reason to worry.[102] Large metropolitan law firms will have to compete directly with organizations many times their size with vastly superior resources and back office support.[103] In addition, the major accounting and consulting firms already have well-established working relationships with nearly all of the largest companies with operations in the United States. These same companies constitute a significant portion of large law firms' client base.

Although not immune to the dangers of a changing marketplace, the small law firm should see MDPs as a tremendous opportunity. Multidisciplinary practice represent an

extraordinary opportunity for small firms to expand their practices, enter new markets, and develop firm expertise and specialties. Small firms do not compete for the same clientele as large metropolitan firms nor, consequently, with the Big Five when MDPs are permitted.[104] Although potential competitors may exist in a small firm's local market, they will generally be less prepared to introduce legal services than the Big Five.[105]

To be certain, MDPs will significantly change the provision of legal services at the local level. Small firms may see increasing competition from larger firms aggressively growing their practice and seeking their piece of the MDP pie.[106] In recent history, consolidation in the legal profession has demonstrated the vulnerability of small and mid-sized firms. However, MDPs may be an opportunity for those firms to exercise the lessons learned from consolidation.

Irrespective of when the rules governing MDPs change, small firms should begin preparing for the MDP marketplace. Firms may begin by reevaluating their position in the marketplace and forming a checklist, similar to the following:

1. **Evaluate the current practice.** Firms should first inventory and evaluate their core areas of legal competency. Then examine the goals of the practice and evaluate their progress in achieving those goals. Firms should then determine whether the goals are appropriate in the MDP marketplace.

2. **Obtain feedback from current clients**. Begin soliciting information from the firm's current clients to learn what they anticipate needing from the law firm and other professionals in the future. Determine which aspects of the firm's service with which clients are most pleased. Learn what improvements in the firm's service clients would like made.[107] Determine what additions to the current services provided would add the most value for clients.

3. **Reevaluate the mission of the firm**. Reexamine or develop the mission statement for the firm. Consider how the practice may deepen or broaden its expertise to grow its client base. Evaluate the current members of the firm and consider whether anyone has the training or education that would permit them to earn other professional certifications, such as financial planning or securities broker. Then determine whether such certifications would help the practice to grow its client base.[108]

4. **Begin building strategic alliance with other professionals**. List the professionals the firm retains or otherwise interacts with on a regular basis. Determine if there are certain professions or individuals that may complement the current practice. Evaluate whether such services would attract new clients or garner more business from existing clients.[109]

5. **Seek legal ethics and malpractice counsel**. When creating alliances with other professionals, seek advice from a lawyer specializing in malpractice and legal ethics to structure the alliance.[110]

Regardless of the changes that occur to the legal professions ethical rules, the growth of coordinated service organizations under the current framework will require the average small firm to contemplate ethical considerations more often as their interaction with non-legal professionals increases. Without the enormous overhead and organizational complexities of large firms, small firms can adapt more quickly to service the needs of their clients "within the confines of the applicable ethical framework."[111]

B. Potential MDP Business Models

Although the ultimate outcome of the MDP debate in the U.S. is uncertain, it is evident that marketplace is seeking the benefits of MDPs. Regardless of the regulatory framework chosen, lawyers and non-lawyers alike will continue to package their services within the ethical guidelines provided.

In its study of multidisciplinary practice, the ABA Commission on Multidisciplinary Practice outlined its conceptualization of five different business models for the delivery of various professional services.[112] Although the structure of coordinated service organizations may be infinitely variable, these models allow for a general classification. To

determine which presents the greatest opportunity for small law firms, this section examines the various models.

1. The Cooperative Model

The first model discussed by the Commission on Multidisciplinary Practice (the Commission) was the Cooperative Model. This model does not require any changes to Model Rule 5.4.[113] The Commission went on to say:

> The prohibitions against fee sharing and partnerships with non-lawyers would continue.... Lawyers could work with non-lawyer professionals whom they directly retain or who are retained by the client.... [A]ny lawyer having direct supervisory authority over a non-lawyer professional would have to take steps "to ensure that the person's conduct is compatible with the professional obligations of the lawyer," especially with respect to the obligation not to disclose information relating to the representation and the protection of work product.[114]

The Cooperative Model is not technically an MDP because it does not involve sharing legal fees or the provision of other professional services. As a result, this business model is permissible under the current regulatory scheme. In fact, most U.S. law firms currently employ this model. Law firms commonly hire paralegals, secretaries, and other office support staff to work on

behalf of its clients.[115] In addition, law firms may retain accountants and other professionals to perform specific tasks for its clients. Although it does not allow the provision of other professional services, law firms can hire non-lawyer professionals to perform certain work in its provision of legal services. An example would be the retention of an accountant to audit a legal client's books during the performance of due diligence or the provision of tax advice.

2. The Command and Control Model

The Commission compares the Command and Control Model to the type of organization permitted under the District of Columbia's variation of Model Rule 5.4. Under such a rule, a lawyer is permitted:

> to form a partnership with a non-lawyer and to share legal fees subject to certain clearly defined restrictions. For example, the law firm or organization must have as its sole purpose the provision of legal services to others; the non-lawyer must agree to abide by these rules of professional conduct; the lawyers with a financial interest or managerial authority must undertake to be responsible for the non-lawyer participants to the same extent as if non-lawyer participants were lawyers under Rule

5.1; and these conditions must be set forth in writing.[116]

The Command and Control Model is not a true MDP due to the fact that a firm can only provide legal services and is not permitted to provide any other types of professional services. As discussed earlier, this business model is currently only permissible in the District of Columbia.[117] Although this model is far from ideal, it would permit law firms to partner with non-lawyers and utilize sources of capital previously unavailable. Such a regulatory scheme could even conceivably permit otherwise conventional law firms to incorporate and sell stock to the general public.[118]

3. The Ancillary Business Model

In utilizing the Ancillary Business Model (ABM), a separate business entity, distinct from the law firm, exists to provide non-legal professional services, such as accounting or consulting services.[119] Lawyers (or law firms) and non-lawyers own and manage the ancillary business. When working for the ancillary firm, lawyers must inform clients that they are not providing legal services and that the law firm is a distinct entity.[120] The firms must inform clients that they may retain the services of the law firm and not the ancillary and vice versa.[121]

There are drawbacks to the Ancillary Business Model. For instance, this arrangement requires the creation and maintenance

of two distinct business entities and the incurrence of the accompanying costs. Such a structure requires duplication of effort in maintaining two financial records, sets of accounts, client records, and other business support functions, which includes holding separate management meetings.

Despite the disadvantages to the ABM, it may represent a great opportunity to small firms. The ABM does not represent a true MDP because legal fees are not shared with non-lawyers.[122] As a result, the ABA permits this business model under the current regulatory scheme. Due to the separation of the business entities (which includes client education on the services provided by each firm), the ABM is also able to overcome the other ethical hurdles raised by opponents of MDPs. This organizational structure has the added benefit of allowing the non-lawyers to continue to follow their profession's more liberal conflict of interest standards. This allows them to service clients that would otherwise violate legal conflict of interest standards.[123] Assuming the additional costs of maintaining two distinct entities is not overwhelming, the ABM represents an opportunity for small law firms to build close working relationships with non-lawyer professionals. As a result, such an organization will be well prepared to form a true, fully integrated MDP when finally permitted by the legal profession's ethical rules.

4. The Contract Model

Under this model, a law firm would establish a contractual relationship with an independent professional services firm. The Commission envisioned that such contracts might provide that:

> (1) the law firm agreeing to identify its affiliation with the professional services firm on its letterhead and business cards, and in its advertising (e.g., A & B, P.C., a member of XYZ Professional Services, LLP); (2) the law firm and the professional services firm agreeing to refer clients to each other on a nonexclusive basis; and (3) the law firm agreeing to purchase goods and services from the professional services firm such as staff management, communications technology, and rent for the leasing of office space and equipment.[124]

Under such an arrangement, the law firm remains a distinct and independent entity under the ownership and operation of the lawyers.[125] The firms' contractual relationship might require that they refer clients to one another nonexclusively, leaving both firms able to accept clients independent of the other firm.[126] Similar to the Ancillary Business Model, the Contract Model has the benefit of allowing the non-lawyers to continue to follow their profession's more liberal conflict of interest standards.

The Contract Model represents a true MDP because of the indirect sharing of legal fees and the provision of professional

services other than legal counsel.[127] The Commission noted that this is the business model utilized by the Big Five in providing legal services to their clients.[128] However, the ABA certainly has not approved of such arrangements. Many MDP opponents claim that the Big Five are violating the fee sharing provisions and are engaged in the unauthorized practice of law.[129]

The Contract Model definitely stands as an improved business model to those acceptable under the current regulatory scheme. It allows the firms to contractually share the costs of office support functions, office space, and equipment. It may also broaden each firm's client base through mutual referrals and advertising.

Despite its advantages, the use of this business model remains contentious. The Big Five's ability to employ it is likely a function of their economic and political influence rather than tacit approval of such arrangements. Should a jurisdiction choose to strictly enforce its fee sharing and UPL provisions, a smaller firm may have difficulty defending against such an attack. Under the current regulatory scheme, smaller firms are well advised to seek counsel specializing in malpractice and legal ethics before attempting to utilize this model.

5. The Fully Integrated Model

The Fully Integrated Model (FIM) envisions only an integrated professional services firm without a distinct law firm. Such a firm may contain:

> organizational units, such as accounting, business consulting, and legal services. It [offers] "a seamless web" of services, including legal services. The legal services unit may represent clients who either (1) retain its services but not those of any other unit of the firm or (2) retain its services as well as the services of other units in the firm. In the case of (2), the legal and nonlegal services may be provided in connection with the same matter or different matters.[130]

Although clearly unacceptable under the current regulatory scheme, FIM may represent the best business structure for small firms when it becomes permissible. This structure presents the fewest barriers to entry into the MDP marketplace. Consequently, smaller firms with less capital are able to open their doors to clients seeking broader or more comprehensive professional services. FIM allows a firm to fully share the profits and costs across legal and non-legal service units without maintaining separate business entities and incurring the accompanying costs.

C. Recommendations on the Regulation of MDPs

For the small law firm, the Fully Integrated Model as defined by the ABA's Commission on Multidisciplinary Practice presents the greatest opportunity. Such a framework would allow

small firms access to new markets and new sources of capital previously inaccessible. It also provides the fewest barriers to entry as the formation and start-up costs are low relative to those present under other forms of MDP regulation.

The Kutak Commission's Proposed Model Rule 5.4 from 1983 is the best platform to launch multidisciplinary practices in the U.S.[131] The proposed rule simply and elegantly establishes an ethical framework for governing multidisciplinary practices. It also has the effect of bringing MDPs under the ABA's ethical umbrella and provides an avenue for monitoring such firms.

The Kutak Commission's proposal also presents small firms with a more manageable regulatory burden. Alternate regulatory schemes may still allow for coordinated service organizations, but the resulting complexity of the system may tax the resources and expertise of smaller firms. As a result, only larger law firms may have the resources to comply with the complex ethical and organizational requirements.

IV. Conclusion

It is not difficult to see the many indicators signaling that the marketplace is seeking a coordinated professional services firm. The worldwide trend is the relaxation of prohibitions against multidisciplinary practices. Clients see the benefits of lower cost, more innovative and comprehensive service offerings, and greater choice in determining a professional service provider. Lawyers and non-lawyer

professionals will have greater freedom in choosing their career paths and entrepreneurial opportunities.

Multidisciplinary practice represents a tremendous opportunity to small law firms. Small firms are best positioned to take advantage of MDP because they lack the enormous overhead and the entrenched power structure of large law firms. Their size gives the small firm the ability to adapt more quickly to a changing marketplace if they are prepared. Small law firms should not fear the coming of the MDP, but embrace it. MDPs can be a tool to revitalize and grow small law practice while providing better service their clients. Sixty-three percent of attorneys in private practice are in small firms or solo practices.[132] Given that statistic, the development of the MDP by small firms has the potential to revolutionize the provision of legal and other professional services at the local level.

Finally, multidisciplinary practice also represents an opportunity for the ABA reestablish itself as a visionary leader of the American legal community. Some jurisdictions have begun to grant the ABA less deference in forming rules for their bar.[133] The ABA must reassert its leadership in forming ethical guidelines. The ABA is best able to formulate a comprehensive and coherent ethical framework on which jurisdictions can pattern themselves. It is also an opportunity for the ABA to show that it is not given over to economic protection of large firms. In promoting MDPs, the ABA will demonstrate that it recognizes the importance of guiding the evolution of the American legal profession, including the development of the MDP.

[1] Alfred M. Butzbaugh, *On Solos, Small Firms and MDPs*, 79 MICH. B.J. 314, 314 (2000) (quoting Susan Hackett, Senior Vice President and General Counsel to the American Corporate Counsel Association).

[2] See, e.g., 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, 207 (2000).

[3] See, e.g., John D. Messina, *Lawyer + Layman: A Recipe for Disaster: Why the Ban on MDP Should Remain*, 62 U. PITT. L. REV. 367 (2000).

[4] The author has chosen to include a hyphen in the spelling of non-lawyer. The authority cited in this paper utilizes both spellings. Quotations excluding the hyphen have been changed for consistency.

[5] The exception is the District of Columbia, which does permit lawyers and non-lawyers to share fees. *See infra* Section II. However, the firm must be dedicated to the provision of legal services alone and located only within the Washington, D.C. *Id*.

[6] *See infra* Section II.A.

[7] *See infra* Section II.E.

[8] A brief discussion of these issues taken up to inform reader of the potential benefits and pitfalls of a multidisciplinary practice. *See infra* Section II.F.

[9] *See* 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) (stating that article "assumes that it is neither possible nor desirable for the U.S. legal profession to hold out against the rest of the world.").

[10] *See infra* Section III.

[11] Karle Lester, *What is a Multidisciplinary Practice?*, 74 WIS. LAW. 21, 21 (2001).

[12] American Bar Association, Comm'n Report, *at* http://www.abanet.org/cpr/mdpreport.html (last visited Oct. 14, 2001)

[13] *See infra* Section II.A.

[14] Lester, *supra* note 11, at 21.

[15] MODEL RULES OF PROF'L CONDUCT R. 5.3 (1983).

[16] The term allocated overhead cost refers to fixed and semi-variable costs, such as rent and equipment leasing, that are attributed to each client. These costs are generally incorporated in the service firms' hourly billing rate.

[17] Provided that the regulatory scheme covering MDPs (in the future) are not especially onerous. If particularly burdensome, large firms may be much more capable of managing the regulatory obligations due to their greater financial and legal resources. Stuart S. Prince, *The Bar Strikes Back: The ABA's Misguided Quash of the MDP Rebellion*, 50 AM. U. L. REV. 245, 250 (2000).

[18] Although many professionals may charge as much or more tha lawyers, the premium demanded by a lawyer also trained in another profession would almost certainly be more costly.

[19] See, e.g., Messina, *supra* note 3, at 376 (referring to beliefs of New York lawyer Bob Ostertag).

[20] The term "Big Five" refers to the United States five largest public accounting firms. They are (in alphabetical order): Arthur Andersen, Deloitte & Touche, Ernst & Young, KPMG, and Price-WaterhouseCoopers.

[21] MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983).

[22] D.C. RULE OF PROF'L CONDUCT 5.7 (1991).

[23] Prince, *supra* note 17, at 264-65.

[24] *Id*.

[25] *Id*.

[26] John H. Matheson & Edward S. Adams, *Not "If" But "How:" Reflecting on the ABA Comm'n's Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269, 1275 (2000). *See also* CANONS OF PROFESSIONAL ETHICS (1908).

[27] Matheson & Adams, *supra* note 26, at 1275.

[28] *Id*. at 1275-76 (quoting 53 REP. A.B.A. 778-79 (1928))

[29] *Id*.

[30] *Id*.

[31] Matheson & Adams, *supra* note 26, at 1276.

[32] *Id*.

[33] 52 REP. A.B.A. 388 (1927).

[34] Matheson & Adams, *supra* note 26, at 1276-77.

[35] *Id*. at 1277. Such a prohibition as enforced then would not tolerate the practices of the Big Five accounting firms, which routinely employ lawyers in this manner.

[36] Matheson & Adams, *supra* note 26, at 1278.

[37] MODEL CODE OF PROF'L RESPONSIBILITY DR 3-102 (1981).

[38] *Id*. DR 3-103. See also *Id*. DR 5-107 (prohibiting control of a lawyer's professional judgment by non-lawyers).

[39] Matheson & Adams, *supra* note 26, at 1278-79.

[40] To reread Model Rule 5.4, *see supra* pp. 8-9.

[41] Matheson & Adams, *supra* note 26, at 1278 n.46.

[42] *Id*. at 1279-80.

[43] *Id*. at 1280 (citing STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 299-300 (1998)).

[44] Matheson & Adams, *supra* note 26, at 1280.

[45] *Id*. at 1285.

[46] A.B.A., Comm'n on Multidisciplinary Practice, Reporter's papers (1999), *available at* http://www.abanet.org/cpr/mdpappendixc.html (last visited on Oct. 16, 2001).

[47] Comm'n on Multidisciplinary Practice Report, A.B.A., Recommendation (1999), *available at* http://www.abanet.org/cpr/mdprecommendation.html (last visited on Oct. 16, 2001).

[48] Diane Molvig, *Multidisciplinary Practices: Service Package of the Future?*, WIS. LAW., Apr. 1999, at 44, *available at* http://www.wisbar.org/wislawmag/1999/04/mdp2.html).

[49] Geoffrey Scotton, *CPA Report Sees No Need for Bar to Control MDPs*, LAW. WKLY., Sept. 3, 1999.

[50] Katherine L. Harrison, Comment, *Multidisciplinary Practices: Changing the Global View of the Legal Profession*, 21 U. PA. J. INT'L ECON. L. 879, 897-98 (2000). For discussion of the legal professions core values, *see infra* Section II.F.

[51] *See* Harrison, *supra* note 50, at 899-900.

[52] *Id*. at 900 (quoting Scotton, *supra* note 49).

[53] *Id*. at 901 (quoting Can. Bar Ass'n, *Status Report on Multidisciplinary Practices*, Presented by the Special Committee on the International Practice of Law at the 1999 Mid-Winter Meeting of Council (Feb. 1999), at http://www.cba.org/mdp/pdf/statusreport_eng.pdf)

[54] *Id*. at 901 n.99.

[55] Dzienkowski & Peroni, *supra* note 2, at 113.

[56] *Id*.

[57] *Id*.

[58] *Id*.

[59] *Id*. at 115-16.

[60] Dzienkowski & Peroni, *supra* note 2, at 116.

[61] *Id*.

[62] *Id*.

[63] Model Rules of Prof'l Conduct R. 1.6 (1983). While the Model Rules are only recommendations by the ABA on professional, they are very influential; every U.S. jurisdiction has implemented the Models Rules in various forms. Robert A. Stein, *Multidisciplinary Practices: Prohibit or Regulate?*, 84 MINN. L. REV. 1529, 1537 (2000).

[64] Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L. REV. 853, 857 (1998).

[65] Rice, *supra* note 66, at 856.

[66] Rice, *supra* note 66, at 859 (quoting 8 John Henry Wigmore, Evidence § 2285, at 527 (John T. McNaughton rev. ed., 1961)).

[67] *See* Messina, *supra* note 3, at 381.

[68] American Bar Association, Comm'n Report, *at* http://www.abanet.org/cpr/mdpreport.html (last visited Oct. 14, 2001).

[69] *Id.*

[70] Prince, *supra* note 17, at 259.

[71] *See, e.g.,* Paul R. Rice, *Our Late Great Secrets?*, LEGAL TIMES, June 14, 1999, at 18 (stating that lawyer-client privilege is unlikely to be destroyed in an MDP environment).

[72] *Id*. at 18.

[73] *Id*.

[74] *Id*.

[75] *Id*. See also Rice, *supra* note 66.

[76] In actuality, lawyers cannot guarantee the privilege by maintaining confidentiality. "The confidentiality element of the lawyer-client privilege spawns more than 75 percent of all litigated privilege issues, in part because of common misconceptions about the relationship between secrecy and the privilege itself." Rice, *supra* note 71.

[77] Rice, *supra* note 66, at 856-57. For a comprehensive argument for the elimination of the confidentiality requirement in preserving privilege, see Rice, *supra* note 66.

[78] Rice, *supra* note 66, at 860-62.

[79] Prince, *supra* note 17, at 257.

[80] *Id*. "Independence extends beyond a lawyer's professional judgment but also includes professional freedom, such as the ability to leave a client, settle cases, or select methods of defending a client." *Id*.

[81] *Id*.

[82] Prince, *supra* note 17, at 258.

[83] *Id*. at 267-68.

[84] *Id*.

[85] *Id*. at 267.

[86] Dzienkowski & Peroni, *supra* note 2, at 140.

[87] *Id*. Prince goes on to say "Law firms would become insolvent if they continuously pursued client interests above the firm's financial interests." Prince, *supra* note 17, at 267-68.

[88] *Id*. at 141. *See also* MODEL RULES OF PROF'L CONDUCT R. 5.3 (1983).

[89] Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 901 (1999).

[90] *Id*. at 901.

[91] *Id*. at 902.

[92] *Id*. at 901-02.

[93] 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, 1319 (2000).

[94] Prince, *supra* note 17, at 256.

[95] *Id*.

[96] *Id*. (citing Jonathon Groner & Siobhan Roth, *Envisioning a Big 5 Law Firm: Ernst and Young Positioning to Offer Full Legal Services*, LEGAL TIMES, Oct. 25, 1999, at 1).

[97] *See infra* Section II.F.

[98] *See* Harrison, *supra* note 50, at 880.

[99] *See, e.g.*, 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, 1146-47 (2000). This author does not wish to suggest that all in the legal profession arrogant and condescending, but it is undeniable that such elements exist within the legal community.

[100] *Id*.

[101] *See, e.g.*, Matheson & Adams, *supra* note 26, at 1282-83.

[102] *See, e.g.*, Jonathon Groner & Siobhan Roth, *Envisioning a Big 5 Law Firm: Ernst and Young Positioning to Offer Full Legal Services*, LEGAL TIMES, Oct. 25, 1999, at 1

[103] *See* Norman K. Clark, *Multidisciplinary Practice: What Will It Mean for the Smaller Firm?*, 79 SEP WIS. LAW. 19, 19-20 (1999).

[104] Small firms simply cannot offer the breadth and depth of legal services and expertise required by large companies and other sophisticated clients. However, a small MDP with experts in other professions could certainly encroach upon larger firms' client base.

[105] In particular, tax preparation, financial planning, and insurance firms may be the primary competitors in the local and regional markets. However, local branch office and smaller independent firms in these areas have fewer resources and are unlikely to have a significant number of lawyers in its employ prior to a change in the legal rules. As a result, they are unlikely to have the capacity to quickly introduce legal services like the Big Five.

[106] Clark, *supra* note 103, at 20.

[107] Victoria Kremski, *Multidisciplinary Practices and the Main Street Lawyer*, 79 MICH. B. J. 1196, 1197 (2000).

[108] *Id*.

[109] *Id*.

[110] *Id*.

[111] *Id*. at 1198.

[112] A.B.A., Comm'n on Multidisciplinary Practice, Hypotheticals and Models (1999), *available at* http://www.abanet.org/cpr/multicomhypos.html (last visited on Oct. 16, 2001).

[113] *Id.*

[114] *Id*. *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 (1983).

[115] Prince, *supra* note 17, at 263.

[116] *Id*.

[117] *See infra* Section II.C.

[118] This proposition is not subject states' ethical rules, but also to state incorporation laws. The general incorporation statutes may not be accessible to professional service firms.

[119] 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, 225 (2000).

[120] *Id*.

[121] *See id*.

[122] Prince, *supra* note 17, at 263.

[123] *See supra* Section II.F.

[124] Comm. on Multidisciplinary Practice, A.B.A., Hypotheticals and Models (1999), *available at* http://www.abanet.org/cpr/multicomhypos.html (last visited on Oct. 16, 2001).

[125] *Id*.

[126] *Id*.

[127] A.B.A., Comm'n on Multidisciplinary Practice, Report to the House of Delegates, App. C (1999), *at* http://www.abanet.org/cpr/mdpappendixc.html (last visited on Nov. 5, 2001).

[128] *Id*.

[129] Prince, *supra* note 17, at 256.

[130] A.B.A., Comm'n on Multidisciplinary Practice, Hypotheticals and Models (1999), *available at* http://www.abanet.org/cpr/multicomhypos.html (last visited on Oct. 16, 2001).

[131] *See supra* pp. 14-15.

[132] FlaBar Online, *Solo and Small Firm Law Practice*, *available at* http://tlhsrv3.flabar.org/BIPS2001.nsf/1119bd38ae090a748525676f0053b606/7ba2696730b495d58525669e004df05e?OpenDocument

[133] *See* Dzienkowski & Peroni, *supra* note 2, at 149-51.