

## NOTES

### FRIEND OR FOE: THE ROLE OF MULTIDISCIPLINARY PRACTICES IN A CHANGING LEGAL PROFESSION

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#### INTRODUCTION

In July 2001, New York became the first state in the nation whose state bar passed provisions allowing regulated business alliances between attorneys and nonattorneys.<sup>1</sup> Although Washington D.C. previously allowed heavily restricted fee-splitting on a limited basis,<sup>2</sup> no other jurisdiction has taken such a giant step towards addressing what has been called the most important issue to face the legal profession in years—multidisciplinary practices (MDPs).<sup>3</sup> Under the American Bar Association's (ABA) Model Rules of Professional Conduct (Model Rules), several provisions preclude the formation of MDPs and restrict lawyers who enter into partnerships or share fees with nonlawyers.<sup>4</sup> In contrast, the New York provisions allow attorneys and nonattorneys to enter into cooperative business relationships involving the practice of law provided they adhere to certain restrictions and regulations.<sup>5</sup>

The rules governing the professional conduct of lawyers in the United States

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1. John Caher, *Multidisciplinary Practice Rules Adopted by State*, N.Y. L.J., July 25, 2001, at 1.

2. Gianluca Morello, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should be Permitted in the United States*, 21 *FORDHAM INT'L L.J.* 190, 207-208 (1997). The District of Columbia modified its rules to permit partnerships and fee splitting between lawyers and nonlawyers. However, it does not permit a nonlawyer and a lawyer to enter into a partnership or share legal fees if the principal purpose of the organization is to provide non-legal services. 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, 243 (2000).

3. See ABA Comm. on Multidisciplinary Practice, *Background Paper on Multidisciplinary Practice: Issues and Developments* (Jan. 1999), at <http://www.abanet.org/cpr/multicomreport0199.html> (last visited Nov. 4, 2002) [hereinafter *Background Paper*].

4. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983).

5. 22 N.Y.C.R.R. § 1200.5c (2002). However, New York continues to prohibit partnerships between lawyers and nonlawyers if the partnership includes the practice of law. *Id.* § 1200.17.

have precluded the formation of MDPs for many years.<sup>6</sup> Founded on preserving the lawyer's "professional independence of judgment,"<sup>7</sup> maintaining confidentiality of client information,<sup>8</sup> and ensuring that attorneys do not use affiliations with nonlawyer professionals as self-referral "feeders,"<sup>9</sup> the ABA's stance against MDPs has been, for the most part, unchallenged until recently. In a series of rejected amendments and disbanded commissions, the ABA affirmed its stance against multidisciplinary practices when it adopted an anti-MDP resolution on July 11, 2000, leading many to believe that the MDP debate had been buried, or at least tabled for some time.<sup>10</sup>

However, New York's announcement along with the Georgia bar's subsequent indication that it may soon lift its ban on lawyer/nonlawyer fee splitting<sup>11</sup> both seem to revive the issue that some commentators jokingly call another kind of MDP: the ABA's "Most-Discussed Problem."<sup>12</sup> Opposing camps on the subject of MDPs are split into two major groups: those who argue that MDPs will provide clients with "one-stop shopping" and those who claim that allowing MDPs will erode the core values of the legal profession.<sup>13</sup>

While the ABA, state bar associations, and the courts struggle to find justification for endorsing MDPs, they might be well served to consider the federal government's attempt to restrict physicians in a manner similar to the ABA's stance against MDPs. Faced with challenges similar to those experienced by the ABA—excessive self-referrals and concern about physicians maintaining independent judgment—in the late 1980s and early 1990s, the federal government enacted amendments to the Medicare laws called the Stark Amendments.<sup>14</sup> These rules restrict fee sharing or physician investment in certain ancillary services such as radiology practices, imaging centers, and medical laboratories. In general, physicians are prohibited from referring patients to entities in which they have a financial interest, unless one of the

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6. Katherine L. Harrison, *Multidisciplinary Practices: Changing the Global View of the Legal Profession*, 21 U. PA. J. INT'L ECON. L. 879, 883 (2000).

7. MODEL RULES OF PROF'L CONDUCT R. 5.4 cmt.

8. Michael Myers, *Elder-Comp, L.L.C. A Multi-Disciplinary Prototype for Tomorrow's Elder Law Practice*, 45 S.D. L. REV. 540, 542 (2000).

9. Ward Bower, *The Case for MDPs: Should Multidisciplinary Practices Be Banned or Embraced?*, LAW PRACTICE MGMT., July/Aug. 1999, at 61, 64.

10. Illinois State Bar Ass'n et al., *Revised Recommendation 10F*, at <http://www.abanet.org/cpr/mdprecom10f.html> (last visited Nov. 4, 2002).

11. State Bar of Georgia Disciplinary Comm., Report on Multidisciplinary Practice, Feb. 2001, at [http://www.gabar.org/paf/MDR\\_report.pdf](http://www.gabar.org/paf/MDR_report.pdf); see also Janet L. Conley & Julia D. Gray, *Georgia Bar's MDP Proposal Puts Curbs on Accounting Link*, FULTON COUNTY DAILY REPORT, July 31, 2001, at 1.

12. ABA Young Lawyers Division, *Commission on Multidisciplinary Practice: The FAQs on MDPs*, at <http://www.abanet.org/yld/tyl/nov99/newtoyou.html> (last visited Nov. 4, 2002).

13. Harrison, *supra* note 6, at 907.

14. See 42 U.S.C. § 1395nn (2000).

statutory exceptions applies.<sup>15</sup>

The enactment of the Stark regulations has not proved fruitful for the federal government for several reasons. In addition to increasing costs associated with ancillary service activity,<sup>16</sup> Stark has been difficult to enforce.<sup>17</sup> Critics have stated, and this Note argues, that the restraint on physician investment in ancillary services is analogous to the bar association's restraints on multidisciplinary practices.<sup>18</sup> Both Stark and the ABA's anti-MDP rules have the common goal of ensuring that physicians and lawyers maintain their independent professional judgment. In addition, both rules have suffered setbacks such as difficulty in enforcement, a resulting increase in ancillary service business, and frustration by professionals and consumers based on the inability to participate in comprehensive solutions to medical and legal issues.<sup>19</sup>

The ABA has no actual authority over the practice of law.<sup>20</sup> The Model Rules are acknowledged as a national standard, but states may promulgate their own rules as necessary. State courts and legislatures have also relied on portions of the Model Code of Professional Responsibility (Model Code)<sup>21</sup> and the Model Rules in developing their own professional guidelines.<sup>22</sup> In fact, approximately forty-one states have adopted a version of the Model Rules.<sup>23</sup> The ABA could be a very viable and useful resource to assist states in establishing guidelines for MDPs. Instead of expending resources to resist the emergence of multidisciplinary practices, the legal community and its clients would fare better if the ABA would concentrate its efforts on determining the most ethical and effective way for attorneys to participate in the establishment and operation of MDPs.

This Note proffers the argument that the ABA's rules against MDPs have created an unrealistic realm of isolation and restraint that will undoubtedly make it difficult for attorneys to meet the needs of sophisticated, demanding clients. Part I of this Note provides an overview of the ABA's stance against multidisciplinary practices. Part II illustrates problems associated with the ABA's anti-MDP position by briefly surveying and analogizing the federal government's Stark guidelines prohibiting physician self-referral involving ancillary services. Part III develops and explores an argument in favor of MDPs.

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15. *Id.* § 1395nn(b). Throughout this Note, the term "self-referral" is used to refer to ownership in ancillary services in both the legal and medical professions.

16. Myers, *supra* note 8, at 548.

17. See Anne W. Morrison, *An Analysis of Anti-Kickback and Self-Referral Law in Modern Health Care*, 21 J. LEGAL MED. 351, 394 (2000).

18. Myers, *supra* note 8, at 548.

19. See discussion, *infra* Part II.B.

20. 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, 596 (1989).

21. The Model Code of Professional Responsibility served as a precursor to the Model Rules. See *infra* note 30 and accompanying text.

22. Andrews, *supra* note 20, at 596-97.

23. *Id.* at 584.

This Note concludes by suggesting that the ABA endorse MDPs and create guidelines that can be used to encourage the development of such practices, while ensuring that the legal community's clients and professionals are protected.

## I. THE ABA'S STANCE AGAINST MULTIDISCIPLINARY PRACTICES

### A. *Historical Perspectives*

The precise origin of the ABA's prohibition against MDPs is unclear.<sup>24</sup> However, in 1910, New York's highest court affirmed the traditionally rooted prohibition against the practice of law by nonlawyer employees of a business corporation when it stated that the profession of law is not "open to all."<sup>25</sup> As a precursor to subsequent declarations that the ABA's anti-MDP stance helps to maintain the lawyer's independent judgment,<sup>26</sup> the court said,

The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist . . . [where an attorney] would be subject to the directions of the corporation [and its directors], and not to the directions of the client.<sup>27</sup>

The original version of the Canons of Professional Ethics did not prohibit lawyers from forming partnerships with nonlawyers.<sup>28</sup> However, the addition of Canons 33 to 35 in 1928 prohibited partnerships between lawyers and members of other professions, and provided that "[n]o division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."<sup>29</sup>

The express prohibition against fee sharing and partnerships between lawyers and nonlawyers continued when the ABA adopted the Model Code of Professional Responsibility in 1969.<sup>30</sup> In 1983, the Model Rules replaced the Model Code. Model Rule 5.4 prohibits a lawyer or law firm from sharing legal

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24. *Id.* at 385.

25. *In re Co-operative Law Co.*, 92 N.E. 15, 16 (N.Y. 1910).

26. *See* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 86-1519 (1986).

27. *Co-operative Law Co.*, 92 N.E. at 16.

28. Andrews, *supra* note 20, at 584.

29. CANONS OF PROF'L ETHICS Canon 34 (1928). Canons 33 and 35 provide additional insight into the prohibitions contained within the Canons. Canon 33 required that "[p]artnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law." CANONS OF PROF'L ETHICS Canon 33. Canon 35 sought to ensure that a lawyer's professional services were not "controlled or exploited" by laypersons. CANONS OF PROF'L ETHICS Canon 35.

30. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 3-102 (1981); MODEL CODE OF PROF'L RESPONSIBILITY DR 3-103 (1981).

fees with a nonlawyer, except in limited situations.<sup>31</sup> In addition, the rule forbids lawyers from forming partnerships between lawyers and nonlawyers if any of the activities consist of the practice of law.<sup>32</sup> Although the Model Rules were significantly revised in 2002, these provisions remain substantially unchanged.

### B. Current Perspectives

The provisions of the Model Rules that currently address multidisciplinary practices are found primarily in Rules 5.4 (a), (b), and (d).<sup>33</sup> Nothing in those rules actually prohibits a lawyer from working with a professional trained in another discipline if such collaboration would help resolve a client's issues. What is forbidden is an "integrated practice" where a lawyer shares fees with a nonlawyer or enters into a partnership with a nonlawyer to provide clients with legal services.<sup>34</sup> The term MDP is defined as:

an organization owned wholly or partly by nonlawyers that provides legal services directly to the public through owner or employee lawyers. In practice, MDPs include otherwise independent law firms owned only by lawyers that practice in close cooperation with professional service firms owned exclusively or partly by nonlawyers, usually under contract.<sup>35</sup>

For example, "a lawyer may directly employ [an accountant] on the lawyer's staff."<sup>36</sup> "A lawyer may also own a company employing a professional [from another discipline] or offering certain products created by the nonlawyer professional."<sup>37</sup> These examples would be acceptable as long as (1) the attorney maintained independent judgment, (2) the attorney did not abuse the privilege of

31. MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983). The exceptions include payments to a deceased or disabled lawyer's estate and payment into a compensation or retirement plan for employees who are not lawyers. *Id.* These exceptions have been called "exceedingly narrow" and irrational by some commentators. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 802 (2d ed. 1998).

32. MODEL RULES OF PROF'L CONDUCT R. 5.4.

33. Rule 5.4 states, in relevant part:

A lawyer or law firm shall not share legal fees with a nonlawyer . . . . A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law . . . . A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for profit, if . . . a nonlawyer has the right to direct or control the professional judgment of the lawyer.

MODEL RULES OF PROF'L CONDUCT R. 5.4. Approximately forty-one states have adopted a version of the Model Rules. *Background Paper, supra* note 3.

34. *Background Paper, supra* note 3.

35. Bower, *supra* note 9, at 61.

36. *Background Paper, supra* note 3.

37. *Id.*

self-referral, and (3) there were no threats to client confidentiality.<sup>38</sup> A lawyer could *not*, however, train sales representatives to give legal counsel during the marketing of living trusts.<sup>39</sup> Nor could a lawyer enter into a partnership or share legal fees with an accountant.<sup>40</sup>

*C. Attempts at Revising the ABA's Prohibition Against MDPs*

In 1976, the ABA Commission on Evaluation of Professional Standards, known as the "Kutak Commission," proposed an amendment to Rule 5.4 that would have allowed the formation of MDPs nonlawyer ownership and management of law firms.<sup>41</sup> In addition, fee sharing between lawyers and nonlawyers would have been acceptable, as long as lawyers maintained their professional judgment and client confidentiality was not impaired.<sup>42</sup> The proposal was met with strong opposition. Among the objections raised was that retail establishments such as Sears would be able to open law firms to compete with traditional firms (which would erode "professionalism" among lawyers).<sup>43</sup> In addition, opponents argued that MDPs would interfere with lawyers' professional judgment, and that the change would have a "fundamental but unknown effect on the legal profession."<sup>44</sup> After the Kutak Commission's five-year study and several months of heated debates, the amendment was struck down, and the ban against MDPs remained in place.<sup>45</sup>

Later in 1998, the MDP question resurfaced when the president of the ABA established a Commission on Multidisciplinary Practice.<sup>46</sup> The Commission heard "sixty hours of testimony from fifty-six witnesses" and reviewed numerous comments from others before arriving at the recommendation that the Model Rules be revised to allow fee splitting and partnerships between lawyers and nonlawyers.<sup>47</sup> In spite of reports, testimony, and data supporting the lessening of restrictions, the Commission's recommendation was rejected and an anti-MDP

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38. See Andrews, *supra* note 20, at 601-16.

39. See John H. Matheson & Peter D. Favorite, *Multidisciplinary Practice and the Future of the Legal Profession: Considering a Role for Independent Directors*, 32 LOY. U. CHI. L.J. 577, 577 (2001) (commenting that a Chicago attorney was suspended by the Illinois Supreme Court for helping a company that marketed estate-planning packages by training sales representatives in giving "legal counsel" to clients).

40. See Andrews, *supra* note 20, at 599.

41. *Id.* at 593-94.

42. See Charles W. Wolfram, *The ABA and MDPs: Context, History, and Process*, 84 MINN. L. REV. 1625, 1629 (2000).

43. *Background Paper*, *supra* note 3.

44. *Id.*

45. Andrews, *supra* note 20, at 596.

46. See ABA Comm. on Multidisciplinary Practice, *Report*, at <http://www.abanet.org/cpr/mdprecommendation.html> (last visited Nov. 4, 2002).

47. *Id.*

resolution was adopted. In addition, the ABA disbanded the Commission.<sup>48</sup>

#### *D. Arguments Behind the Anti-MDP Position*

Although opponents of MDPs offer a myriad of reasons in support of maintaining the ABA's anti-MDP stance, three common arguments surface most often.<sup>49</sup>

1. *Professional Independent Judgment.*—The rationale underlying the argument that MDPs would give nonlawyers control over lawyers was described in *Emmons, Williams, Mires & Leech v. State Bar of California*,<sup>50</sup> where the Court of Appeals of California stated, “fee splitting between lawyer and layman . . . poses the possibility of control by the lay person, interested in his own profit rather than the client’s fate.”<sup>51</sup> The comment to Model Rule 5.4 states that the prohibitions on nonlawyer involvement are to “protect the lawyer’s professional independence of judgment.”<sup>52</sup> This rationale has been offered so frequently that it may appear as rhetoric to some members of the legal community. Two examples may help to illustrate the potential conflict.

a. *Illustrations.*—Suppose a nonlawyer businessperson, aiming to profit from the need for moderately priced, standardized legal services establishes a business that employs lawyers to provide the needed services.<sup>53</sup> There may be a tendency for the nonlawyer manager to set time limits on the attorneys in order to improve profits by increasing the volume of cases handled.<sup>54</sup> Such pressures from the employer could create a potential conflict of interest for the lawyer who owes his client loyalty, but is also concerned about his own job performance.

Another example further illustrates the potential conflicts involved in the operation of MDPs. Consider a real estate development partnership between a nonlawyer and a lawyer. Suppose the nonlawyer partner is a realtor who has invested a great deal of the firm’s time and financial resources in a client’s real

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48. John Gibeaut, “*It’s a Done Deal*”: *House of Delegates Vote Crushes Chances for MDP*, 86 A.B.A. J. 92, 92 (2000) (noting that by a margin of nearly three to one, the ABA voted to maintain its stance against MDPs and to disband the committee formed to study possible changes).

49. This section of the Note discusses three objections: (1) interference with professional independent judgment, (2) concern over the unauthorized practice of law by laypersons, and (3) the risk of exposure of confidential client information. Part III.B. discusses concerns over excessive self-referrals, which extend from unease about maintaining professional judgment.

50. 6 Cal. App. 3d 565 (1970).

51. *Id.* at 573-74. See also *In re Co-operative Law Co.*, 92 N.E. 15, 16 (N.Y. 1910), where the court stated that “[t]he relation of attorney and client . . . cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation” because “[t]he corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only.” *Id.*

52. MODEL RULES OF PROF’L CONDUCT R. 5.4 cmt (1983).

53. Andrews, *supra* note 20, at 606.

54. Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 407 (1988).

estate project.<sup>55</sup> The lawyer partner is asked to evaluate the project to determine if it complies with the law. "In such a situation, the lawyer partner [could be faced with] a potential conflict of interest caused by her divided loyalty to partner and client."<sup>56</sup>

*b. Response.*—As illustrated in the previous scenarios, concerns regarding a lawyer's ability to maintain professional independent judgment are valid. However, the possibility of nonlawyer interference with a lawyer's independent judgment exists under the present system. For example, many lawyers practicing in the private sector are paid by nonlawyers to provide legal services to a client. This occurs, for example, when an insurance company provides counsel to defend an insured<sup>57</sup> or when a corporation pays the legal expenses to defend an employee.<sup>58</sup> Such situations present the same concerns over a lawyer's ability to maintain independent judgment, and such situations are currently addressed in Model Rules 1.7(b),<sup>59</sup> 1.8(f),<sup>60</sup> and 5.2(a).<sup>61</sup>

Perhaps most significant is that "the Supreme Court [of the United States] has found little support for the argument that nonlawyer involvement might impair a lawyer's professional independence in the context of nonprofit organizations that provide the services of lawyers to members."<sup>62</sup> In *NAACP v. Button*,<sup>63</sup> the Court upheld the right of a political organization to finance or promote the services of particular lawyers for their members.<sup>64</sup> The State of Virginia had enacted a law making it a crime and a violation of the ABA's Canons of Professional Ethics for a person to refer another person to a particular attorney or group of attorneys such as the staff of the NAACP. The Court found that the NAACP's activities were modes of expression and association protected by the First and Fourteenth Amendments that the State could not prohibit under

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55. Andrews, *supra* note 20, at 606.

56. *Id.*

57. HAZARD & HODES, *supra* note 31, at 807.

58. Andrews, *supra* note 20, at 607.

59. "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities . . . to a third person." MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (1983).

60. "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; [and] (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." MODEL RULES OF PROF'L CONDUCT R. 1.8(f).

61. "A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." MODEL RULES OF PROF'L CONDUCT R. 5.2(a).

62. Andrews, *supra* note 20, at 609.

63. 371 U.S. 415 (1963).

64. *Id.* at 428-29; *see also* *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 580 (1971); *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1, 8 (1964) (establishing same principle for unions, along with allowing unions to provide legal services through lawyers employed by the unions).

its power to regulate the legal profession.<sup>65</sup> As a direct result of the Court's decisions in *Button*, *United Transportation Union*, and *Brotherhood of Railroad Trainmen*, "the ABA and most states [have] amended their professional rules to allow nonprofit entities to offer the services of lawyers."<sup>66</sup>

2. *Unauthorized Practice of Law by Laypersons.*—An additional justification that has been articulated as a reason for maintaining the anti-MDP position is that such arrangements further the potential of the unauthorized practice of law by laypersons.<sup>67</sup> An example should help illustrate the general theory.

a. *Illustration.*—Suppose a law firm that handles routine work such as simple wills and divorces is owned and managed by a nonlawyer investor. In an effort to manage costs and to ensure that lawyers are available for more complex transactions, managers might instruct nonlawyer personnel to use standardized forms to prepare wills and divorce documents. This arrangement raises the concern that a client's legal rights could be adversely affected because such documents could be "completed without the review or supervision of a lawyer."<sup>68</sup>

b. *Response.*—The argument that removing barriers to MDPs would lead to the unauthorized practice of law by laypersons ignores the existing prohibitions against such behavior. In many jurisdictions, nonlawyers who engage in the unauthorized practice of law are subject to the same duty of care as lawyers.<sup>69</sup> Nonlawyers who undertake the practice of law without the proper training and credentials are subject to civil liability for breach of fiduciary duties and breach of duties of care owed to clients. For example, under the Restatement (Second) of Torts, "one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."<sup>70</sup>

Additional safeguards exist. The Model Rules prohibit a lawyer from assisting nonlawyers in the unauthorized practice of law.<sup>71</sup> In addition, some nonlawyer professionals in the health, education, and business professions have similar duties of ethical responsibility imposed on them by their respective fields'

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65. *Button*, 371 U.S. at 428-29.

66. Andrews, *supra* note 20, at 609-10.

67. Gilbert & Lempert, *supra* note 54, at 404-05.

68. *Id.* at 404. Gilbert and Lempert cite an ABA unpublished staff memorandum that listed this concern as one of four primary reasons for maintaining the ABA's anti-MDP stance. Furthermore, the memorandum stated, "[a] ban [on nonlawyer participation] eliminates even the risk of the dangers being present." *Id.* at 403 (quoting ABA Memorandum Subject: Model Rule 5.4 (Professional Independence of a Lawyer) at 7-8 (Apr. 22, 1987)).

69. See, e.g., *Bowers v. Transamerica Title Ins. Co.*, 675 P.2d 193, 198-200 (Wash. 1983) (escrow agent who engaged in the unauthorized practice of law by preparing escrow instructions, promissory note, and statutory warranty deed was bound by the standards governing attorneys).

70. RESTATEMENT (SECOND) OF TORTS § 299A (1965).

71. "A lawyer shall not . . . (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." MODEL RULES OF PROF'L CONDUCT R. 5.5(b) (1983).

professional codes of conduct.<sup>72</sup>

3. *Confidentiality of Client Information.*—Opponents of MDPs also argue that nonlawyers in MDPs will gain access to confidential client information if a lawyer either inadvertently or deliberately shares such information with nonlawyers.<sup>73</sup>

a. *Illustrations.*—One can envision a situation where a nonlawyer, who has learned client confidences in connection with work undertaken for a client, improperly discloses such information to third persons or uses the information for personal gain.<sup>74</sup> Although concern exists over the potential risks encountered through casual or accidental exposure, the ABA and other MDP opponents have posed an even more drastic situation in which a firm's nonlawyer managers or board of directors "demand access to confidential client information when formulating corporate policy or strategy."<sup>75</sup>

b. *Response.*—Concerns over client confidentiality are encountered in the ABA's current anti-MDP environment. However, two responses should serve to address the issue. First, there exist several provisions within the Model Rules that would protect client confidences in an MDP environment. A lawyer would continue to be bound by the ethical duty to ensure that client information remains confidential.<sup>76</sup> Model Rule 8.4 prohibits a lawyer from violating the confidentiality rule "through the acts of another."<sup>77</sup> In addition, Model Rule 5.3 serves to impose upon the lawyer the duty to ensure that nonlawyer assistants comply with the lawyer's professional responsibilities.<sup>78</sup>

In addition to the existing obligations imposed upon lawyers under the current version of the Model Rules, agency law also creates a duty to maintain ethical standards and protect client confidentiality.<sup>79</sup> A nonlawyer partner, acting

72. See CODES OF PROFESSIONAL RESPONSIBILITY (Rena Gorlin ed. 1990).

73. Cindy Alberts Carson, *Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms*, 7 GEO. J. LEGAL ETHICS 593, 621 (1994).

74. Andrews, *supra* note 20, at 614.

75. Gilbert & Lempert, *supra* note 54, at 405. The ABA Ethics Committee has struggled with this issue and has commented that "the obligation of the staff lawyers to preserve the confidences and secrets of clients applies to statements to and information conveyed to the [firm's] advisory committee . . . or . . . any other person or body not privy to the lawyer-client relationship." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974).

76. MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).

77. The rule states that "[i]t is professional misconduct for a lawyer to: (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another." MODEL RULES OF PROF'L CONDUCT R. 8.4(a).

78. MODEL RULES OF PROF'L CONDUCT R. 5.3. The comment to Model Rule 5.3 states: "A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product." MODEL RULES OF PROF'L CONDUCT. R. 5.3 cmt.

79. See RESTATEMENT (SECOND) OF AGENCY § 395 (1958) (includes a provision that prohibits agent's use or disclosure of client's confidential information).

as an agent, would owe a client the duty not to disclose information for her own benefit or for the benefit of a third party.<sup>80</sup> Agency law would be powerful in an MDP environment, for “[t]he lawyer . . . would be legally liable for malpractice if any of the lawyer’s partners disclosed confidences to the injury of a client.”<sup>81</sup>

## II. PROBLEMS WITH THE ABA’S ANTI-MDP STANCE

The continued resurgence of attempts to quash the anti-MDP philosophy occurs for good reason. The ABA’s prohibition against multidisciplinary practices has created a realm of rigid and unrealistic commercial protectionism that stifles creativity and discourages collaboration among professionals. In addition, consumer demand for non-fragmented legal service increases the need for legal professionals to be able to provide clients with full-service solutions. With the ABA’s anti-MDP position in place, the American public suffers.

Three legitimate problems exist surrounding the ABA’s stance against MDPs. First, in many cases, state courts and bar associations are either unwilling or unable to enforce the prohibition.<sup>82</sup> Second, the ABA’s anti-MDP position has failed to produce the intended effect of minimizing self-referrals. Third, clients are not afforded the benefits of being able to obtain completely integrated solutions to their legal issues. Further development of each of these issues is warranted. The federal government’s restriction against physician investment in ancillary services is illustrative of the failings of the ABA’s anti-MDP position.

### *A. The Ethics in Patient Referrals Act: A Parallel in Regulation of MDPs*

1. *Background.*—Prior to 1992, no federal legislation forbade a doctor from owning a financial interest in ancillary medical services. However, the federal government became alarmed when it determined that physicians with ownership in such ancillary service companies ordered greater numbers of tests and services than in situations where no ownership interest existed.<sup>83</sup> “[S]tudies concluded that physicians had placed their interest ahead of their patients’ interest, and ahead of the taxpayers’ interest. Medicare officials became alarmed.”<sup>84</sup>

Analysis of data collected by the federal government showed that the cost of

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80. *See id.* An agent, whether a lawyer or nonlawyer, is “subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent . . .” *Id.* *See e.g.*, *More v. Burroughs*, 205 P. 1029, 1031 (Kan. 1922) (noting that an agent cannot use information acquired by him while acting on behalf of a principal for the agent’s own personal advantage).

81. Andrews, *supra* note 20, at 616.

82. *See* Adam Miller, *Professional Schizophrenia*, *MIAMI DAILY BUS. REV.*, Oct. 23, 2001, at 6.

83. KENNETH R. WING, *THE LAW AND AMERICAN HEALTH CARE* 928 (1998). The practice became known more commonly as “self-referral.” Morrison, *supra* note 17, at 351.

84. Myers, *supra* note 8, at 547.

unnecessary testing arising from patients being referred to physician-owned ancillary entities ran well into the tens of millions of dollars.<sup>85</sup> Studies showed that patients of physicians who owned or invested in clinical laboratories received forty-five percent more services than did Medicare patients in general.<sup>86</sup>

To protect patients and federal Medicare dollars, in 1989, Representative Fortney H. Stark introduced the Ethics in Patient Referrals Act, which prohibited any entity or individual from furnishing a service reimbursable under Medicare to an individual if the individual's referring physician or an immediate family member of the referring physician had a financial relationship with the entity.<sup>87</sup> The Ethics in Patient Referrals Act was enacted into law in 1992 and was codified as Section 1877 to the Social Security Act (42 U.S.C. § 1395nn). The Act became known as "Stark I."<sup>88</sup>

Stark I would not remain unchanged for long. "During the six years it took for Congress to enact and . . . implement Stark I, congressional efforts were already underway to expand the scope of the law."<sup>89</sup> Congress developed legislation, commonly known as "Stark II," which covers both Medicare and Medicaid and expands the self-referral ban of Stark I from only clinical laboratory services to include ten additional health services.<sup>90</sup> Stark II took effect January 4, 2002, allowing individuals and entities affected by the final rule time to restructure their business arrangements to comply.<sup>91</sup>

2. *Problems with Stark.*—Stark legislation has endured a number of setbacks and has been, in some ways, ineffective in its goals of protecting patients and decreasing Medicare and Medicaid expenditures.

a. *Stark's failure to effectively reduce ancillary services costs.*—Although Stark laws "reduced [the number of physicians who had] ownership in ancillary services,"<sup>92</sup> it failed to fulfill its actual purpose of reducing the *costs* associated with such services. As one commentator noted, "Medicare officials waited with spreadsheets in hand, prepared to measure the cost savings they had promised . . ." as a result of Stark legislation. Instead, ancillary activity

85. WING, *supra* note 83, at 928.

86. BRADFORD H. GRAY, *THE PROFIT MOTIVE AND PATIENT CARE* 191 (1991) (further indicating that such laboratory services cost Medicare \$28 million).

87. Jo-Ellyn Sakowitz Klein, *The Stark Laws: Conquering Physician Conflicts of Interest?* 87 GEO. L.J. 499, 499-500 (1998).

88. *Id.* at 500.

89. Maria A. Morrison, *An Analysis of the Stark II Proposed Rule*, 67 U. MO. K.C. L. REV. 613, 614 (1999).

90. The ten additional health services included under Stark II are: (1) physical therapy services; (2) occupational therapy services; (3) radiology services; (4) radiation therapy services and supplies; (5) durable medical equipment and supplies; (6) parenteral and enteral nutrients, equipment, and supplies; (7) prosthetics, orthotics, and prosthetic devices and supplies; (8) home health services; (9) outpatient prescription drugs; and (10) inpatient and outpatient hospital services. 42 U.S.C. § 1395nn(h)(6) (2000).

91. *Id.*

92. Myers, *supra* note 8, at 548.

increased.<sup>93</sup>

The void in the market that was created by the restrictions of the Stark legislation was quickly absorbed by institutional organizations such as hospitals, which were not required to comply with Stark.<sup>94</sup> Hospitals coordinated services to provide organized delivery systems.<sup>95</sup> The resulting impact was an increase in the volume of clinical and other ancillary services, which logically caused associated Medicare costs to skyrocket.<sup>96</sup> Accordingly, Stark legislation not only failed to reduce the number of patient referrals for ancillary services, but it also failed in its stated goal of reducing federal government expenditures associated with such ancillary services.

*b. Difficulties in the enforcement of Stark.*—In addition to an unanticipated increase in ancillary service costs, the federal government has experienced setbacks in applying Stark regulations. Some attempts at enforcing Stark laws have been successful.<sup>97</sup> However, for the most part, enforcing Stark has proved to be, at best, a challenge. In several instances, Stark “enforcers” have experienced difficulty in defining and identifying inappropriate acts.<sup>98</sup> Some commentators have noted that complicated exceptions to the rules make spotting infractions cumbersome.<sup>99</sup> Other scholars have questioned the ethical and economic wisdom of using legislation such as Stark I and II to deal with medical fraud claims.<sup>100</sup>

In addition, because potential violators are allowed to avoid the prohibitions against self-referrals by forming indirect ownership arrangements, physicians may still profit from self-referral, while avoiding the stiff civil penalties imposed by the legislation.<sup>101</sup> In summary, although difficulty in enforcement is certainly

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93. *Id.* (citing LAWRENCE FROLIK & ALISON PATRUCCO BARNES, *ELDERLAW* 470 (1992)). For example, costs associated with one of the excluded services, home health care, more than doubled within the three years after the enactment of Stark. The number of Medicare-funded home health visits increased by eighteen percent annually. *Id.*

94. Myers, *supra* note 8, at 548-49.

95. *Id.* at 548.

96. *See id.*

97. *See* *Gublo v. Novacare, Inc.*, 62 F. Supp. 2d 347 (D. Mass. 1999) (qui tam suit involving Stark law violations); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017 (S.D. Tex. 1998) (healthcare provider and affiliates accused of Stark and anti-kickback violations).

98. Morrison, *supra* note 17, at 378 (commenting that “the ambiguity of the language of [Stark laws] is an obstacle to understanding whether a particular arrangement is in violation of the statute”). *See also* GRAY, *supra* note 86, at 200-01 (stating that an overwhelming majority of agencies responsible for monitoring compliance of similar state laws experienced difficulties because of vagueness in the laws).

99. *See* Morrison, *supra* note 17, at 378.

100. *See* Dayna Bowen Matthew, *Tainted Prosecution of Tainted Claims: The Law, Economics, and Ethics of Fighting Medical Fraud Under the Civil False Claims Act*, 76 *IND. L.J.* 525, 526 (2001).

101. *See* Morgan R. Baumgartner, *Physician Self-Referral and Joint Ventures Prohibitions:*

no reason alone to discard legislation, it has the effect of tipping the scale towards considering more viable options to restrictions on ancillary services and self-referrals.

*B. A Comparative Analysis of the ABA's and the Federal Government's Anti-MDP Stance*

As discussed in Part I.D. of this Note, the stated purpose of the ABA's stance against MDPs is to preserve the core values of the legal profession by protecting the "lawyer's professional independence of judgment."<sup>102</sup> A less-often asserted, but unquestionably articulated rationale for the prohibition is to eliminate or reduce the lawyer's incentive to become involved in excessive self-referrals.<sup>103</sup>

The ABA's stance against multidisciplinary practices is analogous to the federal government's restriction against physician investment in ancillary services in three ways. First, just as federal courts and administrative agencies have had difficulty enforcing Stark legislation, state courts and bar associations have had problems enforcing their respective prohibitions against MDPs. Second, just as Stark legislation has failed to reduce the number of referrals physicians make for ancillary services, the stance against MDPs has not, and will not, have the effect of reducing referrals between lawyers and nonlawyers. Third, clients and patients in both the legal and medical fields are often not afforded the benefit of being able to obtain completely integrated solutions to their legal or medical issues because attorneys and physicians are forbidden from being wholly involved in resolving the patient's or client's medical or legal issues.

1. *Enforcement Difficulties.*—Like the medical community, the legal profession has also had difficulties enforcing alleged anti-MDP violations. Critics of the ABA's anti-MDP stance comment that "the enforcement model doesn't seem to be going anywhere."<sup>104</sup> For example, in January 2000, Florida attorney, Thomas M. Cryan was accused of violating state bar rules by providing legal services to clients while employed by an accounting firm.<sup>105</sup> Specifically, his accuser, lawyer John Hume claimed that Cryan violated the Florida Bar's rules against practicing law while working for nonlawyers. Hume stated that Cryan was involved in fee splitting when he appeared before the United States Tax Court on behalf of clients and gave legal advice to clients concerning their rights.<sup>106</sup> Cryan responded by stating that the services he provided were not legal

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*Necessary Shield Against Abusive Practices or Overregulation?*, 19 J. CORP. L. 313, 327 (1994).

102. MODEL RULES OF PROF'L CONDUCT R. 5.4 cmt (1983).

103. See Bower, *supra* note 9, at 64. In the medical context, proponents have argued that lack of restrictions against self-referrals erode independent professional judgment, which creates increases in the volume and frequency of unnecessary referrals. Morrison, *supra* note 17, at 371.

104. Miller, *supra* note 82, at 6.

105. *Id.*

106. *Id.*

services, but were instead “professional services.”<sup>107</sup> In April 2001, the Bar’s MDP grievance committee found that without further evidence, there was “no probable cause for further disciplinary proceedings.”<sup>108</sup> As of October 2001, the Florida MDP Grievance Committee, which was formed in February 2000, had investigated no other complaints.<sup>109</sup>

Even in situations where it has been substantiated that lawyers violated Model Rule 5.4 or equivalent state bar rules, some courts have upheld the underlying substantive agreement between the lawyer and nonlawyer, thus making the rule essentially ineffective. In *Danzig v. Danzig*,<sup>110</sup> a lawyer who had clearly entered into an unethical fee-splitting arrangement with a layperson not only refused to make payment, but also urged the ethical violation as an affirmative defense to the resulting suit by the nonlawyer.<sup>111</sup> Surprisingly, the court held the contract void and against public policy, but nonetheless enforceable.<sup>112</sup>

The difficulty in enforcing Model Rule 5.4 is a double-edged sword. For attorneys who would rather risk suspension or sanctions than pay a hefty fee to nonlawyer partners, it is sometimes an affirmative defense to participating in unethical arrangements. For nonlawyers who partner with lawyers, but may not be aware of the prohibition, the rule undermines the integrity of the profession and allows both lawyers and nonlawyers to make a mockery of the Model Rules. The difficulties (and sometimes, embarrassments) involved in enforcing violations of the anti-MDP rules undermine the benefits afforded by keeping the rule in place. Accordingly, the rules cry out for change.

2. *Problems with the Ancillary Business Justification.*—The ABA’s stance against multidisciplinary practices has an additional goal of reducing the number of unnecessary referrals between lawyers and nonlawyers.<sup>113</sup> The rationale behind the prohibition against self-referrals is as follows: if lawyers and nonlawyers have a financial interest in the outcome of a referral, or a financial arrangement with any entity or partner, or if they receive something of value in exchange for a referral, then they will refer clients who do not need services, or will refer clients to the “highest bidder.”<sup>114</sup>

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107. *Id.*

108. *Id.*

109. *Id.*

110. 904 P.2d 312 (Wash. Ct. App. 1995).

111. *Id.* at 314.

112. *Id.* But see *Trotter v. Nelson*, 684 N.E.2d 1150 (Ind. 1997) (Indiana Supreme Court held that the lawyer may have committed “a gross violation of the Conduct Rules,” and the fee-splitting contract was declared void and unenforceable as against public policy). *Id.* at 1155. Cf. *Florida Bar v. Shapiro*, 413 So. 2d 1184 (Fla. 1982) (lawyer disciplined for paying contingent salary to nonlawyer employee based on amount of fees generated); *Comm. on Prof’l Ethics and Conduct of the Iowa State Bar Ass’n v. Lawler*, 342 N.W.2d 486 (Iowa 1984) (lawyer disciplined for sharing legal fee with nonlawyer assistant in exchange for referral of client).

113. Bower, *supra* note 9, at 64.

114. Cf. Morrison, *supra* note 17, at 351 (making identical argument in context of physician

Just as the federal government has seen an increase in ancillary services instead of the decrease it anticipated as a result of the adoption of Stark, the legal profession has seen an increase in the number of ancillary services being performed by accounting firms and other institutional organizations.<sup>115</sup> Accounting firms in the United States and worldwide are now “providing more than just traditional accounting services.”<sup>116</sup> In 2000, while the ABA and state bar associations debated the pros and cons of whether to allow MDPs, between 5000 and 6000 lawyers in the United States were employed by the five largest accounting firms, performing “quasi-legal” services.<sup>117</sup>

It is no secret that consumers have become more sophisticated and demanding over time. It is also “axiomatic that consumer dissatisfaction creates new markets.”<sup>118</sup> While banks and trust companies affiliate with insurance outlets to become capable of moving clients through coordinated networks, the ABA’s anti-MDP stance generates “dissatisfied consumers and misused professionals.”<sup>119</sup> In the legal arena, consumer demand for comprehensive services is driving the proliferation of lawyers and nonlawyers who provide the services to meet those demands—namely in accounting firms. Such responsive measures would hardly fare well as support of an argument for MDPs, except for one important factor: the participants dodge oversight by state courts and bar associations by declaring that they provide “law-related [professional] services,” instead of legal services.<sup>120</sup>

3. *Fragmented Solutions to Legal Issues.*—Consumers of legal services are becoming more and more sophisticated. With the emergence of the internet, packaged legal software, pre-paid legal services, and courtroom television programs, consumers know more about the law than ever before. These well-versed clients require and deserve comprehensive solutions to their legal issues.

With the ABA’s anti-MDP stance in place, clients are often not given access to completely integrated solutions because attorneys are unable to be wholly involved in resolving the client’s legal issues. For example, an elderly client who needed help with pensions, Social Security, Medicare, Medicaid, guardianship, trusts and estates, investments, income, estate and inheritance tax issues, and assisted living would probably be dissatisfied under the ABA’s current rules because the client would have to see an attorney, a social worker, an accountant, and an investment planner individually. The fragmentation that currently exists is often time consuming and costly and works against the consumer’s best interests.<sup>121</sup> “The [consumer] market demands integrated, legal, financial,

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self-referral in the medical profession).

115. See Geanne Rosenberg, *Accounting Legal Affiliates Criticize ABA’s Proposal to Restrict MDPs*, NAT’L L.J., July 31, 2000, at B6.

116. Harrison, *supra* note 6, at 902.

117. Nathan Koppel, *What, Me Worry?*, AM. LAW., Sept. 2000, at 23.

118. Myers, *supra* note 8, at 541.

119. *Id.*

120. Miller, *supra* note 82, at 6.

121. Myers, *supra* note 8, at 541.

insurance and support services” for everyone.<sup>122</sup>

In short, not only is the legal profession being denied the opportunity to engage in endeavors that would be professionally rewarding—and not only are self-referrals between lawyers and nonlawyers increasing—but those who avoid the anti-MDP rules are not held to reasonable standards of legal professionalism.

### III. A PRO-MDP ARGUMENT

Currently, there is a broadly recognized need among consumers for innovative, comprehensive solutions to legal issues. Unfortunately, in practically every jurisdiction in the United States, rules prohibiting nonlawyer involvement in the business of law remain on the books.<sup>123</sup> MDPs are inevitable, and in fact, exist under the ABA’s current rules. Clients, lawyers and other professions would benefit from a professional model allowing MDPs.

#### A. *A Survey of Possible Models*

Allowing MDPs would require state bar associations to modify their professional rules to include provisions identifying acceptable conduct. During its consideration of modifying the Model Rules in 1999, the ABA posted on its website five proposed models for the purpose of furthering dialogue on issues that were to be considered by the Commission on Multidisciplinary Practice.<sup>124</sup> A brief discussion of these models is helpful in developing a workable system that would allow multidisciplinary practices.

1. *The Cooperative Model.*—Under the Cooperative Model, no changes to Model Rule 5.4 would occur.<sup>125</sup> The prohibitions against fee sharing and partnerships with nonlawyers would continue. Lawyers would be free to employ nonlawyer professionals on their staffs to assist them in advising clients. Lawyers could also work with nonlawyer professionals whom they directly retain or who are retained by the client. Professionals who are completely opposed to MDPs are likely to favor this model because it restricts lawyer/nonlawyer partnerships.

2. *The Command and Control Model.*—The Command and Control Model is based on the amended version of Rule 5.4 adopted in the District of Columbia.<sup>126</sup> It permits a lawyer to form a partnership with a nonlawyer 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.<sup>127</sup> The nonlawyer must agree to “abide by [the] rules of

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122. *Id.* at 553.

123. Andrews, *supra* note 20, at 655.

124. See ABA Comm. on Multidisciplinary Practice, *Hypotheticals and Models*, at <http://www.abanet.org/cpr/multicomhypos.html> (last visited Nov. 4, 2002) [hereinafter *Hypotheticals and Models*].

125. *Id.*

126. *Id.* See also WASHINGTON, D.C. RULES OF PROF’L CONDUCT R. 5.4 (2000).

127. *Hypotheticals and Models*, *supra* note 124.

professional conduct."<sup>128</sup> In addition, the agreement between the lawyer and nonlawyer must be in writing.<sup>129</sup>

3. *The Ancillary Business Model*.—In this model, a law firm operates an ancillary business that provides professional nonlegal services to clients.<sup>130</sup> Lawyers and nonlawyer professionals operate as partners in the ancillary business. However, the parties "take great care to assure that [their] clients understand that the ancillary business is distinct from the law firm and does not offer legal services."<sup>131</sup>

4. *The Contract Model*.—In the Contract Model, a professional services company and an independent law firm join contractually to provide services to clients.<sup>132</sup> The law firm remains an independent entity controlled and managed by lawyers, and accepts clients who have a relationship with the professional services company, as well as those who have no such relationship. A typical contract could include the following terms: (1) "the law firm and the professional services firm [agree] to refer clients to each other on a nonexclusive basis"; (2) the law firm agrees "to identify its affiliation with the professional services firm on its letterhead and business cards, and in its advertising"; or (3) the law firm agrees "to purchase goods and services from the professional services firm."<sup>133</sup>

5. *The Fully Integrated Model*.—In the full integration model, a single professional services firm is structured with organizational units, one of which provides legal services.<sup>134</sup> The firm advertises the provision of a "seamless web" of services" because the legal services unit may represent clients who either retain its services alone or who retain the services of other units in the firm, in addition to legal services.<sup>135</sup>

### B. *An Argument in Favor of the Fully Integrated Model*

The Fully Integrated Model provides the most comprehensive solution to the problems that exist in an anti-MDP environment. The full integration model would provide consumers and businesses with several advantages, many of which address concerns over enforcement, self-referrals, and fragmented solutions to clients' legal and non-legal needs. Multidisciplinary practices are a responsive solution to the demands of today's sophisticated legal clientele. For three valid reasons, the ABA and state bar associations should adopt rules that will allow the implementation of MDPs.

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128. *Id.*

129. *Id.*

130. *Id.*

131. Daly, *supra* note 2, at 225.

132. *Id.*

133. *Id.* at 265.

134. *Id.* at 226. This model differs from the contract model in that there is no free-standing law firm involved. *Hypotheticals and Models*, *supra* note 124.

135. Daly, *supra* note 2, at 226.

1. *Positive Impact on Enforcement.*—The ABA's endorsement of the Fully Integrated Model would result in the "professionalization" of law firm management," which would possibly result in a decrease in the number of violations of the Model Rules.<sup>136</sup> Professional managers may be better able to determine how quality legal and nonlegal services should be delivered most efficiently and at a lower cost to the consumer.<sup>137</sup> Such efficiency could lessen incentives for both nonlawyers and lawyers to engage in inappropriate behavior.<sup>138</sup>

The ABA's endorsement of MDPs could also positively impact the ability of state courts and bar associations to enforce rules and ensure that lawyers behave ethically when representing clients within the realm of partnership relationships. Under a pro-MDP model, the ABA and state bar associations would be required to develop enforceable rules under which MDPs could exist. In addition, adding a requirement that arrangements between lawyers and nonlawyers be placed in writing could lessen the possibility of miscommunication between the client and the service professional.

2. *Improvement in the Quality of Self-Referrals.*—While removing or modifying the ABA's anti-MDP stance will not completely eliminate and may not even reduce client referrals, it will help to ensure that client referrals are warranted and will help put measures in place to create incentives for attorneys to behave ethically. The rationale behind the current rule is incorrectly based on the assumption that lawyers and nonlawyers will automatically behave unethically. Although it is true that many individuals are motivated by the almighty dollar, it is improper and unfounded to believe that professionals are motivated to the point that they will intentionally defraud clients. The current increase in self-referrals, most prevalently between the legal and nonlegal professionals, are a result of increasing client demand. Such increase in demand warrants the ABA's response and attention. Instead, the ABA has refused to address the difficult ethical and legal issues that accompany involvement in MDPs and has chosen to ban participation altogether.

The ABA's endorsement of MDPs, along with efforts towards creating workable and effective guidelines for the implementation and operation of multidisciplinary practices will have a positive effect of ensuring that, even as referrals increase, consumers and professionals are protected. Two points

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136. Andrews, *supra* note 20, at 628.

137. *Id.*

138. *Id.* Although the ABA concededly has no authority to insist that nonlawyers follow the legal profession's rules, it can address the issue of nonlawyer conduct by specifying the conditions under which a lawyer may work in an MDP. For example, the ABA's Ethics Commission could recommend that a lawyer only be permitted to work in an MDP arrangement if all nonlawyers in the MDP agreed to comply with the lawyers' ethics rules. See American Bar Association, ABA Comm. on Multidisciplinary Practice, Testimony of Laurel S. Terry, Mar. 12, 1999, at <http://www.abanet.org/cpr/terryremarks.html> (last visited Nov. 4, 2002) (recommending that "nonlawyers not be bound by the legal ethics rules *per se*, but [that] they be obliged to comply when necessary to ensure that the lawyer complies").

support this theory. First, sections of the Model Rules adequately ensure that the lawyer acts in the client's best interest. The comment to Model Rule 1.2 (a) states that the "client has ultimate authority to determine the purposes to be served by legal representation . . ." <sup>139</sup> In addition, Model Rule 1.4 requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." <sup>140</sup> These rules are broad—much broader, in fact than Model Rule 5.4. Model Rules 1.2 and 1.4 allow state courts and bar associations to use reasonable discernment in determining whether a lawyer has failed to meet her obligations to adequately inform clients of the scope of legal representation.

In addition, in its proposed version of Rule 5.4, the Kutak Commission added a specific measure of protection that would require lawyers to forgo representing any clients where there would be "interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." <sup>141</sup> This provision, along with an added requirement that attorneys provide clients with full disclosure of any relationship or affiliation with other persons or entities to whom the lawyer was referring the client, would place responsibility on both the lawyer and nonlawyer to ensure that each client has complete information surrounding the handling of his or her legal issues.

3. *Reduced Fragmentation and Increased Comprehensive Solutions.*—MDPs serve the public's interest by reducing fragmentation of legal services and providing consumers with wholly integrated solutions to their legal issues. One-stop shopping is not beneath the legal profession. Often, very business-savvy and sophisticated legal clients wish to use one resource to plan for retirement, provide eldercare for a loved one, or develop a business strategy. MDPs would allow such services and would also reduce costs and increase efficiency. <sup>142</sup>

Under the current system, a client who needs assistance with a problem involving both legal and nonlegal issues must work to coordinate efforts among several firms. The client must also divulge information to both the lawyer and nonlawyer professionals, requiring the investment of considerable time. The concept of multidisciplinary practices recognizes "that the law is increasingly interrelated to many fields that traditionally have been viewed as nonlegal, such as economics, business, engineering, management, medicine, and psychology." <sup>143</sup> A multidisciplinary practice would allow professionals to collaborate and provide services not only in the area of law, but also in one of the many law related fields. Workable prototypes in the context of elder law and living trusts have already been developed. <sup>144</sup>

139. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt (1983).

140. MODEL RULES OF PROF'L CONDUCT R. 1.4 (b).

141. Andrews, *supra* note 20, at 593-94.

142. Morello, *supra* note 2, at 239.

143. Andrews, *supra* note 20, at 623.

144. See Myers, *supra* note 8 (outlining a business plan for "Elder-Comp, L.L.C.," a one-stop firm providing comprehensive and integrated legal, financial, and support services to seniors and caregivers); Pamela Lopata, *Can States Juggle the Unauthorized and Multidisciplinary Practices*

4. *A "Win-Win" Situation for Consumers and Professionals.*—The current ABA rules regarding scope of representation along with an additional provision that requires lawyers to fully disclose their relationship with a nonlawyer to the client will help ensure that (1) consumers are informed of their choices; (2) lawyers accept responsibility for their partnering relationships with nonlawyers; (3) lawyers who are employed by nonlawyer firms, such as accounting or consulting firms, have no incentive to “practice law in secret;” and (4) even as self-referrals between lawyers and nonlawyers increase in response to consumer demand, such relationships will benefit, and not harm, both the consumer and the lawyer professionally.

#### CONCLUSION

As illustrated by New York’s recent move, state bar associations are not required to adopt the ABA’s Model Rules. So one might ask, “Why then do we need the ABA to endorse MDPs?” One reason is because the tradition and historical perseverance of the ABA represents integrity and the capability to face challenging legal issues head-on. The ABA could be a viable resource to assist states in establishing guidelines for MDPs. Although state bar associations and courts are not required to adhere to the ABA’s opinions and positions on issues such as MDPs, the ABA’s significant influence is evidenced by the fact that four-fifths of states have adopted some version of the ABA’s Model Rules.<sup>145</sup>

On February 5, 2002, the ABA House of Delegates debated Report 401 of the Ethics 2000 Commission and amended the Model Rules of Professional Conduct without any reference whatsoever to Model Rule 5.4.<sup>146</sup> However, there remains hope. In May 2002, the Standing Committee on Ethics and Professional Responsibility submitted a report to the ABA House of Delegates recommending that Model Rule 7.2, which addresses advertising, be amended to provide guidance allowing lawyers to participate in referral arrangements with other lawyers and nonlawyer professional services providers.<sup>147</sup> Specifically, Model Rule 7.2 will be amended to add a fourth provision to Rule 7.2(b) that a lawyer may

refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is

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*of Law?: A Look at the States' Current Grapple With the Problem in the Context of Living Trusts*, 50 CATH. U.L. REV. 467 (2001) (discussing lawyers and nonlawyers working together to market, draft, and sell revocable living trusts, as well as other estate planning instruments).

145. Andrews, *supra* note 20, at 584.

146. See ABA, Summary of House of Delegates Action on Ethics 2000 Commission Report, at [http://www.abanet.org/cpr/e2k-summary\\_2002.html](http://www.abanet.org/cpr/e2k-summary_2002.html) (last visited Nov. 4, 2002).

147. ABA Comm. on Ethics and Prof'l Responsibility, Report to the House of Delegates: Recommendation, at [http://www.abanet.org/cpr/ethics-72\\_75.doc](http://www.abanet.org/cpr/ethics-72_75.doc) (last visited Nov. 4, 2002).

informed of the existence and nature of the agreement.<sup>148</sup>

Under this amendment, referral arrangements are allowed as long as they are non-exclusive, meaning that the lawyer is free to exercise independent professional judgment if, in the lawyer's opinion, referral of a client to a different service provider would be preferable.<sup>149</sup> In addition, the lawyer must disclose the existence of any referral arrangements to their clients before making a referral recommendation.<sup>150</sup> The ABA adopted the amendment in August 2002 and the legal community will undoubtedly wait with anticipation to observe how the changes will impact MDPs.

As one ABA delegate asked, "Why are we in such a hurry to take MDP, lock it up in an airtight container, and put it on the back of the shelf?"<sup>151</sup> While some commentators claim that scandals such as the "Enron affair" should be the "death knell of the MDP debate,"<sup>152</sup> in reality, the scandals prove that the ABA's goal should not be to prohibit multidisciplinary practices, but to provide guidance to legal professionals and their associates so that clients are protected.<sup>153</sup> Instead of expending resources to resist the emergence of MDPs, the legal community and its clients would be better served if the ABA would endorse MDPs and concentrate its efforts on determining the most effective way for attorneys to operate multidisciplinary practices. MDPs make sense for the legal profession and for its consumers.

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148. *Id.*

149. *Id.*

150. *Id.*

151. Gibeaut, *supra* note 48, at 93.

152. Robert Lennon, *MDP's Executioners*, AM. LAW., Mar. 2002, at 18.

153. John Caher, *Hassett Ends Term Focused on Multidisciplinary Practice*, N.Y. L.J., June 11, 2001, at 6.