MULTIDISCIPLINARY PRACTICE MODELS: AN ANALYSIS OF ISSUES RELATED TO PROPOSED CHANGES IN THE MODEL RULES OF PROFESSIONAL CONDUCT

Steven J. Arsenault-
W. R. Koprowsla'

t INTRODUCTION

Historically, the legal and accounting professions have focused on their respective fields with little intermingling between the two disciplines. Accountants focused on providing services relating to financial and managerial accounting, auditing, tax planning and compliance, and, more recently, management consulting services. Attorneys focused on legal issues from antitrust to zoning and everything in between. The two professions sometimes shared clients, sometimes worked together on limited projects, such as a merger or acquisition transaction or an accountant serving as an expert witness in litigation, but the professions remained largely separate.

However, in recent years, clients' problems have become more and more complex, and it is increasingly unlikely that these problems will be limited to a single discipline, whether law, accounting or some other area.[1] Moreover, given the global nature of today's economy, these problems often span across geographic, jurisdictional and national boundaries. Multidisciplinary practices ("MDPs") offer an economic opportunity for both the accounting and legal professions to provide more efficient and cost-effective services to their clients in today's demanding marketplace for professional services.

It Accounting Firms and MDPS

Accounting firms have taken the lead in establishing MDPs, believing that "the profession must reengineer itself to respond to the needs of a new global marketplace and to better serve the public interest."[2] Accounting firms outside the U.S. have been expanding into the legal field, particularly in Europe.[3] For example,

•Assistant Professor, College of Charleston; L.L.M., 1994, University of Florida College of Law, J.D., 1991, University of South Carolina School of Law, B.S., 1987, College of Charleston.
••Professor, Texas A&M University-Corpus Christi; J.D., 1991, University of South Carolina School of Law, Ph.D., 1987, Temple University; M.S., 1979, University of Southern California; B. A., 1976, Temple University.

[1] *See* Remarks of Steven Alan Bennett, Former General Counsel of Banc One Corporation, before the ABA Commission on Multidisciplinary Practice (Nov. 13, 1998) <http://www.abanet.org/ cpr/bennetthtml>.

[2] John Von Brachel, *Professional Issues: New AJCPA Board Chairman: Reinventing the CPA,* 11-96 J.ACCT. 49 (1996).

[3] Though MDPs have made significant progress outside the U.S., there are still significant variations in the degree to which MDPs are permitted in various international jurisdictions. Gianluca

Arthur Andersen, with 1,500 attorneys worldwide, is now reported to be the second largest law firm in the world, and Price Waterhouse (now PriceWaterhouse-Coopers) is reported to have more than 300 business lawyers in 33 European countries.[4]

While these types of MDP firms routinely provide legal services outside the U.S., the legal profession's current ethical restrictions have prevented the development of MDPs here in the U.S.[5] However, efforts are underway to ease these restrictions and allow the development of such practices in the U.S. as well.

Many feel that the development of MDPs in the U.S., particularly those involving the combination of accounting and legal services, is inevitable.[6] In 1998, Philip S. Anderson, President of the American Bar Association, appointed the ABA Commission on Multidisciplinary Practice (the "Commission") to review the ethical rules prohibiting attorneys from practicing in MDPs and to make a recommendation regarding potential modifications of those rules.[7] The Commission recently issued its report, recommending that the ethical rules for attorneys be modified to allow MDPs.[8] The ABA House of Delegates was scheduled to vote on the proposed changes to the Model Rules at its August 1999 annual meeting in Atlanta, Georgia, but after considerable discussion, the delegates decided to postpone the vote to allow more time for the delegates to study and become familiar with the relevant issues.[9]

ffl. Overview of Legal Profession's Constraints on MDPS

Currently, the ethical rules governing attorney conduct in every U.S. jurisdiction (with the limited exception of Washington, D C.)[10] prohibit the

Morello, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Disciplinary Practices Should Be Permitted in the United States,* 21 FORDHAM INTI, L. J. 190, 196-203 (1997); Brodsky, *Accountants and the Practice of Law,* N.Y.L.J., Aug. 12,1998, at 3.

[4] *See* Gregory S. Smith, *A Little Off the Top: Accounting Firms Edge Into the Legal Market,* GA.B.J. Feb. 1999, at 10, 12.

[5] While the legal profession's ethical rules have prevented law firms from establishing true MDPs in the U.S., during the 1980s and 1990s, many large U.S. law firms diversified their services by establishing ancillary business subsidiaries to provide consulting services in areas such as healthcare, real estate and legislative services. *See* Appendix C, Reporter's Notes, Report of the ABA Commission on Multidisciplinary Practice (visited Apr. 25, 2000) <http://wwww.abanet.org/mdpappendixc.html> (hereinafter "Reporter's Notes"); *see also* Judith R. Trepeck, *Lawyers in CPA's Clothing,* 10-92 J.ACCT. 119(1992).

[6] *See* Delos N. Lutton, Union Internationale des Avocats, Remarks to American Bar Association Special Comission on Multidisciplinary Practice (Aug. 8, 1999) <http://www.abanet.org/ cpr/lutton.html>.

[7] *See* Patricia Manson, *ABA Panel Set to Examine Ancillary Business Practices,* CHI. Daily L.B., Oct 13, 1998, at 1.

[8] *See* American Bar Association Commission on Multidisciplinary Practice, Report to the House of Delegates, Recommendation (visited Apr. 25, 2000) <http://www.abanet.org/cnr/mdp recommendation.html> (hereinafter "Report"); Commission on Multidisciplinary Practice, Report (Aug. 1999) < http://www.abanet.org/cpr/mdreport.html>.

[9] *See ABA Delays Action on MDPs,* ABA Press Release (Aug. 10, 1999) <http://www.abanet org/media/aug99/mdp.html>.

[10] *See* D.C. Rules OF PROFESSIONAL CONDUCT Rule 5.4 (1991), which permits fee-sharing and partnership with nonlawyers for the delivery of legal services. The exception is limited to organizations that solely provide legal services. This limitation, along with the limitations imposed by

implementation of true multidisciplinary practices. These prohibitions were not included in the original Canons of Professional Ethics developed by the ABA in 1908 but were added 20 years later." In developing the ABA Model Rules of Professional Conduct in the late 1960s, the members of the ABA Commission on Evaluation of Professional Standards (commonly known as the "Kutak Commission"), after examining the prohibitions on MDPs in the Code of Professional Responsibility, found that rescinding these prohibitions was in the best interest of clients and would not undermine professional values such as independence of professional judgment.[12] The ABA House of Delegates did not agree, however, and included the prohibition on MDPs in the Model Rules.[13] Specifically, the current Model Rule 5.4 prohibits the sharing of legal fees with a nonlawyer and forming a partnership or other association with a nonlawyer if any of the activities of the partnership or association consist of the practice of law.[14]

In carrying out its charge to review the current prohibition and make a recommendation regarding any changes, the Commission specifically considered the effect of any recommended change on what the Commission and numerous witnesses describe as the legal profession's core values: professional independence of judgment, the protection of confidential client information, and loyalty to clients through the avoidance of conflicts of interest.[1S] The Commission concluded that it is possible to satisfy the interests of clients and attorneys by revising the Model Rules to allow attorneys to practice in an MDP environment without compromising these core values.[16]

IV. ANALYSIS OF THE PROPOSED CHANGES TO THE MODEL RULES

The Commission proposed numerous specific changes to the Model Rules to accommodate the MDP form of practice.[17] Under the proposed rules, an MDP that is controlled by lawyers would operate much like a traditional law firm operates

ABA Formal Opinion 91-360 (1991), which concluded that a firm with offices in more than one jurisdiction could not have a nonlawyer partner in its Washington, D.C. office, has resulted in very few firms who have nonlawyer partners. *See* Reporters Notes, *supra* note J; see *also* Summary of the Testimony of Susan Gilbert, Ethics Counsel for District of Columbia, before the Multidisciplinary Practice Commission (Nov. 12, 1999) <http://www/abanetorg.cpr/gilbertl198.html>.

[11] *See* Report, *supra* note 8.

[12] *See* Reporter's Notes, *supra* note 5.

[13] *See id.*

[14] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1998).

[15] *See* Report, *supra* note 8.

16 *See id.*

[17] The Commission defined an MDP for purposes of the Model Rules as follows: "'Multidisciplinary practice (MDP)' denotes a partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to clients) other that the MDP itself, or that holds itself out to the public as providing nonlegal, as well as legal, services, [sic] It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, and there is a direct or indirect sharing of profits as part of the arrangement" Appendix A Report of the American Bar Association Commission on Multidisciplinary Practice (visited Apr. 25, 2000) <http://www.abanet.org/mdpappendixahtml> (hereinafter "Report, Appendix A").

today, except that the firm could have non-lawyer partners who could share in the legal fees generated by the firm. An MDP not controlled by lawyers would be required to participate in an annual certification process intended to assure that the professional role and independent judgment of the attorney is preserved. In particular, such MDPs must maintain procedures to protect an attorney's obligation to segregate client funds, to abide by the rules of professional conduct, and to acknowledge that attorneys in an MDP have the same obligation to render voluntary *pro bono publico* legal services as attorneys in traditional law firms.[18] The certification process would require that such MDPs certify to the highest court in each jurisdiction in which the MDP delivers legal services that it has complied with these procedures.[19] Such MDPs would also be required to consent to being regulated by the courts, being subject to an administrative audit to assure compliance with these procedures, and paying an annual certification fee to be used to fund the audit process.[20] The proposed changes also make appropriate changes to the rules concerning confidentiality of information, responsibilities of partners and supervising lawyers, and responsibilities regarding nonlawyers.[21]

V. Comparison of Possible MDP Models

The Commission's report describes five models for integrating legal and accounting services under the proposed modifications to the Model Rules. The five models are (1) the Cooperative Model, (2) the Command and Control Model, (3) the Law-Related Services/Ancillary Business Model, (4) the Contract Model, and (5) the Fully Integrated Model.[22] Of these, the first three are not MDPs, while the fourth and fifth models represent true MDPs.

Under the Cooperative Model, lawyers employ nonlawyer professionals to assist them in advising clients. The nonlawyers are subject to direct supervision of the employing attorney. Similarly, under the Command and Control Model, a lawyer forms a partnership with a nonlawyer, subject to certain restrictions, including the requirement that the organization have as its sole purpose the provision of legal services.[23] This second model is not a true MDP as defined by the Commission because of this "sole purpose" restriction. Under the Law-Related Services/Ancillary Business Model, the law firm owns and operates a separate non-legal consulting firm to provide services. The law firm and the consulting firm may have some clients in common, but each may also provide services to clients independent of the other. In this model, nonlawyer professionals may have an equity interest in the organization, but because the organization is not providing legal services, it is also not an MDP under the proposed Model Rules. This is the model some law firms are currently

[18] *See* Model Rules of Professional Conduct Proposed Rule 5.8(cXl)-<5) (1999).

19 *See* Model Rules of Professional Conduct Proposed Rule 5.8(cX7) (1999).

[20] *See* MODEL RULES OF PROFESSIONAL CONDUCT Proposed Rule 5.8(cX8)-(9) (1999).

[21] *See* Report, Appendix A *supra* note 17.

[22] *See* Reporter's Notes, *supra* note 5.

[23] This is the model in use under the ethics rules of the District of Columbia. D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1991).

using to provide ancillary services in areas such as real estate, lobbying or consulting. Since none of these three models involves an MDP, they are not subject to the certification and procedural requirements of proposed Model Rule 5.8. However, these models also do not provide significant opportunities for accountants because of the limitations on true integration of services.

In contrast, under the Contract Model, a law firm enters into a contractual relationship with a professional services firm (which may be an accounting firm). The law firm remains a separate entity, but it agrees to identify the affiliation on its letterhead and business cards. The law firm and professional services firm also agree to refer clients to each other (normally on a nonexclusive basis) and the law firm may purchase goods and services from the professional services firm, such as staff management, technology and office space. This model is currently used extensively by the Big Five accounting firms outside the U.S.[24] Because the Contract Model involves an arrangement by which a law firm joins with one or more other professional firms to provide legal services and a direct or indirect sharing of profits, this model is an MDP subject to the requirements of proposed Model Rule 5.8.

Finally, under the Fully Integrated Model, services are provided by a single entity with no separate law firm. The organization provides a variety of professional services, such as legal, accounting and consulting services. Like the Contract Model, the Fully Integrated Model creates an organization that is an MDP subject to the certification requirements of proposed Model Rule 5.8.

While the Fully Integrated Model may eventually become the standard for U.S. MDPs if the Commission's proposal is adopted and implemented, it appears that, at least initially the Contract Model would be the best form for integrating accounting and legal practices. This model would make it easier to minimize many of the complications concerning the attomey-client privilege and the conflict of interest issues discussed above. Moreover, the adoption and refinement of regulations concerning MDPs will likely evolve slowly. As the regulations become clearer, the Contract Model may serve as a good transition between the current separate status of the two professions and the combined status which MDPs potentially represent. Finally, unlike the Fully Integrated Model that could lead to a de facto merger of the professions and a blurring of their ethical requirements, the Contract Model preserves the independence of both the accounting and legal professions, which will also be beneficial during the transition period.

VL Potential Benefits of MDPS

Proponents of MDPs believe that MDPs offer a substantial opportunity for the legal and accounting professions to provide a more efficient one-stop professional services environment for existing clients, to increase their client bases, and to benefit financially from the professional services provided by affiliated professionals to an extent not allowed under the current legal ethics rules. The efficiencies provided by the MDP structure would increase competition for both

[24] *See* Report, *supra* note 8; *see also infra* notes 8-17 and accompanying text

accountants and attorneys, leading to lower prices and better client service than is currently provided under the existing system. Large national and multinational law and accounting firms in particular are likely to find that they are better positioned to compete as MDPs in the global economy due to their expanded scope of services and the potential for economies of scale. These increases in efficiency and competition will result in significant benefits to the clients of the MDP firms.

VDL Concerns Regarding Implementation of MDPS in the United STATES

Some commentators have asserted that the legal profession's restrictive rules regarding nonlawyers exist to protect lawyers' economic interests[26] and act as a form of economic protectionism.[27] While most arguments that have been made against the imposition of MDPs are based on well-reasoned and very rational policy considerations, this protectionist attitude can still be seen within segments of the legal profession. For example, Dallas attorney William Elliot was quoted as saying, in reference to the movement of Big 6 accounting firms into traditional legal territory: "Down here in Texas, we only fight over women, dogs and fences. And this is a fences issue."[28]

The potential concerns regarding implementation of MDPs (in addition to any potential negative effect on attorneys' economic interests) fall into two broad categories: (1) the potential effects of MDPs on the legal profession's core values, and (2) other policy issues concerning MPD implementation. Each of these categories is discussed further below.

A. Potential Effect of MDPS on the Legal Profession's Core Values

Professional Judgment

Not all agree that MDPs are positive. For example, many attorneys believe that a change in the form of practice for attorneys will lead to a loss of the attorney's independence and will impair his professional judgment.[29] Some commentators have even suggested that allowing attorneys to practice in MDPs will result in a situation analogous to the physician in the managed care setting, with employee attorneys turning over their professional judgment to cost-conscious nonlawyers, resulting in the same type of practice constraints that physicians face from HMOs.[30] In addition,

[25] *See* Morello, *supra* note 3, at 240.

[26] *See* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. Rev. 1 (1984).

[27] 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 (1989).

[28] Larry Smith, *Attorneys v. CPAs . .. Texas Case Crystallizes Competitive Practice Issues for Major Firms*, OF COUNSEL, Feb. 1998, at 1.

[29] *See* Smith, *supra*, note 4; L. Harold Levinson, *Independent Law Firms that Practice Law Only: Society's Need, the Legal Profession's Responsibility*, 51 OHIO ST. L.J. 229 (1990).

[30] *See* Smith, *supra*, note 4; Howard C. Coker, *Ancillary Business—An Economic Opportunity or an Ethical Dilemma Threatening Our Profession?*, 74-NOV FLA. B.J. 6 (1998).

given the monopoly on the practice of law which attorneys have enjoyed, there is some concern that expanding services beyond the traditional practice of law provides an opportunity to do away with this monopoly.[31]

To some extent, these concerns reflect recent developments within the legal profession itself. For example, for a number of years, insurance companies have been directing the practice of defense attorneys through very direct control over law firm billing. These insurance clients have paid a great deal of attention to the activities of their outside legal counsel, often engaging in significant and detailed auditing of legal bills.[32] These focused efforts at controlling attorney billing certainly have a significant impact on the attorney's practice and by extension, may suggest an impairment of the attorney's professional independence.[33] However, the Model Rules clearly contemplated this type of situation and require the attorney to exercise independent professional judgment. While the insurance industry's actions do present ethical challenges for attorneys, we must trust that the ethical rules in place to guide the legal profession will allow attorneys to meet these challenges. To the extent that they do not, the ethical rules should be revised; however, it does not make sense to assume that because there are questions concerning the application of these ethical rules to a given situation that the situation itself should be prohibited.

Like the situation involving the efforts by insurance companies to control outside legal costs, the possibility of non-lawyers controlling an MDP firm which includes a law practice does raise some ethical concerns regarding attorney independence. However, the Commission's proposed modification of the Model Rules includes rules designed to specifically address these concerns. For example, the proposed changes include a specific statement that a lawyer in an MDP remains subject to all the Model Rules of Professional Conduct.[34] Further, an MDP not controlled by lawyers would be required to certify annually that it will not directly or indirectly interfere with a lawyer's exercise of independent professional judgment on behalf of a client and that it will establish, maintain and enforce procedures designed to protect a lawyer's exercise of independent professional judgment from interference by the MDP, any member of the MDP or any person or entity controlled by the MDP, and that the MDP will annually review the procedures and amend them as necessary to ensure their effectiveness.[35] The proposal also requires that the members of the MDP will abide by the rules of professional conduct when they are engaged in the delivery of legal services to a client.[36] These procedures are designed to assure that the attorneys in the MDP will meet their required ethical obligations while practicing in the MDP context. Like the insurance defense situation, the

[31] *See* Coker, *supra,* note 30.

[32] *See* John P. Freeman, *Ethics Watch,* 10-FEB S.C. Law. 10 (1999). As Professor Freeman notes, these legal bill audits raise other significant ethical questions, including the possible disclosure of confidential client information. *See also* J. Anthony McLain, *Third Party Auditing of Lawyer's Billings- Confidentiality Problems and Interference With Representation,* 60 ALA. LAW. 35 (1999).

[33] *See* Douglas R. Richmond, *The Business and Ethics of Liability Insurers' Efforts To Manage Legal Care,* 28 U. Mem. L. Rev. 57 (1997).

[34] *See* MODEL RULES OF PROFESSIONAL CONDUCT Proposed Rule 5.8(b) (1999).

[35] *See* MODEL RULES OF PROFESSIONAL CONDUCT Proposed Rule 5.8(c)(1), (2) and (6) (1999).

36. *See* MODEL RULES OF PROFESSIONAL CONDUCT Proposed Rule 5.8(cX4) (1999).

implementation of MDPs will certainly create additional ethical challenges for attorneys. Nonetheless, the Commission, after substantial study, found that the provisions of Proposed Model Rule 5.8 will be adequate to ensure appropriate compliance with attorneys' ethical obligations. Further, as the current debate demonstrates, these rules are not set in stone; to the extent modifications of the Proposed Model Rule are found to be necessary, additional changes can be made after further study.

Protection of Confidential Client Information

It is unclear how the attomey-client privilege and the rules relating to the maintenance of client confidences[37] would apply in an MDP environment[38] For example, it is unclear whether communications between a client and a nonlawyer professional in an MDP would be protected by the attomey-client privilege, or whether the privilege would be considered waived, and therefore subject to disclosure.[39] An argument can be made that the nonlawyer professionals in the MDP should be treated like a paralegal or legal assistant in the current law firm structure for purposes of applying the attomey-client privilege, bringing communications with these individuals under the protection of the privilege. However, an argument can also be made that the nonlawyer professional is more like an accountant or other retained expert in today's separate professional environment and that the attomey- client privilege should only apply where, as is currently the case, the nonlawyer professional is working for the lawyer in providing legal services to the client.

In fact, one possible advantage for clients hiring professionals who practice in an MDP firm may be the elimination of the legal fiction of retaining an accountant through an attorney in order to bring communications within the scope of the attomey-client privilege. Currently, in order to protect communications with the client under the privilege, clients must engage the services of the accountant through a law firm rather than retaining such services directly.[40] This process results in unnecessary duplication of services at a high cost to the client. If the attomey-client

[37] The discussion below focuses on the application of the attomey-client privilege in the MDP environment. However, it is important to recognize that certified public accountants are also subject to rules governing the disclosure of confidential client information. *See* CODE OF PROFESSIONAL CONDUCT, Rule 301 (American Inst, of Certified Pub. Accountants (1997)) (hereinafter "A1CPA CODE OF PROFESSIONAL CONDUCT"), which provides that a CPA shall not disclose any confidential client information without the specific consent of the client. The rule does not apply to the extent disclosure is required in order to comply with the CPA's professional duties as an auditor, to comply with **a** valid and enforceable subpoena or summons or to comply with applicable laws and government regulations. *See id.*

[38] *See* Steven J. Arsenault & W. R. Koprowski, *Tax Practitioner Privilege: A Safety Net With Many Holes,* #63 PRACTICAL TAX STRATEGIES 12, 12-16 (July 1999). While the recently enacted authorized tax practitioner privilege under I.R.C. § 7525 provides clients of accountants and other tax professionals in the U.S. with some protection against compelled disclosure of client communications, this protection is limited in scope, and significant differences between this privilege and the attomey-client privilege exist *See id.*

[39] This issue was subject to considerable debate in testimony before the Commission. *See* Reporter's Notes, *supra* note 5; *infra* notes 73-75 and accompanying text

[40] *See* Mark A Segal, *Professional Issues: Accountants and the Attorney-Client Privilege,* 4-97 J.ACCT. 53 (1997).

privilege in the MDP environment is applied so that communications with the accountant are within the scope of the attomey-client privilege, these additional costs will be eliminated without sacrificing the principles upon which the attomey-client privilege is founded. The effect would be to simply eliminate the fiction of requiring the client to retain the attorney and the attorney to retain the accountant.

Of course, the attomey-client privilege (as currently formulated) only applies where the communication relates to the provision of legal services.[41] It has sometimes been difficult to distinguish between legal and non-legal services in a traditional law firm setting,[42] and this analysis will be considerably more complicated in a true MDP setting where, by definition, both legal and non-legal services are provided by the same firm. The proposed changes to the Model Rules, perhaps in anticipation of these issues, include a comment specifying that a lawyer in an MDP will need to pay particular attention to the special confidentiality problems that will arise.[43] How the attomey-client privilege will need to be modified to accommodate the MDP form of practice will certainly be the subject of further debate and consideration in the future.

Loyalty to Clients Through Avoidance of Conflicts of Interest

The possible integration of accounting and legal services within an MDP has also raised conflict of interest concerns due to the differences between the conflict of interest rules applicable to the two professions.

The accounting profession's conflict of interest rules are found primarily in AICPA Code of Professional Conduct, which requires that regardless of the capacity in which they serve clients, CPAs should protect the integrity of their work, maintain objectivity and avoid any subordination of their judgment. Further, a CPA who provides auditing and other attestation functions should be independent both in fact and appearance and, in providing all other non-auditing services, should maintain objectivity and avoid conflicts of interest.[44]

Attorneys are generally prohibited from representing a client if the representation of the client will be directly adverse to another client, unless the lawyer reasonably believes that the representation will not adversely affect the relationship with the other client and each client consents after consultation.[45] An attorney also may not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or third person or by the lawyers own interests, unless the lawyer reasonably believes that the representation will not be adversely affected and the client consents after

[41] *See United States* v. *Millman*, 822 F.2d 305 (2d Cir. 1987); *Holifield* v. *United States*, 689 F.Supp. 865 (D. Wis. 1988), *affd* 909 F.2d 201 (7th Cir. 1990).

[42] *See, e.g., United States* v. *Wilson*, 798 F.2d 509 (1st Cir. 1986) (holding communications with attorney who acts as a negotiator or business agent for client not privileged); *Hardy v. New York News, Inc.*, 114 F.R.D. 633 (S.D.N.Y. 1987) (holding communications to lawyer serving as director of employee relations concerning affirmative action programs not privileged).

[43] *See* MODEL RULES OF PROFESSIONAL CONDUCT Proposed Rule 1.6 cmt. (1999).

44 *See* AICPA CODE OF PROFESSIONAL CONDUCT, *supra* note 37, at § 1, art. IV.

45. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1998).

consultation.[46] The attorney is also subject to significant limitations on her ability to enter into a business transaction with a client[47] and to represent a client in a matter which is substantially similar to a prior representation if the client's interests are materially adverse to the interests of the former client[48] Further, these conflict of interest rules apply not only to the individual attomey(s) involved but to the entire law firm.[49]

Some critics of the MDP proposal have suggested that including both attorneys and accountants in the same firm will result in conflicts of interest that will compromise the ethical obligations of the attorneys practicing in the firms. The proposed changes to the Model Rules specifically address this concern, providing that in connection with the delivery of legal services, each client of an MDP be treated as the lawyer's client for purposes of conflict of interest determinations.[50] This requirement should be sufficient to protect the interests of clients and prevent the type of conflicts of interest that might otherwise arise as a result of a combination of attorneys and accountants in the same firm.

This extension of the imputation of conflicts of interest to the entire MDP firm may in fact limit the potential benefits otherwise associated with an accounting firm becoming part of an MDP firm[51] and may, in some circumstances, even result in a decrease in the firm's client base. The extension of the imputed disqualification rule to the MDP environment will clearly inhibit growth of MDPs in large multinational firms such as the Big Five accounting firms to some degree; the extent to which the rule results in such inhibition remains to be seen. In any event, the Commission's proposal clearly addresses the conflict of interest concern, and there is currently no evidence that the revised Model Rules would be ineffective.

B. Other Policy Issues Concerning MDP Implementation

Difference in Roles of Accounting and Legal Professions and Effect on Auditor Independence

One of the major concerns with allowing MDPs, particularly with the combination of attorneys and CPAs, is the difference in the roles of each of the professions. The role of accountants has traditionally been to objectively analyze and disclose accounting and financial information through their attestation function. More recently, accountants have expanded the scope of their services to include other areas, such as tax and management consulting services. Attorneys, on the other hand, are advocates for the interests of their clients.[52] Reconciling these conflicting

46.See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1998).

[47] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 (1998).

[48] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1998).

[49] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1998).

[50] *See* Report, *supra* note 8.

[51]*See* Remarks of Richard Spivak, Arthur Andersen LLP, before the ABA Commission on Multidisciplinary Practice (Mar. 31, 1999) <http://www.abanet.org/cpr/spivak3.html> (hereinafter Remarks of Richard Spivak).

[52] *See* Smith, *supra* note 4, at 10.

roles is a potential impediment to combining accounting and legal services in a single MDP firm.

More specifically, one of the major concerns with combining the services of the two professions in a single MDP firm is the potential for the impairment of the accountants' independence as auditors. Especially in the public sector, auditors serve a vital role in providing the markets with assurances that financial statements for public companies fairly represent the financial condition of those companies and that adequate disclosure is made of material issues that may be of concern to investors.

As discussed earlier, the AICPA Code of Professional Conduct requires that CPAs protect the integrity of their work, maintain objectivity and avoid any subordination of their judgment, and, further, that a CPA who provides auditing and other attestation functions should be independent both in fact and appearance.[53] The concern over auditor independence is nothing new; commentators have discussed the issue for a number of years.[54] Accounting and auditing literature in recent years has contained a great deal of discussion over auditor independence.[55]

In 1997, the AICPA, in connection with the implementation of the Independence Standards Board ("ISB"), commissioned a study to assist the ISB in developing a conceptual framework for independence applicable to audits of public entities to serve as a foundation for the development of principles-based independence standards.[56] The study included substantial analysis of auditor independence from accounting, legal, economic, psychological and social points of view.

Of particular interest, the AICPA study included a separate study by The Law & Economics Consulting Group, Inc. into the effects of a multi-client, multi- service public accounting firm on auditor independence.[57] The study's findings are intriguing. For example, the study found that the threat of liability from failed audit functions is significant and provides incentives to maintain auditor independence.[58] The study also found that auditors' investments in their own reputations as well as in

[53] *See* AICPA CODE OF PROFESSIONAL CONDUCT, *supra* note 44.

[54] *See, e.g.*, Ralph Saul, *Keeping the Watchdog Healthy*, FIN. Executive, Nov.-Dec. 1995, at 10, 10-12. The importance of auditor independence was in fact recognized as early as 1875. *See* R.A Chandler & J.R. Edwards (eds.), Recurring Issues in Auditing - Prof. Debate 1875-1900 (1994).

[55] *See, e.g.*, James L. Craig, *The CPA and Independence: Illusion or Reality?*, CPA J., Mar. 1999, at 14, 14-21; John T. Sweeney and Robin W. Roberts, *Cognitive Moral Development and Auditor Independence*, 22 ACCX, ORQ. & SocX at 337, 342 n. 3-4 (1997); C.E. Jordan & J.G. Johnston, *Auditor's Independence: A Proposal to the Profession and the Public*, The WOMAN'S CPA July 1987, at 3, 3-9. Some commentators even suggest that true auditor independence is psychologically impossible. *See* Max H. Bazerman, Kimberly P. Morgan & George F. Loewenstein, *The Impossibility of Auditor Independence*, SLOAN Momt. Rev., Summer 1997, at 89,91 n.4.

[56] *See* AICPA *Serving the Public Interest: A New Conceptual Framework for Auditor Independence* (OcL 20, 1997), <http://flp.aicpa.org/public/download/members/div/secps/isb/white. htm>.

[57] *See* The Law & Economics Consulting Group, Inc., *An Economic Analysis of Auditor Independence For A Multi-Client, Multi-Service Public Accounting Firm* (Oct. 20, 1997), <http://flpaicpa.org/public/download/members/div/secps/isb/0U7194.doc> (hereinafter The Law & Economics Consulting Group).

[58] *See id.* at 10.

technology and audit methodology provide significant incentives to maintain auditor independence, since a loss of independence would mean a loss of the audit client and a simultaneous loss of the auditors' investments.[59]

More important to the MDP discussion, the study examined the impact of non-audit services such as management consulting services on auditor independence. The study found that between 1990 and 1996, of 610 claims against the Big Six accounting firms arising from the firms' audit services, only 24 claims mentioned that the auditor was also supplying consulting services to the client. In 19 of those 24 cases, auditor independence was not an issue, and in 2 of the remaining 5 cases, there were allegations of a lack of independence that were not directed at the supply of consulting services. Thus, in only 3 out of 610 cases were allegations made that independence was impaired by the provision of consulting services by the same firm.[60]

The study also found that the provision of non-audit services was not a relevant factor in developing risk profiles for the Big Six accounting firms and that the insurance industry does not use the supply of non-audit services, either to audit clients or to others, as a predictive variable in estimating the litigation losses of the Big Six accounting firms.[61] The study suggested that this is evidence that existing safeguards of auditor independence operate to ensure that accounting firms protect their independence when providing non-audit services.[62] The study concluded that there was no evidence that the supply of non-audit services, such as management consulting services, impaired auditor independence.[63]

The Law & Economics Consulting Group's study was of course commissioned by the AICPA and should therefore be viewed with a certain degree of skepticism. Nonetheless, the study's findings do provide support for the position of MDP advocates that allowing both law and accounting services to be provided in a single MDP firm will not impair auditor independence.

In addition, the accounting profession has taken considerable steps in recent years to enhance auditor independence, both in appearance and in fact. For example, the profession has undertaken a significant peer review process that requires evaluation by a peer review team of both audit and non-audit services to ensure that the firm's quality control system is functioning appropriately. The peer reviewers must also determine that consulting engagements are not proscribed by the rules set forth by the AICPA's SEC Practice Section, to make sure the consulting personnel did not function in a capacity similar to management, and, finally, to consider whether all significant accounting, auditing and reporting judgments appear to be

[59] *See id.* at 11; *see also* Remarks of Richard Spivak, *supra* note 51 (suggesting that the potential for civil liability and diminished firm reputation create a "significant regulatory force" that will provide enhanced adherence to applicable ethical standards).

[60] *See* The Law & Economics Group, *supra* note 57, at 17. Analysis of these types of statistics for the periods before and after 1996 would be most usefiil in analyzing this issue and would be an appropriate subject for additional empirical research.

[61] *See id.* at 18.

[62] *See id.* at 19.

[63] *See id.*

objective.[64] As of 1993, over a thirteen year period, the peer review teams had not developed any evidence indicating that the rendering of consulting services had impaired independence or objectivity or that any proscribed consulting services had been rendered.[65] The results of these peer review team analyses provide further evidence that providing management consulting services will not compromise auditor independence.

As is the case with management consulting services, the ethical rules governing CPAs and the possibility of legal liability will provide an incentive to maintain auditor independence in the MDP environment, just as they have in the current CPA firms with the provision of management consulting services. If in fact auditor independence is compromised, it is likely to be compromised to an equal or greater extent by the provision of management consulting services as by the provision of legal services in an MDP firm. In fact, given their extensive experience with conflict of interest issues and the potential for litigation, the addition of attorneys in the MDP firm may even cause an increase in attention to auditor independence issues.

At this point, there is no empirical evidence that the provision of legal services in an MDP firm would have any negative effect on auditor independence. At the very least, additional study should be undertaken to further assess the impact of the provision of non-audit services on auditor independence. To the extent that auditor independence is found to be compromised, those concerns should be addressed through the ISB, the Securities and Exchange Commission and the AICPA's ethical standards, since they would affect a broader scope of services than just the legal services that could be provided by an MDP firm under the Commission's proposal.[66]

Administrative Burdens of Proposed MDP System

The administrative requirements of proposed Model Rule 5.8 will require considerable administrative oversight. Both the internal requirements designed to protect the core values of the legal profession and the certification requirements will require considerable resources, both financial and otherwise. In addition, because the proposed changes to the Model Rules must be approved both by the ABA House of Delegates and by the regulatory authorities in each jurisdiction, the extent and exact nature of these requirements is yet to be determined. Given the significant variation in the regulation of the legal profession in the various states, non-attorney controlled MDPs could face certification requirements from 50 or more different

64.See William J. Read, *Consulting Services and CPA Firms,* CPA J., Feb. 1993, at 55, 55-57.

65.See id.

66.At least one commentator has called for the accounting profession to require large firms to divest themselves of their non-auditing interests in order to assure the independence of CPA firms engaged in auditing activities for public companies. *See* Abraham J. Bnloff, *Our Profession s Jurassic Park",* CPA J., Aug. 1994, at 26, 30. While this suggestion is a possible solution to the concerns over auditor independence, it is rather drastic. Given that the cun-ent evidence does not demonstrate a causal relationship between non-audit services and any impairment of auditor independence, additional empirical research in this area certainly seems prudent before taking such a drastic step.

jurisdictions, making these administrative requirements particularly burdensome.[67] These administrative burdens, and in particular their applicability to MDP firms not controlled by attorneys, is one of the major sources of criticism from the AICPA regarding the Commission's MDP proposal.[68]

Vffl. CONCLUSION

While a great deal has been written about the benefits and inevitability of MDPs, an equal amount of attention has been devoted to concerns about the effect of MDPs on the legal profession's core values and other related policy issues. The ABA Commission on Multidisciplinary Practice has proposed changes to the ABA Model Rules of Professional Conduct which would facilitate the development of MDPs in the U.S., and the ABA House of Delegates will reconsider the Commission's proposals in 2000. If the proposed changes to the Model Rules are approved, then the governing authorities in each jurisdiction will need to individually consider the adoption and implementation of the proposed changes.

Whether or not these changes will ultimately be implemented and what precise form they will take is uncertain. This is, after all, not the first time the ABA has considered this issue. What is certain is that the discussion over MDPs will continue, and, given the potential benefits to both the accounting and legal professions and their clients, it seems likely that some form of MDP regulation will eventually take effect. Additional consideration will need to be given to issues such as the application of the attomey-client privilege to MDPs, the effect of the legal profession's conflict of interest rules in an MDP setting, and, ultimately, the form and nature of MDP operations in the U.S. It is important for both the accounting and legal professions in the United States to understand the MDP debate so that they can frame an appropriate approach to MDPs in a timely and thoughtful manner.

[67] *See* Remarks of Richard Spivak, *supra* note 31 (expressing concerns over the potential burdens of the proposed regulatory system).

[68] *See* Randy Meyers, *Lawyers and CPAs: How the Landscape is Changing*, 2-2000 J.ACCT. 73,75 (2000).