
NEW YORK'S CONTROVERSIAL ETHICS CODE CHANGES: AN ATTEMPT TO FIT MULTIDISCIPLINARY PRACTICE WITHIN EXISTING ETHICAL BOUNDARIES

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I. INTRODUCTION

Whether and to what extent multidisciplinary practices should be allowed in the United States has recently been described as the “most important issue facing the legal profession today.”¹ Multidisciplinary practices, or “MDPs,” emerged as an important ethical issue more than ten years ago when the accounting profession began to offer businesses a wide variety of professional services they had not traditionally offered.² Consulting and other professional service firms followed suit, and began promoting services similar to those traditionally offered by law firms.³ The growth of these nonlegal firms led such firms to hire an increasing number of lawyers. Not surprisingly, this trend raised concerns about the unauthorized practice of law, conflicts of interest, and lawyer

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1. John H. Matheson, *Governance Issues in the Multidisciplinary Corporate Practice Firm*, 69 U. CIN. L. REV. 1107, 1107 (2001) (quoting Darryl Van Dutch, *ABA Honchos Differ Over MDP Vote*, NAT'L L.J., Aug. 23, 1999, at A6).

2. 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, 580 (2001).

3. *Id.*

independence.⁴ Since the distinctions between legal and nonlegal professions have become muddled, the American Bar Association (“ABA”) has devoted significant resources to addressing the MDP issue.⁵

While both supporters and adversaries of MDPs assert that protecting the client’s interest is of utmost concern, each side differs in its interpretation of what is best for the client. Supporters often point out efficiency and client demand for integrated services as central reasons to embrace MDPs as an inevitable practice structure.⁶ On the other hand, many lawyers believe MDPs are properly banned by Rule 5.4 of the Model Rules of Professional Responsibility, and are inherently dangerous to clients and the public because of potential conflicts of interest and compromises of client confidentiality.⁷ MDP adversaries also argue that the client is best served by lawyers, rather than collaborations of lawyers and non-lawyers, since lawyers must comply with a stringent ethical code that preserves confidentiality, loyalty, and independence of judgment, which other professions do not.⁸

New York’s new Professional Responsibility Code provisions have been described as the first rules in the nation to “officially address” MDPs.⁹ The New York rules are in fact a set of compromises that attempt to reconcile the changing economy and client demand with the core values of the legal profession by allowing lawyers to coordinate their efforts with non-lawyers in a structured framework.¹⁰ This Note will outline the new

4. See Adam A. Shulenburg, Note, *Would You Like Fries with That? The Future of Multidisciplinary Practices*, 87 IOWA L. REV. 327, 336–40 (2001).

5. Matheson & Favorite, *supra* note 2, at 581.

6. Julia J. Hall, Comment, *Resolving the MDP Issue: Deciding If the Status Quo is What’s Best for the Client*, 52 MERCER L. REV. 1191, 1203 (2001); Bradley G. Johnson, Note, *Ready or Not, Here They Come: Why the ABA Should Amend the Model Rules to Accommodate Multidisciplinary Practices*, 57 WASH. & LEE L. REV. 951, 993–95 (2000). See also Adam Miller, *Professional Schizophrenia*, BROWARD DAILY BUS. REV., Oct. 22, 2001, at A1 (discussing the demand created by “[c]lients looking for aggressive solutions to their business problems, not just legal advice”).

7. See John Caher, *Still Debated, MDP Arrives in New York*, N.Y. L.J., Nov. 1, 2001, at 1, 8.

8. See Michael W. Loudenslager, *Cover Me: The Effects of Attorney-Accountant Multidisciplinary Practice on the Protections of the Attorney-Client Privilege*, 53 BAYLOR L. REV. 33, 51–54 (2001); Jean Eaglesham & Michael Peel, *Battling Over the One-Stop Shop*, FIN. TIMES (London), Jan. 7, 2002, at 14.

9. Chris Kelleher, *MDP Update: The Empire Strikes Back*, CPA J., Oct. 2001, at 12, 12.

10. *New York Courts Modify Ethics Rules to Allow Multidisciplinary Alliances*, 70 U.S. L. WK. 2070, 2070 (2001) [hereinafter *NY Courts Modify Ethics Rules*]. See also Press Release, N.Y. State Bar Association, *New Rules Clarify Standards for N.Y. Lawyers’ Alliances with Nonlegal Professional Service Firms* (July 24, 2001), at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_Opinions/Multi-disciplinary_Practice_Rules/News_Release/News_Release.htm (announcing New York’s adoption of two new disciplinary rules governing lawyer participation in contractual alliances with non-lawyers).

provisions and modifications in the New York Code of Professional Responsibility and will analyze the surrounding practical and ethical issues. Part II will discuss the background for the MDP debate and the status of MDPs throughout the United States and abroad. Part III will discuss the changes made to the New York Code of Professional Responsibility. Part IV will suggest recommendations for successfully integrating these changes into practice, as well as possible changes to the Model Rules in order to accommodate future professional business alliances between lawyers and non-lawyers. Part V concludes with an analysis of a recent development that may affect the future of multidisciplinary practices.

II. BACKGROUND

A. MULTIDISCIPLINARY PRACTICES

1. Definitions

The ABA Commission on Multidisciplinary Practices defines an MDP as:

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 a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal services. 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 a part of the arrangement.¹¹

The form of practice sanctioned by the New York Code, however, does not consist of a *partnership* between lawyers and non-lawyers—only a specific type of *practice*.¹² The type of alliance allowed by New York differs practically and ideologically from the traditional notion of MDP, yet is still often referred to as an “MDP.” For purposes of this Note, the term MDP will usually refer to the traditional concept defined above, or, as it is often described in legal periodicals, the general integration of lawyers and non-lawyers in practice. As a result of the recent actions of the New York State Bar, New York’s 2002 Code of Professional Responsibility now states that “a lawyer or law firm may enter into and maintain a contractual relationship with a non-legal professional. . . for the purpose of offering to

11. ABA COMM’N ON MULTIDISCIPLINARY PRACTICE, REPORT recommendation (1999), at <http://www.abanet.org/cpr/mdprecommendation.html>.

12. Steven C. Krane, *Let Lawyers Practice Law*, NAT’L L.J., Jan. 28, 2002, at A16.

the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other non-legal professional services.”¹³

This allowance for contractual relationships is similar to the type of practice proposed in the MacCrate Report, discussed in detail in Part III of this Note, and is sometimes called a “lawyer-friendly” MDP even though it is not an MDP in the traditional sense.¹⁴ Written from the perspective of lawyers, the term “lawyer-friendly” is used to describe New York’s newly amended Code because it strives to maintain lawyers’ independence and control of the legal profession.¹⁵ In contrast, earlier proposals for “accountant-friendly” MDPs that consisted of “a fully integrated merger of various professionals under one roof,” caused greater compromises of independence through proposals of fee sharing and partnerships between lawyers and non-lawyers.¹⁶ These types of practices continue to be rejected by the ABA.¹⁷

2. The Big Five’s¹⁸ Influence on MDP

While the new additions to the New York Code allow alliances between lawyers and engineers, or architects and other professionals, the most prominent of those alliances involve attorneys and accountants.¹⁹ These alliances will also be the central focus of this Note, as they are the most common and potentially, the most compromising arrangements. Since the Big Five accounting firms have increased competition in the legal services market through these alliances, the MDP debate has been pushed to the forefront because lawyers want to understand and regulate the accounting firms’ new practices. “Clients are [now] looking for aggressive solutions to their business problems, not just legal advice, and the giant accounting and consulting firms are eager to help, in many cases hiring

13. N.Y. CODE OF PROF’L RESPONSIBILITY DR 1-107(A) (2002) (codified at N.Y. COMP. CODES R. & REGS. tit. 22, §§ 1200–1200.46 (2002)). Hereinafter, all references to §§ 1200–1200.46 will be listed as the appropriate disciplinary rule, or “DR.”

14. Kelleher, *supra* note 9, at 12.

15. *Id.*

16. *Id.*; ABA COMM’N ON MULTIDISCIPLINARY PRACTICE, REPORT (1999), at <http://www.abanet.org/cpr/mdpreport.html> [hereinafter 1999 REPORT].

17. See Shulenburg, *supra* note 4, at 328–30.

18. At the time of writing, the Big Five consisted of Arthur Andersen, Deloitte and Touche, Ernst and Young, KPMG, and PricewaterhouseCoopers. Due to Arthur Andersen’s demise stemming from its involvement in the Enron scandal (discussed in the Conclusion), the “Big Five” may no longer be accurate terminology.

19. Caher, *supra* note 7, at 1.

lawyers to deliver the services.”²⁰ Consulting and compliance work, largely law-related, make up a growing percentage of the Big Five accounting firms’ business. According to the Wall Street Journal, in April 2001, the Big Five firms received three times as many fees for nonauditing services—particularly consulting—as they received for auditing, one of their largest traditional lines of service.²¹ Many lawyers faced with such powerful competition find the appeal of affiliations with accounting firms and other non-lawyer professionals as too attractive to continue the fight against MDPs.²²

While the Big Five insist that the lawyers they hire do not provide “legal services” to clients, many attorneys contend that lawyers employed by accounting firms frequently provide law-related services that are indistinguishable from what law firms offer.²³ Mike Boyle, director of forensic accounting and litigation services for the accounting firm, KPMG, stresses that legal work is always referred to outside counsel.²⁴ Boyle was reluctant to define what KPMG considers a “legal service,” saying, “No matter what definition I gave you, someone would find fault with it.”²⁵ One Florida lawyer, who worked for KPMG after graduating from law school, says that at KPMG, she conducted research for tax planning and drafted memos suggesting how those clients’ plans should be drafted.²⁶ She also directly advised clients on tax compliance issues. She says of her experience: “[A] lot of times the research we did, the memos we drafted and the compliance advice we offered was the same work that’s done in

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The authors of the New York rules may have had the saying “the best defense is a good offense” in mind when they drafted the new code sections.²⁸ Lawyers supporting these rules maintain that the longer the legal profession waits and hopes that MDPs will disappear, the more probable it is that the Big Five will be able to introduce accountant-friendly MDPs in the United States.²⁹ It can be argued that New York supports the

20. Miller, *supra* note 6.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Kelleher, *supra* note 9, at 12.

29. *Id.*

proposition that MDPs must be in accord with lawyer-friendly MDP principles, or risk nonexistence.³⁰

3. The International Status of MDPs

“The provision of legal services, in combination with other professional services in the international arena is rapidly developing.”³¹ Partnerships between lawyers and other professionals are permitted already in many foreign countries.³² KPMG operates Klegal, and PricewaterhouseCoopers owns the Landwell Legal Network.³³ Most recently, the Big Five firms “have been acquiring or affiliating closely with³⁴ Andersen United Kingdom, part of Arthur Andersen, offers legal services through Garrett & Company.³⁵ Andersen Legal Services has also bought out the premier law firm in Spain.³⁶ Since 1993, major accounting firms have been able to establish legal capabilities in places such as Wales and Australia, which now operate under Big Five names.³⁷ These accounting firms have major law firm “affiliates” in Hong Kong, Singapore, Canada, and several Latin American and African countries.³⁸ The Big Five are also actively pursuing independent law firms in Japan, Korea, Southeast Asia, and India.³⁹ In some parts of the world, however, legislators have taken a stand against MDPs. In the United Kingdom, traditional MDPs are banned, although independent law firms can practice in close cooperation with Big Five firms under a contractual agreement.⁴⁰

Despite the popularity of MDP-like arrangements abroad, a survey of more than 100 in-house lawyers at leading European companies in 2000 revealed widespread fear about the potential for conflicts of interest created by MDPs.⁴¹ While MDPs, in theory, can embrace any number of different

30. *Id.*

31. Shulenburg, *supra* note 4, at 334.

32. *Id.*

33. Miller, *supra* note 6.

34. Ward Bower, *The Case for MDPs: Should Multidisciplinary Practices Be Banned or Embraced?*, LAW PRAC. MGMT., July / Aug. 1999, at 61, 61, available at <http://www.abanet.org/lpm/magazine/mdp-bowe995.html>.

35. John D. Messina, Comment, *Lawyer + Layman: A Recipe for Disaster! Why the Ban on MDPs Should Remain*, 62 U. PITT. L. REV. 367, 372 (2000).

36. Bower, *supra* note 34, at 61; Karen R. Long, *Lawyers Question Ethics of ‘One Roof’ Practices*, PLAIN DEALER, Nov. 13, 2001, at E1.

37. Bower, *supra* note 34, at 62.

38. *Id.*

39. *Id.*

40. *Id.* at 62–63.

41. Eaglesham & Peel, *supra* note 8.

global disciplines, the movement of the Big Five accountants to build global legal service businesses alarms many lawyers. Their apprehension seems to stem mostly from accountants' gradual encroachment into the legal services market.⁴² Some lawyers view the existence of the Big Five's legal networks as a circumvention of regulations that ban true MDPs.⁴³ One British survey of 350 corporations asked two officers of each corporation—the head of the legal department and the Chief Financial Officer—whether they preferred MDPs to separately organized and controlled law firms and accounting firms. Eighty-eight percent of the legal representatives said they did not prefer one-stop shopping, and the same percentage of CFOs said that they would rather pick and choose from independent law firms and independent accounting firms.⁴⁴

Despite these qualms, “2002 could see a number of significant Bars [in the United States] beginning to open up a bit,”⁴⁵ said Tony Williams, the worldwide managing partner of Anderson Legal. But he added, “[T]he dominance of lawyers both in the legislative forums and everything else probably means [regulatory acceptance of MDPs] will be much slower [here] than in other parts of the world.”⁴⁶ So far, Andersen Legal has attracted high-quality foreign law firms and some internationally respected lawyers. Robert Lawry, director of the Center for Professional Ethics at Case Western Reserve School of Law, stated that at Harvard Law School, the firm that scheduled the most job interviews with graduates during Spring 2001 was a business consulting company.⁴⁷

One of the most recent developments in the foreign MDP arena has been the European Court of Justice's ruling that PricewaterhouseCoopers and Andersen may not incorporate two Dutch law practices, respectively, as part of their attempt to create a multidisciplinary partnership.⁴⁸ The court's opinion on February 19, 2002 stated that because there is a “degree of incompatibility” between lawyers' and accountants' work, the ban on MDPs “may be necessary for the proper practice of the legal profession.”⁴⁹

42. *Id.*

43. See Shulenburger, *supra* note 4, at 333; Robert L. Ostertag, *Multidisciplinary Practice: Our Profession is Not for Sale*, 18 GPSOLO 22, 27 (2001).

44. Symposium, *Multidisciplinary Practice*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 153, 161–62 (2000).

45. Eaglesham & Peel, *supra* note 8.

46. *Id.*

47. Long, *supra* note 36.

48. Michael Mann & Nikki Tait, *A Setback for the One-Stop Shop*, FIN. TIMES (London), Feb. 25, 2002, at 14.

49. Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2002 E.C.R. I-01577.

4. Regulation of MDPs in the United States

The American Bar Association's position on MDPs is deeply rooted in the structure of the ABA Model Rules of Professional Conduct. These rules are viewed generally as a national standard since the ABA is often referred to as the national leader in formulating rules that govern the conduct of lawyers.⁵⁰ The model regulations crafted by the ABA are most often adopted by state authorities in similar form.⁵¹ Thus, widespread change in the regulation of the legal profession is greatly influenced by changes in the ABA's Model Rules.

Twice in the last twenty years, the ABA has considered amending the Model Rules to permit MDPs in the United States.⁵² The ABA failed to ratify the proposed changes both times.⁵³ To facilitate a revision of the Model Rules, the ABA appointed a commission to evaluate professional standards called the "Kutak Commission."⁵⁴ The Commission submitted its proposed set of ethics rules to the ABA in 1982.⁵⁵ The issue of non-lawyer participation in business with lawyers was the central topic of debate. The Kutak Commission proposed a new version of Model Rule 5.4 that would have allowed MDPs in the United States. The proposed rule permitted a lawyer to be employed in an organization that was not entirely lawyer-owned, so long as the structure did not interfere with the lawyer's independent professional judgment or with Model Rule principles of confidentiality, solicitation, and fee determination.⁵⁶

The ABA House of Delegates rejected the proposed Rule 5.4 by a wide margin and cited several reasons. They feared that the new Rule 5.4 would permit "Sears, H&R Block, or Big Eight accounting firms to open law offices which would compete with traditional law firms."⁵⁷ The ABA sided with the original opponents of the Kutak Commission's proposal, who were concerned that non-lawyer ownership of law firms would

50. Katherine L. Harrison, *Multidisciplinary Practices: Changing the Global View of the Legal Profession*, 21 U.P.A. J. INT'L ECON. L. 879, 882 (2000).

51. Janet L. Conley, *ABA Backs Foreign-US Attorney Partnerships*, FULTON COUNTY DAILY REP., Dec. 6, 2001, at 1.

52. Aubrey Meachum Connatser, Comment, *Multidisciplinary Partnerships in the United States and the United Kingdom and Their Effect on International Business Litigation*, 36 TEX. INT'L L.J. 365, 370-71 (2001).

53. *Id.*

54. Hall, *supra* note 6, at 1195.

55. Connatser, *supra* note 52, at 371.

56. *Id.*

57. Matheson, *supra* note 1, at 1118.

threaten lawyers' professional independence.⁵⁸ Opponents also worried that the legal profession could be dramatically altered and undermined due to the economic pressures of partnering with non-lawyers.⁵⁹

In 1998, ABA president Philip S. Anderson formed another commission to study the relationship between MDPs and the Model Rules.⁶⁰ The Commission made recommendations reminiscent of the Kutak Commission's proposed modification of Model Rule 5.4. In 1999 and again in 2000, the ABA voted not to alter the Model Rules, although it stated that the Model Rules should be revised as necessary to safeguard against illegal alliances between nonlegal entities adversely affecting the legal profession.⁶¹

Presently, all U.S. jurisdictions prohibit lawyers from entering into partnerships with non-lawyers.⁶² The current rules generally permit side-by-side arrangements,⁶³ as well as various, limited strategic alliances between law firms and other professional firms as long as the arrangement does not result in any ownership or supervisory right by non-lawyers over the practice of law.⁶⁴ At least twelve U.S. jurisdictions have issued reports in favor of recognizing some form of MDP.⁶⁵ These jurisdictions are Arizona, California, Colorado, the District of Columbia, Georgia, Maine, Minnesota, North Carolina, South Carolina, South Dakota, Utah, and Wyoming.⁶⁶ In practice, the District of Columbia Bar allows MDPs under certain circumstances, discussed in the next section.⁶⁷ But New York is the first state formally to adopt ethics rules that specifically allow and govern lawyer participation in a form of multidisciplinary practice.⁶⁸

Some lawyers support the New York rules as a way to regulate something that has existed for some time. According to Seth Rosner, a

58. *Id.*

59. *Id.*

60. Connatser, *supra* note 52, at 372; Matheson & Favorite, *supra* note 2, at 590.

61. See Nathan M. Crystal, *Core Values: False and True*, 70 *FORDHAM L. REV.* 747, 748-49 (2001).

62. Long, *supra* note 36.

63. "Side-by-side" arrangements are arrangements in which two firms refer business to each other, but one is not "above" the other in a supervisory role. See Press Release, N.Y. State Bar Association, State Bar Committee Report Would Permit Lawyer/Non-lawyer "Side by Side" Business Arrangements (May 2, 2000) (on file with author).

64. ABA COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT (2000), at <http://www.abanet.org/cpr/mdp-report10f.html> [hereinafter 2000 REPORT].

65. *NY Courts Modify Ethics Rules*, *supra* note 10, at 2070.

66. *Id.*

67. Loudenslager, *supra* note 8, at 73-74.

68. *NY Courts Modify Ethics Rules*, *supra* note 10, at 2070.

New York lawyer who served as a liaison to the ABA's Ethics 2000 Commission, "New York has in effect recognized and regularized what's

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But some lawyers point out that the policing effort is futile because few clients or lawyers have an incentive to turn in offenders.⁷⁰ Complaints alleging unauthorized practice of law are rare, and are most often brought against very small firms.⁷¹ Some lawyers believe the public will not complain if accounting firms provide the equivalent of legal services. Furthermore, attorneys are worried that if they do allege unauthorized practice of law, they may end up destroying business relationships with attorneys and accounting firms.⁷² Further, the definition of "practice of law" is illusive in that it is almost impossible to define precisely what constitutes the practice of law in the United States. While it is easy to list what lawyers may do, it is difficult to list what *only* lawyers may do. Tax planning, for example, is considered a legal service when performed by a lawyer, yet may also be performed by a non-lawyer in other contexts.⁷³

5. MDPs Already Exist in the United States

The idea of lawyers forming alliances with other professionals is not new, since "lawyers have engaged in multidisciplinary practice for

⁷⁴ According to Jeff Coburn of Coburn Consulting, more than ten percent of the top 200 largest law firms in the U.S. currently operate one or more ancillary businesses.⁷⁵ These firms have either set up separate companies or have created subsidiaries to provide legal and nonlegal services.⁷⁶ Firms that deliver nonlegal services are not affected by the prohibitions on partnerships and fee sharing with non-lawyers because they are not law firms, where presumably the practice of law does not exist. Yet, according to some critics, the consultants in these ancillary businesses may be very close to engaging in the unauthorized practice of law.⁷⁷ Still, it has become unclear to what degree lawyers and other professionals may

69. Tamara Loomis, *ABA Is About to Consider a Major Overhaul*, N.Y. L.J., Aug. 2, 2001, at 5.

70. See Miller, *supra* note 6.

71. Long, *supra* note 36.

72. Miller, *supra* note 6.

73. See Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 873 (1999).

74. Krane, *supra* note 12. This sentiment was expressed in the April 2000 MacCrate Report.

75. *CPA Firms Beware: Lawyers are Now Diversifying, Too*, ACCT. OFF. MGMT. & ADMIN. REP., Oct. 2000, at 1.

76. *Id.*

77. See, e.g., Matheson & Favorite, *supra* note 2, at 590.

affiliate or associate with each other without violating Model Rule 5.4. Exactly which services reside in the exclusive domain of the lawyer, and which are in that of the non-lawyer, remain unclear.

Former President of the NYSBA has stated that the existing rules do not necessarily prevent lawyers from participating in ancillary business ventures or even from entering into some forms of strategic alliances with non-lawyer professionals.⁷⁸ Model Rule 5.7 allows for the provision of ancillary services by lawyers so long as all of the other Model Rules of Professional Conduct are followed, including Model Rule 5.4's prohibition on the sharing of legal fees.⁷⁹ According to Model Rule 5.7, lawyers must ensure that their clients understand that some nonlegal services provided by firms are not covered by the Model Rules.⁸⁰ Some firms have formed associations and joint ventures that fall short of being described as actual MDPs. Likewise, accounting firms wanting to provide legal services to their clients have openly and aggressively attempted to provide legal services without being licensed to practice law.⁸¹ To date, the Big Five have employed about 4,000 American lawyers.⁸² The Big Five say that they are not practicing law, and are merely engaging in tax related services.⁸³ But those who think this resembles the unauthorized practice of law point out that accountants are already permitted to practice tax; the addition of lawyers to this practice oversteps permissible boundaries.⁸⁴

Washington, D.C. is the only jurisdiction in the United States that allows lawyers to share fees with non-lawyers. This is codified in D.C. Rule of Professional Conduct 5.4.⁸⁵ In 1990, D.C. became the only jurisdiction in the United States to depart from the ABA Model on the issue of non-lawyer partners by allowing non-lawyers to be partners in law firms in very limited circumstances.⁸⁶ The D.C. rule allows fee-sharing and partnerships only between lawyers and non-lawyers working in organizations that are structured as law firms, where the attorneys provide legal services and non-attorneys may only provide incidental services.⁸⁷

78. *NY Courts Modify Ethics Rules*, *supra* note 10, at 2070.

79. Paul R. Koppel, *Under Siege from Within and Without: Why Model Rule 5.4 is Vital to the Continued Existence of the American Legal Profession*, 14 *GEO. J. LEGAL ETHICS* 687, 688 (2001).

80. *Id.*

81. Ostertag, *supra* note 43, at 27.

82. *Id.*

83. *Id.*

84. *Id.*

85. Harrison, *supra* note 50, at 887.

86. L. Harold Levinson, *Collaboration Between Lawyers and Others: Coping with the ABA Model Rules After Resolution 10F*, 36 *WAKE FOREST L. REV.* 133, 138 (2001).

87. Harrison, *supra* note 50, at 888.

For example, Ernst & Young was allowed to provide financial backing to a law firm called McKee Nelson Ernst & Young, which was not considered a full-fledged MDP.⁸⁸ William Nelson, a partner of McKee Nelson, says that “the alliance with Ernst & Young is not truly a multidisciplinary practice, since the two don’t share profits and the law firm is managed as an independent entity composed solely of lawyers.”⁸⁹ The alliance initially limited the law firm since it could not represent companies that Ernst & Young audited. But since the law firm has recently obtained its own financing and dropped the accounting firm’s name, this restriction on the types of clients it represents has been eliminated.⁹⁰

Although the D.C. rule appears to permit MDPs in some contexts, according to the District of Columbia Bar Association’s Ethics Counsel, this rule has not resulted in a tremendous growth of non-law partners and MDPs.⁹¹ One reason is that the law restricts the “non-lawyer professional [or firm] from providing services that are not in support of legal services.”⁹² Consequently, other professional services, such as accounting, may not be provided if they are not collateral to the existing legal representation.⁹³ Washington, D.C.’s form of MDP assures that the attorney-client privilege applies to accountant-client communication by requiring that the sole purpose of the practice is to provide legal services.⁹⁴ Since the accountant acts as the attorney’s agent or representative, the attorney-client privilege applies.⁹⁵

III. NEW YORK’S NEW RULES

A. PROCEDURAL HISTORY

The New York Bar’s new policies regarding MDPs were adopted in response to a tumultuous three-year period in which lawyers saw the pendulum swing in both directions—for and against MDPs. As mentioned before, the ABA formed the Commission on Multidisciplinary Practice to study existing MDPs in the United States in 1988.⁹⁶ The twelve-person

88. Brenda Sandburg, *Enron Mess Gives a Boost to MDP Foes*, RECORDER, Jan. 23, 2002, at 1.

89. *Id.*

90. *Id.*

91. Shulenburg, *supra* note 4, at 337–38.

92. *Id.* at 338.

93. *See id.* at 337–38.

94. Loudenslager, *supra* note 8, at 73.

95. *Id.* at 74.

96. Kelleher, *supra* note 9, at 12.

Commission was set up to investigate professional service firms operated by accountants and other non-lawyers who sought to offer legal services to the public.⁹⁷ In 1999, as a result of the Commission's research, it adopted a proposal that would have permitted accounting firms to provide legal services by directly employing lawyers, sometimes called "accountant-"⁹⁸ In order to accomplish this goal, the Commission recommended that the ABA House of Delegates amend Model Rule 5.4, which prohibits fee splitting and partnerships with non attorneys.⁹⁹ The Commission wrote that "[w]hile detailed empirical data is not available, representatives of both individual and corporate clients expressed support for relaxing the rules of professional conduct that currently either foreclose or make it extremely difficult' to form MDPs."¹⁰⁰ However, the ABA voted to postpone any amendment of the Model Rules until the Commission could produce evidence that clearly demonstrated that the modification would benefit the public as well as lawyers.¹⁰¹

Meanwhile, as the Commission studied the issue, opposition to traditional MDPs within the ABA grew rapidly.¹⁰² The New York State Bar Association led this movement away from traditional MDPs in April 2000 by issuing a 388-page MDP study—dubbed the MacCrate Report, after Robert MacCrate, New York State Bar member and chair of the Special Committee on the Law Governing Firm Structure and Operation.¹⁰³ The report, entitled, "Preserving the Core Values of the American Legal Profession,"¹⁰⁴ reached the conclusion that "Multidisciplinary practice between lawyers and non-lawyers is incompatible with the core values of the legal profession."¹⁰⁵ However, although the report condemned partnerships between lawyers and non-lawyers, it nevertheless advocated "side-by-side" business arrangements with non-lawyers, which would later be the basis for New York's amendments.¹⁰⁶

97. Harrison, *supra* note 50, at 888.

98. See Kelleher, *supra* note 9, at 12.

99. Harrison, *supra* note 50, at 880.

100. *Id.* at 889–90 (quoting 1999 REPORT, *supra* note 16).

101. See Harrison, *supra* note 50, at 880.

102. Kelleher, *supra* note 9, at 12.

103. John Caher, *Multidisciplinary Practice Rules Adopted by State: New York Takes Lead on Lawyer-Nonlawyer Partnerships*, N.Y. L.J., July 25, 2001, at 1. See also *NY Courts Modify Ethics Rules*, *supra* note 10, at 2070 (detailing the New York State Bar Association's contribution to the passage of amendments to New York's Code of Professional Responsibility).

104. Caher, *supra* note 103.

105. Kelleher, *supra* note 9, at 12.

106. See 2000 REPORT, *supra* note 64.

In 2000, when the Standing Committee on Ethics and Professional Responsibility again recommended that the ABA amend the Model Rules to relax Model Rule 5.4's prohibitions against sharing legal fees and forming partnerships, the ABA's House of Delegates rejected the commission's recommendations by a vote of 314 to 106.¹⁰⁷ In response to the committee's proposal, the ABA issued Resolution 10F, which stated the intention "to continue the ban on lawyers partnering with non-lawyers in multidisciplinary practices."¹⁰⁸ The ABA stated that it was up to the ABA Ethics Committee, in consultation with each state Bar, to draft rules regulating strategic alliances and other contractual relationships with nonlegal professionals, so as to establish safeguards consistent with the principles in the resolution.¹⁰⁹ New York promptly did so, relying on the report produced by Robert MacCrate.¹¹⁰

New York's four Appellate Divisions soon approved new sections of the New York Code of Professional Responsibility and amended others to permit and regulate cooperative business relationships between lawyers and non-lawyers.¹¹¹ The actual order was released by Chief Administrative Judge Jonathan Lippman in July 2001, just when some lawyers thought the MDP topic had been retired.¹¹² Lippman stated, "These issues are so important to us that we felt it was necessary to clarify these kinds of cooperative business relationships within the ethical landscape of New York."¹¹³ The new rules took effect November 1, 2001.¹¹⁴

New York is still largely connected to the earlier Model Code of Professional Responsibility, but New York's ethics laws are influenced by the Model Rules, even though the state is among the eight states that have not adopted them.¹¹⁵ New York's Code of Professional Responsibility is "a cooperative project between bench and bar."¹¹⁶ The Appellate Division has

107. Crystal, *supra* note 61, at 748.

108. Harrison, *supra* note 50, 881.

109. See Levinson, *supra* note 86, at 143.

110. Caher, *supra* note 103.

111. *Id.* Structurally, the rules embody an amendment to Part 1200 of Title 22 of the Official Compilation of Codes, Rules and Regulations, and the addition of a new Part 1205 entitled Cooperative Business Arrangements Between Lawyers and Nonlegal Professionals. See *id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. See Loomis, *supra* note 69. Since the majority of states follow the Model Rules of Professional Conduct, this Note often refers to the Model Rules as dictating ethical conduct in general. Essentially all states follow an ethical code similar to the Model Rules.

116. Steven C. Krane, "Endgame," N.Y. St. B.A. J., Sept. 2001, at 5, 6.

statutory power to enact rules that govern lawyer discipline.¹¹⁷ However, the presiding justices do not act without consulting the justices of their respective departments and the Interdepartmental Committee on the Code of Professional Responsibility.¹¹⁸ This committee receives and reviews proposed changes to the Code, such as those proposed by the NYSBA House of Delegates.¹¹⁹ The Ethical Considerations that accompany the provisions are adopted not by the courts, but by the NYSBA House of Delegates.¹²⁰ Steven Krane, now former President of the NYSBA, hopes that “the rules are recognised and accepted as a reasoned solution to the MDP debate, and ultimately become the standard nationwide.”¹²¹ He later stated: “[I]t will be my task and honor to take those rules to the rest of the nation and present them to the ABA House of Delegates in February 2002.”¹²²

B. CHANGES TO THE NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY

The New York Code additions and modifications do not allow MDPs to be “one-stop shops” for legal, accounting, and other services.¹²³ Instead, the new laws allow lawyers to offer nonlegal services to their clients, as long as the client recognizes that such services do not come with the protections of the lawyer-client relationship.¹²⁴ They also permit contractual affiliations between lawyers and other professionals on a continuing basis.¹²⁵ The new rules are a conservative first step toward MDP and share several similarities with the MacCrate Report—a report that previously led the ABA to retain barriers between attorney and non attorney ventures.¹²⁶ In what critics have called a “toe-in-the-water approach,” the rules reaffirm the core values of the legal profession as a way to “tread in the emerging world of MDP.”¹²⁷

The additions to the New York Code center around two new disciplinary rules. DR 1-106 specifies the circumstances under which a

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *NY Bar Introduces MDP Regulations*, LAW., July 30, 2001, at 4.

122. Krane, *supra* note 116, at 6.

123. Loomis, *supra* note 69, at 7.

124. *Id.*

125. *Id.*

126. Caher, *supra* note 7.

127. *Id.*

lawyer may provide nonlegal services,¹²⁸ and DR 1-107 contains the provisions for and regulation of contractual relationships between lawyers and non-lawyers.¹²⁹ New Ethical Considerations (“ECs”) accompany each rule. The new scheme also affects amendments to DR 2-101 (publicity and advertising), DR 2-102 (professional notices and letterheads), and DR 2-103 (solicitation and referrals), requiring that lawyers who form alliances with non-lawyers exercise special care in the way they hold themselves and their firms out to the public.¹³⁰

1. DR 1-106: Responsibilities Regarding Nonlegal Services

DR 1-106 governs the provision of nonlegal services by lawyers or law firms, either directly or through companies that they own or control. The purpose of the rule is to clarify whether the services being provided are legal or nonlegal.¹³¹ Nonlegal services are defined as “those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a non-lawyer.”¹³² Lawyers who provide nonlegal services to clients are subject to the New York Code only if: (1) the lawyer or law firm provides nonlegal services that are not distinct from legal services; (2) even though the nonlegal services are distinct from legal services, “the person receiving such services could reasonably believe that the non-legal services are the subject of an attorney-client relationship”; or (3) the lawyer or law firm is the owner, controlling party of, agent of, or affiliated with an organization that they know to be providing nonlegal services.¹³³ In addition, when a contractual relationship between lawyers and nonlegal professionals exists, it is presumed under this rule that the person receiving nonlegal services believes the services to be the subject of an attorney-client relationship unless the lawyer or law firm has advised the client *in writing* that the services are not legal services and that the attorney-client relationship does not exist with respect to the nonlegal services.¹³⁴ Lawyers may also use this client disclosure and consent statement to inform clients that the interest of the lawyer or law

128. See N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-106 (2002).

129. See *id.* DR 1-107.

130. See *id.* DR 2-101, 2-102, 2-103.

131. Krane, *supra* note 116, at 5.

132. N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-106(C).

133. *Id.* DR 1-106(A)(1-3).

134. *Id.* DR 1-106(A)(4); Anthony E. Davis, *New Rules on Cooperative Business Arrangements with Non-Lawyers*, N.Y. L.J., Sept. 6, 2001, at 3.

firm is only a “de minimis” interest in the entity providing nonlegal services, and therefore the attorney-client relationship does not apply.¹³⁵

Included with these provisions regarding nonlegal services is a statement about non-lawyer control of the legal practice. DR 1-106(B) states that a lawyer or law firm shall not permit a non-lawyer or non-lawyer entity “to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty . . . with respect to the confidences and secrets of a client receiving legal services.”¹³⁶

DR 1-106 is accompanied by Ethical Considerations 1-9 through 1-12.¹³⁷ Among other things, these considerations emphasize that the recipient of nonlegal services should not expect or assume that the protection of client confidences and secrets also attaches to the provision of nonlegal services.¹³⁸ To mitigate client confusion, DR 1-106(A)(1) requires that the lawyer adhere to the Code of Professional Responsibility with respect to the nonlegal services when legal and nonlegal services are not distinct.¹³⁹ EC 1-11 states that the Disciplinary Rules will be presumed to apply to a lawyer who provides nonlegal services unless the lawyer complies with DR 1-106(A)(4) by communicating in writing to the person receiving the nonlegal services that the services are not legal services and that the protection of the attorney-client relationship does not exist with respect to the nonlegal services.¹⁴⁰ Further, EC 1-11 reiterates that the written disclaimer set forth in DR 1-106(A)(4) may not be adequate when the client is not a sophisticated user of nonlegal services, and a more detailed explanation may be required.¹⁴¹

2. DR 1-107: Contractual Relationships Between Lawyers and Nonlegal Professionals

DR 1-107 has been added to the New York Code to define and guide cooperative business arrangements between lawyers and nonlegal professionals.¹⁴² This rule states in part:

135. N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-106(A)(4); Davis, *supra* note 134.

136. N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-106(B).

137. *See id.* EC 1-9 to 1-12.

138. *Id.* EC 1-9.

139. *Id.* DR 1-106(A)(1).

140. *Id.* EC 1-11.

141. *Id.*

142. *Id.* DR 1-107(A).

[A] lawyer or law firm may enter into and maintain a contractual relationship with a non-legal professional or non-legal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other non-legal professional services.¹⁴³

This statement applies as long as certain provisions are met.¹⁴⁴ The following sections will outline these provisions, and will discuss potential concerns regarding DR 1-107.

a. DR 1-107(A): Contractual Relationships Between Lawyers and Nonlegal Professionals

A “cooperative business arrangement” is essentially a “contractual relationship [between a lawyer or law firm and a nonlegal professional firm] for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other non-legal professional services.”¹⁴⁵ The provisions of DR 1-107 apply to lawyers who (1) undertake to provide legal services to a client referred by a nonlegal service provider, or (2) refer an existing client to a nonlegal service provider.¹⁴⁶

One criticism of this arrangement is that the accountant and lawyer will begin to work together so closely that they commingle tasks.¹⁴⁷ Andrew Bailey, an accounting professor who worked at the Securities and Exchange Commission last year, said, “Most people do the right thing It’s about 2 percent of the practitioners who cause the problems. But you have to be wary of the 2 percent. The SEC makes it clear you don’t provide legal services if you are going to perform the audit.”¹⁴⁸

b. DR 1-107(A)(1): Non-lawyer Professionals Must Be ABA Approved

In December 2001, the Appellate Division recognized five types of professionals who could form business arrangements with lawyers: architects, certified public accountants, professional engineers, land surveyors, and certified social workers.¹⁴⁹ When DR 1-107 was originally released the prior summer, the content of the ABA approved “list of

143. *Id.*

144. *Id.* DR 1-107(B) (establishing the requirements that the nonlegal professional must meet).

145. *Id.* DR 1-107(A).

146. *See id.* DR 1-107.

147. Long, *supra* note 36.

148. *Id.*

149. *Today’s News Section*, N.Y. L.J., Dec. 26, 2001, at 1.

professionals” had not yet been decided.¹⁵⁰ In addition to the five professions listed in December 2001, the Appellate Division requested that the bar also recognize any profession in which education and work experience are “tantamount to a college degree.”¹⁵¹ The accompanying EC 1-17 states that “[a] member of a non-legal profession or professional service firm may apply for the inclusion of particular professions on the list, or professions may be added to the list by the Appellate Divisions sua sponte.”¹⁵² Also, this paragraph states that where a lawyer engages a non-lawyer for a specific matter, such as an environmental engineer, the relationship is not governed by DR 1-107.¹⁵³

Although the new standards require that non-lawyers be members of “learned professions,” the most significant requirement is that the allied profession also have ethics standards that it is required to follow.¹⁵⁴ New York State Bar Association President Steven Krane states that this requirement is critical, “since there are a number of licensed professions in New York that don’t require much more than a training course.”¹⁵⁵ Krane adds that they “want[] to make sure it [isn’t] going to lead to ‘John Smith, Attorney at Law and Nail-Wrapping Salon’.”¹⁵⁶ But a profession’s having ethics standards does not necessarily mean that these standards will be compatible with those of the legal profession. For example, accountants are bound by ethics standards to report their clients’ information to the public, while lawyers have a duty to maintain client confidences to the greatest extent possible.

c. DR 1-107(A)(2): Non-lawyers Must Not Hold Any Ownership or Supervisory Right in Connection with the Practice of Law By the Lawyer or Law Firm

This section of the rule can be clarified by looking both to the Preliminary Statement or “Preamble” of the revised New York Code and to the Ethical Considerations accompanying this rule. The Preliminary Statement recognizes that “the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of

150. *Id.*

151. *Id.*

152. N.Y. CODE OF PROF'L RESPONSIBILITY EC 1-17 (2002).

153. *See id.*

154. *NY Courts Modify Ethics Rules*, *supra* note 10, at 2071.

155. *Id.*

156. *Id.*

lawyers but also of their non-professional employees and associates.”¹⁵⁷ For example, accompanying DR 1-107, EC 1-13 states that the nonlegal professional or professional service firm may not, for example, decide whether to accept or terminate an engagement to provide legal services in a particular matter, determine the manner in which lawyers are hired or trained, or make decisions relating to the undertaking of pro bono work.¹⁵⁸ This section seems to mirror Model Rule 5.4(d), which prohibits a lawyer from practicing in a professional corporation or association if a non-lawyer is a corporate director or officer or otherwise controls the professional judgment of the lawyer.¹⁵⁹

d. DR 1-107(A)(2): Lawyer Must Not Share Legal Fees with Nonlegal Professionals

DR 1-107(A)(2) states that the lawyer may not share legal fees with a non-lawyer or “receive[] . . . any monetary or other tangible benefit for giving or receiving a referral.”¹⁶⁰ The requirement that the non-lawyer may not have an ownership interest in a law firm, share fees, or direct legal work is a central restriction on the ability of lawyers to form relationships with non-lawyers. Ethical Consideration 1-14 adds, “The contractual relationship permitted by DR 1-107 may provide for the sharing of premises, general overhead, or administrative costs and services on an arm’s length basis.”¹⁶¹ DR 1-107(C) states that DR 1-107(A) “shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a non-legal professional service firm.”¹⁶² This requirement seems to encourage nonexclusive referral agreements, something that the ABA Standing Committee on Ethics and Professional Responsibility says should be mandatory.¹⁶³

Yet, some critics contend it is artificial to prohibit fee sharing between lawyers and non-lawyers while at the same time permitting client referral arrangements.¹⁶⁴ Anthony E. Davis of the New York Law Journal believes that any agreement to refer clients is a “tangible benefit” itself.¹⁶⁵ The

157. N.Y. CODE OF PROF'L RESPONSIBILITY prelim. stmt. (2002).

158. *See id.* EC 1-13.

159. MODEL RULES OF PROF'L CONDUCT R. 5.4(d) (2002).

160. N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-107(A)(2).

161. *Id.* EC 1-14.

162. *Id.* DR 1-107(C).

163. ABA Ethics Committee Proposes Rule Change Allowing Multidisciplinary Referral Pacts, 70 U.S.L.W. 2331 (BNA 2001) [hereinafter ABA Ethics Committee Proposes Rule Change].

164. *See* Davis, *supra* note 134.

165. *Id.*

argument is that the “barter” of mutual clients is no less problematic than direct fee sharing or even ownership because it has the potential to yield the same results: two entities doing work for the same client and financially benefiting from the increased business.¹⁶⁶ Davis argues that the barter arrangement “may be a more insidious (and harder to comprehend) conflict of interest than either of fee sharing or cross-ownership,” and therefore should, in his view, require client consent as well.¹⁶⁷

e. DR 1-107(A)(3): The Relationship Between the Lawyer(s) and Nonlegal Professional(s) Must Be Disclosed

A lawyer or law firm in a cooperative business arrangement must provide the client with some form of a statement of clients’ rights before representing a client referred by the affiliated nonlegal firm, as well as before referring a client to such nonlegal firm for other services. The statement must include a consent to the referral to be signed by the client, and comply with the requirements set forth in DR 1-106(A)(4).¹⁶⁸ Among the required provisions of the statement are guarantees of undivided loyalty of the lawyer to the client, and a promise that confidences imparted by a client to a lawyer are protected by the attorney-client privilege, which may not be disclosed by the lawyer as part of a referral to a nonlegal service provider without separate written client consent. In addition, the client is warned that the protections of the attorney-client privilege may not apply to the dealings between the client and the nonlegal service provider. The model disclosure form set out in the Statement of Client Rights in the New York Code states:

Information that would be protected as a confidence or secret, if imparted by the client to a lawyer, may not be so protected when disclosed by the client to a nonlegal service provider. Under some circumstances, the nonlegal service provider may be required by statute or a code of ethics to make disclosure to a government agency.¹⁶⁹

Clients are allowed to consent to contractual relationships, but not to fee sharing or cross ownership.¹⁷⁰ Inevitably, one question raised is whether clients will be able to fully understand the relationships or agreements to which they are consenting. The question therefore becomes:

166. *Id.*

167. *Id.*

168. N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-107(A)(3) (2002).

169. N.Y. COMP. CODES R. & REGS. tit. 22, § 1205.4(3) (2002).

170. *See* Davis, *supra* note 134.

To which arrangements should clients be able consent and which should be prohibited even with the consent and urging of a client?¹⁷¹

3. DR 2-101: Publicity and Advertising

In addition to the completely new provisions in DR 1-106 and 1-107, the rule relating to publicity and advertising has also been modified to require that lawyers exercise special care in advertising or disclosing information relating to their experience or professional qualifications in providing nonlegal services to the public.¹⁷² DR 2-101 now states that the lawyer may provide the following information regarding publicity and advertising:

[N]onlegal services provided by the lawyer or by an entity owned and controlled by the lawyer; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm . . . and the nature and extent of services available through those contractual relationships.¹⁷³

DR 2-102 allows lawyers to announce changed associations, including the addition of nonlegal business to be conducted by the lawyer.¹⁷⁴ A sign near the office may also identify the law office “and any nonlegal business conducted by the lawyer or law firm.”¹⁷⁵ A lawyer or law firm that has a contractual relationship to provide legal or other professional services “on a systematic and continuing basis” with a nonlegal professional or nonlegal firm may not include the name of the nonlegal professional or firm.¹⁷⁶ DR 2-101 states that “[i]t is proper” to include this information about contractual relationships, but does not clearly mandate that the existence of this relationship with a non-lawyer be disclosed as long as the statement is not misleading.¹⁷⁷

IV. RECOMMENDATIONS

Most lawyers agree that New York Code modifications are “an appropriate first-step” in tackling the MDP issue, “but only a first-step.”¹⁷⁸ A harsh critic of the new provisions has said that they are “internally

171. *See id.*

172. *See* N.Y. CODE OF PROF'L RESPONSIBILITY DR 2-101 to 2-102.

173. *Id.* DR 2-101.

174. *See id.* DR 2-102.

175. *Id.*

176. *Id.*

177. *Id.* DR 2-101.

178. Caher, *supra* note 7.

inconsistent and at odds with acceptable practices elsewhere.”¹⁷⁹ Inevitably, the rules will be modified as lawyers and non-lawyers identify problems through practice.¹⁸⁰ For example, Francis Nusspickel, a CPA at Arthur Andersen, suggests that “[t]here are some areas that are not appropriate for MDP, like litigation.”¹⁸¹ But she condones the use of MDPs in mergers and acquisitions, employment contracts, and other areas where the work product requires the skills of both accountants and attorneys.¹⁸²

Such speculation about the extent to which MDPs should be allowed and regulated has been raised by many, but the American Bar Association is the most authoritative and extensive source of information concerning this issue. Several multidisciplinary practice issues were debated by lawyers, law professors, and judges at the ABA’s February 2002 meeting. The ABA’s Ethics 2000 Commission submitted proposed ethical rule changes, entitled “Report 401,” for consideration by the House of Delegates, which resulted in the modification of various Model Rules of Professional Conduct.¹⁸³ Although state supreme courts must first adopt these rules in order for the changes to become binding on lawyers, alterations to the Model Rules may encourage other states to follow New York’s progressive lead with respect to lawyers’ associations with other professionals. In addition, the fact that the ABA House of Delegates did not alter certain rules emphasizes the ABA’s commitment to prohibiting certain forms of multidisciplinary practice.

Although the House of Delegates altered several Model Rules at the meeting, their alteration of Rule 5.7 and refusal to substantially alter Rule 5.4 were the most notable with respect to multidisciplinary practice. Model Rule 5.7 deals with lawyer responsibility for law-related services. The Reporter’s explanation of changes states that paragraph (a)(2) of this rule has been broadened so that the rule covers all circumstances in which a lawyer’s provision of law-related services is distinct from the lawyer’s provision of legal services “whether the law-related services are performed through a law firm or a separate entity.”¹⁸⁴ In certain respects, the altered rule seems to follow New York’s DR 1-106’s responsibilities regarding nonlegal services in that both rules recognize that lawyers working in

179. Davis, *supra* note 134.

180. *See id.*

181. Caher, *supra* note 7.

182. *See id.*

183. *See* Summary of House of Delegates Action on Ethics 2000 Commission Report, available at http://www.abanet.org/cpr/e2k-summary_2002.html (last visited Jan. 16, 2003).

184. *See* MODEL RULES OF PROF'L CONDUCT R. 5.7 cmt. (2002).

conjunction with entities that do not engage in the practice of law must nevertheless be subject to legal disciplinary rules. Even though Model Rule 5.7 contains the term “law-related” services and New York’s DR 1-106 refers to “non-legal services,” it is clear from the respective definitions that these terms are basically equivalent.¹⁸⁵ The absence of any modifications of Model Rule 5.4 with respect to MDPs is also significant, as this reaffirms the ABA’s ban on the sharing of legal fees with a non-lawyer except in specific circumstances.

While certain alterations of the Model Rules occurred at the Midyear Meeting, further consideration should be given to whether further functional modifications are needed to ensure state rules like New York’s DR 1-106 and 1-107 become successful in practice. The following paragraphs will outline the most common ethical issues raised by New York’s modifications to the Code and will suggest possible solutions.

A. ATTORNEY-CLIENT PRIVILEGE

Alliances between lawyers and non-lawyers may compromise client confidentiality because of disparities between the ethics rules that govern lawyers and those that govern other professionals.¹⁸⁶ Honoring client confidences is of great importance in the legal profession in that it promotes open and honest communication between client and lawyer, and encourages people to seek early legal assistance.¹⁸⁷ Accountants and other professionals are required to reveal the results of their work; attorneys, however, are often prohibited from doing so. Moreover, most jurisdictions do not give the communication between accountants and clients protection from court compelled disclosure.¹⁸⁸ Therefore, once a client shares information with the accountant that would have otherwise been protected by the attorney-client privilege, the private information may become public, to the client’s disadvantage.¹⁸⁹ For example, if both litigation and auditing services are offered to a client by the strategic alliance between a law firm and an accounting firm, incriminating information revealed to

185. N.Y. CODE OF PROF’L RESPONSIBILITY DR 1-106 (2002); MODEL RULES OF PROF’L CONDUCT R. 5.7 (2002).

186. Eaglesham & Peel, *supra* note 8.

187. Connatser, *supra* note 52, at 380.

188. Loudenslager, *supra* note 8, at 37.

189. *Id.*

lawyers for the purpose of a trial may unwittingly be shared with the accountants who have a duty to report wrongdoing to the public.¹⁹⁰

New York's new rules attempt to deal with these ethical concerns by specifying to the client the circumstances in which the attorney-client protections apply. DR 1-106(A)(4) states that the client receiving nonlegal services is presumed to believe the services are the subject of an attorney-client relationship unless advised otherwise in writing by the lawyer.¹⁹¹ In addition, Part (B) of this rule states that no non-lawyer may cause a lawyer to compromise the duty to protect the confidences and secrets of a client receiving legal services. DR 1-107 mandates that the lawyer divulge the existence of the contractual relationship to clients.¹⁹² As a precaution, the Statement of Client's Rights In Cooperative Business Arrangements (or equivalent statement) must be signed by the client before the commencement of legal representation.¹⁹³ It states that the protections afforded to a client by the attorney-client privilege may not carry over to dealings between the client and a nonlegal service provider.¹⁹⁴ Further, the statement warns that "[u]nder some circumstances, the nonlegal service provider may be required by statute or a code of ethics to make a disclosure to a government agency."¹⁹⁵

In addition to the Disciplinary Rules, New York's EC 1-15 states that a lawyer or law firm cannot permit its obligation to maintain client confidences as required by DR 4-101 to be compromised by the contractual relationship. These rules attempt to keep the contractual relationship consistent with Model Rule 1.6, which mandates that a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation or the disclosure is "impliedly authorized in order to carry out the representation."¹⁹⁶ Limited exceptions to Rule 1.6 exist in which lawyers may reveal confidential information to prevent the commission of a criminal act or to establish a defense for themselves.¹⁹⁷

Suggestions for how to preserve client confidentiality when lawyers and non-lawyers practice together are found in the recommendations of the

190. See Jeffrey M. Jones, Comment, *Bend, But Don't Break: MDP Proposal Bends in the Right Direction, But—Crack!!—Goes Too Far*, 54 SMU L. REV. 395, 409 (2001).

191. See N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-106(A)(4) (2002).

192. See *id.* DR 1-107(A)(3).

193. *Id.*

194. *Id.* DR 1-106.

195. *Id.*

196. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

197. *Id.*

2000 Commission on Multidisciplinary Practice.¹⁹⁸ First, the Commission recommended that in a traditional MDP, for purposes of conflicts of interest and imputation, all clients should be treated as if the MDP were a law firm and all employees were lawyers.¹⁹⁹ If this rule were applied to the contractual relationship allowed by New York, both the law firm and the associated non-lawyer professionals would become one “firm” subject to lawyer confidentiality rules. Where the law firm was in a contractual relationship with, for example, an accounting firm, the accountants in this situation would be torn between compelled disclosure and compelled secrecy. In addition to practical difficulties of imposing a lawyer’s duty of confidentiality on non-lawyers, other professions may resent having to abide by lawyers’ rules in order to merely exist in a referral relationship. Furthermore, a radical view has been proposed by Daniel Fischel, who claims that even though the SEC has stated that the role of the auditor and lawyer are incompatible, a client may nevertheless choose to hire one firm to provide both legal and auditing services even though the attorney-client privilege may be less available.²⁰⁰ The reason: to communicate its credibility to the market and that it has nothing to hide.²⁰¹

The opposite approach is to treat legal and nonlegal entities in a contractual relationship as completely separate for confidentiality purposes. This would essentially preserve the status quo. Lawyers could continue to protect information revealed to them, and accountants would have client confidentiality privileges in limited situations. The umbrella of the attorney-client privilege already covers accountant communications where the client communicates with the accountant to enable the attorney to provide legal services to the client.²⁰² In addition, the communication between a taxpayer and a tax practitioner is protected under Internal Revenue Code § 7525, although the protections of this statute are limited.²⁰³

In considering the possible future adoption of the New York rules by jurisdictions around the country, state bar associations should consider enacting a testimonial accountant-client privilege to accompany the allowance of contractual relationships between lawyers and non-lawyers.²⁰⁴ The testimonial accountant-client privilege has been said to encourage the

198. 2000 REPORT, *supra* note 64.

199. *Id.*

200. See Daniel R. Fischel, *Multidisciplinary Practice*, 55 BUS. LAW. 951, 961 & n.36 (2000).

201. *Id.* at 962.

202. Loudenslager, *supra* note 8, at 61.

203. *Id.* at 63–64.

204. See *id.* at 80.

“free flow of information between an accountant and her client without fear of future disclosure in litigation.”²⁰⁵ For example, Florida’s accountant-client privilege shelters confidential communications between lawyer and client during the rendering of accounting services.²⁰⁶ The privilege includes other confidential information obtained by the accountant from the client for purposes of rendering accounting advice.²⁰⁷ Currently, only fourteen U.S. jurisdictions have such statutes, the scope of which varies from jurisdiction to jurisdiction.²⁰⁸ States that do not recognize this privilege generally have other statutes that require accountants to keep communications with their clients confidential, but require accountants to disclose such communications if subpoenaed.²⁰⁹

The ethics rules should place the burden on both the lawyer and non-lawyer professional engaged in a contractual relationship to make sure that the client is aware that the lawyer and non-lawyer may have different, and even conflicting, obligations with respect to the disclosure of client information. Clients, alert to different levels of protection for lawyers and other service providers, may intentionally reveal different information to each. Client information cannot be shared between the two entities, however, as the attorney-client protection would become meaningless and the clients’ interests jeopardized.

B. PROFESSIONAL INDEPENDENCE

Lawyers’ professional independence may be compromised if non-lawyers can influence legal decisions or control their compensation. For this reason, both the Model Rules and New York’s strategic alliance model prohibit non-lawyers from owning, managing, supervising, or sharing legal fees with lawyers.²¹⁰ But critics, including Florida lawyer Terry Russel, contend that the contractual alliance model holds no more appeal than the straight MDP approach.²¹¹ Russel argues that exclusive relationships between lawyers and non-lawyers may compromise core values and harm the public. She states, “I send you business, you send me business: That’s

205. *Id.* at 68 (quoting Thomas J. Molony, Note, *Is the Supreme Court Ready to Recognize Another Privilege? An Examination of the Accountant-Client Privilege in the Aftermath of Jaffee v. Redmond*, 55 WASH. & LEE L. REV. 247, 283–84 (1998)).

206. *Id.* at 70–71.

207. *Id.* at 71.

208. *Id.* at 68.

209. *Id.*

210. See N.Y. CODE OF PROF’L RESPONSIBILITY DR 1-107(A)(2) (2002); MODEL RULES OF PROF’L CONDUCT R. 5.4(d) (2002).

211. Miller, *supra* note 6.

a lame effort to create an MDP without calling it that.”²¹² Professor Robert Lawry raises a prevalent concern that was raised recently when seventy-five lawyers and accountants met to consider the MDP debate at Case Western Reserve Law School: “There is a fear that the whole notion of professionalism is evaporating There is a worry that we lawyers are not putting the public first instead of all of us being intent on making a dime.”²¹³

Lawyers are required to retain professional independence and loyalty to clients through various ethical provisions such as Model Rule 5.4.²¹⁴ This rule “effectively bans MDPs with provisions designed to prevent or limit the influence by non-lawyer third parties.”²¹⁵ It prohibits fee sharing with non-lawyers, partnerships with non-lawyers, and the practice of law in a professional corporation if a non-lawyer owns an interest in that corporation.²¹⁶ Its purpose is to safeguard lawyers’ professional judgment and to prevent a lawyer from being pressured by a non-lawyer to violate ethical duties, since non-lawyers “are not subject to the same ethical mandates regarding independence, conflicts of interest, fees and the other important provisions of the [legal] profession’s code of conduct.”²¹⁷ This idea is expressed in the text of the new rules.

New York’s DR 1-106(B) addresses the problem of professional independence in its declaration that a nonlegal entity is not permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services. DR 1-107(A) also states that “a lawyer must remain completely responsible for his or her own independent professional judgment” and that a nonlegal firm may not have any “ownership or investment interest in . . . or supervisory right” in connection with the practice of law, share legal fees with a non-lawyer, or give or receive a material benefit for a referral.²¹⁸ Although the new rules prohibit lawyers from sharing legal fees, administrative and overhead costs are viewed as any other “outsourcing” arrangement and are not generally perceived to violate rules regulating lawyer independence.²¹⁹

212. *Id.*

213. Long, *supra* note 36.

214. See MODEL RULES OF PROF’L CONDUCT R. 5.4 (2002).

215. Harrison, *supra* note 50, at 882.

216. *Id.*; MODEL RULES OF PROF’L CONDUCT R. 5.4(a), (b), (d) (2002).

217. Harrison, *supra* note 50, at 882–83.

218. N.Y. CODE OF PROF’L RESPONSIBILITY DR 1-107(A) (2002).

219. Bower, *supra* note 34, at 64.

Even though New York's rules seem exhaustive, potential problems still exist. First, the requirements for ownership and control can be manipulated easily. Firms may be structured as separate entities, yet non-lawyers may be able to wield control over legal work if lawyers are, directly or indirectly, reliant on non-lawyers for compensation. Advocates of strategic alliances point to the fact that lawyers already face economic pressure from superiors in traditional law firm settings.²²⁰ But what is different in the strategic alliance situation is that non-lawyers attempting to wield control are not bound by the same ethical standards that bind lawyers. For instance, a non-lawyer may pressure a young associate lawyer to engage in representation that may be prohibited by legal ethics rules, but is permissible under the accountant's more relaxed conflict of interest regulations. Of course, the lawyer must abide by lawyer ethics rules, but the particular circumstances may force the lawyer to risk termination of employment for refusal to represent a client who is already a client of the accounting firm.

Presumably, an associate would not be put in such a compromising situation if it were possible to consult a supervising attorney familiar with the differences in conflicts standards between lawyers and other professions. Therefore, DR 1-107(A)(2) states that a non-lawyer may not hold any "ownership or investment interest in, or managerial or supervisory right, power or position" relating to the practice of law.²²¹ In fact, the ABA's MDP Commission has recommended that the ABA Model Rules clearly state that a lawyer supervised by a non-lawyer may not use as a defense the fact that the lawyer merely complied with the non-lawyer's resolution of a question of professional duty. This recommendation should be incorporated into New York's Code to assure that lawyers are not easily persuaded to discount their ethical obligations, even though non-lawyer control is already technically prohibited.

In 2000, the ABA House of Delegates asked the Standing Committee on Ethics and Professional Responsibility to recommend possible ethics rule amendments addressing the issue of lawyer independence in contractual relationships between lawyers and non-lawyers.²²² In response, the ABA Standing Committee on Ethics and Professional Responsibility "filed a proposal recommending that the ABA House of Delegates amend Model Rule 7.2(c) to clarify that lawyers may participate in referral arrangements

220. Johnson, *supra* note 6, at 969.

221. N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-107(A).

222. Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Works of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 471 (2002).

with each other and with non-lawyer professional service providers, so long as the referral pacts are nonexclusive and are revealed to the affected clients.”²²³ According to the committee’s report, “[t]he present ABA Model Rule 7.2 is flawed” in that “the rule could easily be misread to prohibit such arrangements, a result not intended by the rule’s original

²²⁴ To preserve lawyers’ independent professional judgment, the committee recommended nonexclusive referral arrangements.²²⁵

The Model Rules should prohibit *exclusive* contractual alliances.²²⁶ Exclusive alliances prevent a lawyer from exercising independent judgment, since their existence would not allow the lawyer to refer the client to a nonlegal firm outside of any contractual arrangement.²²⁷ The New York Code excepts “relationships consisting solely of non-exclusive reciprocal referral agreements” from the restrictions placed on nonlegal firms by DR 1-107(A) (such as professional licensure), but does not go further to prohibit all exclusive referral agreements with all types of firms.²²⁸ A proposal has been made to subject every active member of the Bar to the Rules of Professional Conduct, regardless of the type of organization that employs the lawyer.²²⁹ The lawyer would be able to practice in any organizational setting, as long as the lawyer reasonably believes that the organization has adequate policies in place to ensure that the lawyer is able to comply with the ethics rules. Therefore, even lawyers employed by consulting firms will be put on notice that they are subject to the Model Rules of Professional Conduct by virtue of being Bar members.

C. CONFLICTS OF INTEREST

Conflicts of interest may arise during contractual relationships between lawyers and non-lawyer professionals because non-lawyers are not governed by the same ethics standards that apply to attorneys.²³⁰ In

223. ABA Ethics Committee Proposes Rule Change, *supra* note 163, at 2331.

224. *Id.*

225. *Id.*

226. See Miller, *supra* note 6.

227. See *id.*

228. The ABA finally agreed to amend Model Rule 7.2 pursuant to the Committee’s suggestions at its Annual Meeting held in August 2002. This amendment specifically allows a lawyer to refer clients to lawyers and non-lawyers “pursuant to an agreement,” as long as the agreement is nonexclusive and the client is sufficiently informed. MODEL RULES OF PROF’L CONDUCT R. 7.2 (2003).

229. See 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, 277–78 (2000).

230. Eaglesham & Peel, *supra* note 8.

particular, it is natural that clients who need law-related consulting would seek a referral from their accountants since many clients confer with their accountants frequently.²³¹ Yet, lawyers are held to very different conflict of interest standards than other professionals, especially accountants. Supporters of alliances between lawyers and non-lawyers claim that non-lawyer professionals already owe certain duties to their clients and that most of the duties imposed on lawyers are also imposed on other professionals through contract, tort, property, and criminal law.²³² Although several professionals have various duties to their clients, lawyers generally recognize more types of conflicts than other professionals, such as those that are indirect, that are potential, and to which consent cannot be given. Accountants, on the other hand, usually only recognize direct conflicts of interest.²³³ The accounting profession allows for dual representation of adverse clients after the construction of firewalls, while such artificial boundaries are usually shunned in the legal profession.²³⁴ While “accountants generally worry about being too closely aligned with the client,” lawyers “worry about being too closely aligned with someone *other than* the client.”²³⁵

Lawyers, accountants, and securities regulators have recently recognized that an inherent conflict of interest arises when legal services are offered in conjunction with auditing services, even if the audit client consents to such an integrated arrangement.²³⁶ In June of 2000, the SEC expressed concerns about the potential of MDPs to compromise the independence of the accounting firm as an auditor.²³⁷ In its proposed amendment to the current auditor independence rules, the SEC states that “an accountant is not independent of an audit client if the accountant provides any service to the audit client or its affiliates that . . . may be provided only by someone licensed to practice law.”²³⁸ Further, this view has been recognized by the U.S. Supreme Court.²³⁹ In *United States v.*

231. See Miller, *supra* note 6.

232. *Id.*

233. Terry, *supra* note 73, at 901.

234. Connatser, *supra* note 52, at 377.

235. Terry, *supra* note 73, at 902 (emphasis added).

236. See Koppel, *supra* note 79, at 703–04.

237. Matheson, *supra* note 1, at 1125.

238. *Id.* at 1127.

239. See generally *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984) (reversing appellate court’s holding that an accountant-client privilege existed with respect to tax documents relevant to litigation). See also Mann & Tait *supra* note 48, at 14 (discussing the European Court of Justice’s refusal to allow PricewaterhouseCoopers and Andersen to incorporate two Dutch law practices as MDPs in Europe).

Arthur Young & Co., the Court noted that “[i]f investors were to view the auditor as an advocate for the corporate client, the value of the audit function itself might well be lost.”²⁴⁰ Although it seems clear that auditing and legal services should not be provided to one client by the same lawyer or law firm, the point at which a contractual business relationship becomes closer to an actual partnership is unclear.

The Model Rules prohibit a lawyer from representing a client if the client’s representation may be materially limited by the lawyer’s interests or by the lawyer’s responsibilities to others, unless the client consents and the lawyer reasonably believes the representation of the client will not be adversely affected.²⁴¹ Model Rule 1.7 prohibits lawyers from representing a client when conflicts of interest are either present, or likely to become present.²⁴² Conflicts can occur in three main instances: concurrent representation that is directly adverse to the client, concurrent representation that is not directly adverse but potentially damaging to the client, and successive representation.²⁴³ Model Rule 1.10 prevents a firm from merely blocking off a tainted lawyer with an ethical firewall.²⁴⁴ In the legal profession, the client is seen as hiring an entire law firm when hiring a single attorney.²⁴⁵ Unlike law firms, accounting firms are not governed by a rule of imputed disqualification.²⁴⁶ Such a rule would have prevented the Big Five firms from growing to their present size.

The New York Code attempts to supplement the Bar’s ethical rules. Along with the acknowledgement in 1-107(A) that “law has an essential tradition of complete independence and uncompromised loyalty to those it services,” the rule provides ways to avoid conflicts of interest.²⁴⁷ As previously discussed, these include the ban on ownership or investment in the practice of law by non-lawyers, the prohibition on sharing legal fees with non-lawyers, and the requirement that the contractual relationship be disclosed to the client.²⁴⁸ New York’s EC 1-14 states that the existence of a contractual relationship permitted by DR 1-107 does not by itself create a

240. *Arthur Young & Co.*, 465 U.S. at 820 n.15.

241. MODEL RULES OF PROF’L CONDUCT R. 1.7(b) (2002).

242. *See id.* R. 1.7 cmt. 3, 4.

243. GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK & ROGER C. CRAMTON, *THE LAW AND ETHICS OF LAWYERING* 577 (3d ed. 1999).

244. MODEL RULES OF PROF’L CONDUCT R. 1.10 (2002).

245. Carol A. Needham, *Permitting Lawyer’s to Participate in Multidisciplinary Practices: Business As Usual or the End of the Profession As We Know It?*, 84 MINN. L. REV. 1315, 1352–53 (2000).

246. *Id.* at 1353–54.

247. N.Y. CODE OF PROF’L RESPONSIBILITY DR 1-107(A) (2002).

248. *Id.* DR 1-107(A)(2), (3).

conflict of interest.²⁴⁹ But EC 1-14 recognizes that when a law firm represents a client in a matter in which a nonlegal firm is also involved, “the law firm’s interest in maintaining an advantageous relationship with the non-legal professional service firm might, in certain circumstances, adversely affect the independent professional judgment of the law firm, creating a conflict of interest.”²⁵⁰ In addition, New York’s rules should mirror the SEC’s recommendations by strongly discouraging the provision of audit and legal services by contractually merged entities.

D. UNAUTHORIZED PRACTICE OF LAW

Allowing contractual relationships between lawyers and non-lawyers may result in the unauthorized practice of law. Some scholars dismiss this potential problem by citing the fact that a lawyer who enters into business with non-lawyers always remains bound by the applicable rules of ethical conduct.²⁵¹ Proponents of alliances between lawyers and non-lawyers bring up the existence of paralegals, legal secretaries, and other non-lawyer personnel who constantly deal with clients, but do not practice law.²⁵² Yet, opponents of the New York rules fear that non-lawyers associated with lawyers through contractual relationships will begin practicing law, and that these practices will allow lawyers who are not licensed for various reasons, to practice law.²⁵³

Legal critics argue that the unauthorized practice of law may occur inadvertently, since “the practice of law” is largely undefined and differs by jurisdiction.²⁵⁴ Non-lawyers working in contractual relationships with lawyers, like lawyers already working for the Big Five, may perform work that traditionally has been thought to constitute the practice of law. It is common for the Big Five accounting firms to advertise that they offer an ERISA practice or “estate planning consulting,” and some even go so far as to explicitly state that they offer legal services.²⁵⁵

A lawsuit dealing with the issue of unauthorized practice of law drew national attention in January 2000.²⁵⁶ Lawyer John Hume filed a complaint against Thomas Cryan, accusing him of providing legal services to outside

249. *Id.* EC 1-14.

250. *Id.*

251. *See* Matheson & Favorite, *supra* note 2, at 604.

252. *See id.*

253. *See id.* at 603–05.

254. *See id.* at 603–04.

255. Needham, *supra* note 245, at 1325.

256. *See* Miller, *supra* note 6.

clients while employed by the Andersen accounting firm. Cryan denied that he violated Bar rules, since he only appeared before the U.S. Tax Court on behalf of clients. Under the Tax Court rules, he claimed, one is not required to be a lawyer to be admitted to practice before the court.²⁵⁷ Ultimately, the Bar's MDP grievance committee dismissed Hume's complaint in April 2001 because it could not find probable cause for a continued disciplinary proceeding.²⁵⁸ In general, investigations into the unauthorized practice of law are difficult to conduct, and are ultimately unsuccessful because the definition of a legal service is not clear.²⁵⁹

Whether the formation of contractual alliances will mitigate or exacerbate existing unauthorized practice of law is unclear. On the one hand, having lawyers in business relationships with accounting firms may assure that the practice of law stays with lawyers, since lawyers will certainly not refer a client to an accounting firm or "professional service firm" for a task that is essentially a legal one. On the other hand, lawyers and non-lawyers already bordering on practicing law while employed by accounting firms may continue to do so in contractual alliance situations by refusing to refer clients seeking legal services to the affiliated law firm, and may even attempt to use the law firm's resources to help them continue this practice.

There is also a concern that contractual alliances will provide an opportunity for disbarred lawyers or graduates who did not pass the bar, to practice law.²⁶⁰ This concern has been disputed for several reasons. Unethical law school graduates who claim not to practice law—but do—could potentially work in any other type of firm before the adoption of the New York rules. If the disbarred lawyer's consulting firm has a contractual relationship with a law firm, the disbarred lawyer is probably no more likely to practice law than if the relationship had not formed. DR 1-107 states that lawyers must "otherwise comply with the legal and ethical principles governing lawyers in New York State."²⁶¹ This includes duties such as the obligation to not share client confidences with unauthorized people, not allow the non-lawyer to affect the lawyer's independent

257. *Id.*

258. *Id.*

259. The comment to Model Rule 5.5 states, "The definition of the practice of law is established by law and varies from one jurisdiction to another." MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. (2002).

260. John H. Matheson & Edward S. Adams, *Not "If" but "How": Reflecting on the ABA Commission's Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269, 1312 (2000).

261. N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-107(A) (2002).

judgment, and not assist in the unauthorized practice of law.²⁶² “[F]ew practicing attorneys are likely to avail themselves of the services of those found not worthy of admission to the bar or those whose ethics resulted in the removal of their license to practice.”²⁶³

To prevent the unauthorized practice of law, jurisdictions should attempt to redefine which activities are reserved only for attorneys, and make clear that those who are not attorneys may not hold themselves out as attorneys. Currently, the definition of the practice of law is left to individual jurisdictions since each has presumably developed its own body of case law, statutes, and ethics opinions on the subject. When the distinctions between what is and is not the practice of law become more clear, the unauthorized practice of law will be easier to identify and curtail. While a layman may be able to stitch a minor cut as well as a surgeon, and a paralegal may be able to fill in a simple form as well as an attorney, the performance of legal tasks by non-lawyers will inevitably put the public in danger.²⁶⁴ Client protection is the central rationale behind lawyers’ ethics standards and the Bar examination. Non-lawyer professionals who are not subject to such standards should be strictly prohibited from providing legal services that are merely masked as other services.

V. CONCLUSION

A hypothetical news article in 2001 could have read in part:

[The accounting firm Arthur] Andersen has admitted that it destroyed documents and e-mail messages relating to its work for Enron[, a Houston-based energy company that is now bankrupt.] The firm is grappling with contentions that its auditors signed off on questionable partnerships that concealed Enron’s financial problems, and that it attested to misleading financial statements. Andersen was fired as Enron’s auditor on [January 17, 2002].²⁶⁵

What does this have to do with MDPs? The scandal at Arthur Andersen has recently given “ammunition to an array of critics” who believe that MDPs present an ethical problem for lawyers.²⁶⁶ Their concern is that conflicts of interest may arise when accountants and lawyers

262. See *id.* Canon 3, 4, 5.

263. Matheson & Adams, *supra* note 260, at 1312.

264. Needham, *supra* note 245, at 1329–31.

265. Geanne Rosenberg, *Scandal Seen As Blow to Outlook for MDP*, NAT’LL.J., Jan. 21, 2002, at A1.

266. Brenda Sandburg, *Enron Accounting Scandal Seen As Damaging to MDPs*, N.Y. L.J., Jan. 24, 2002, at 5.

are linked financially to the same client.²⁶⁷ Robert MacCrate, the New York attorney who helped eradicate the ABA resolution that would have allowed traditional MDPs, said about the case, “I think it’s a complete

²⁶⁸ MacCrate also stated that before Enron’s collapse, “the role of Andersen as auditor may have conflicted with its role as a private consultant to the company.”²⁶⁹ A similar conflict would have occurred if Andersen had provided legal services to Enron in addition to auditing.²⁷⁰

Prior to this scandal, prominent lawyers had joined Andersen Legal in the anticipation that “an affiliation with the Big Five firm would offer technology and growth opportunities[,]” as well as instant credibility.²⁷¹ After what happened with Enron, some lawyers are instead “asking whether the name will be a liability.”²⁷² According to Sherwin Simmons, chairman of the ABA’s former Commission on Multidisciplinary Practice, as a result of the Enron collapse, “the Big Five international law networks may face increased attention from federal regulators.”²⁷³

On the other hand, others believe that this calamity may only affect the issue of traditional, fully-integrated multidisciplinary practices. Hybrid forms, such as law firm subsidiary businesses and strategic alliances like those sanctioned by New York, will continue to emerge. Commenting on whether Enron will dampen the Big Five’s interest in legal services, John A.C. Keith, former president of the Virginia State Bar, said of firms like Andersen, “It may make them want to get into law practice all the more—

²⁷⁴

The legal profession is self-regulating and lawyers enjoy a high degree of autonomy. As a result, lawyers have practiced, and will continue to practice, with non-lawyers to varying degrees. How can the legal profession’s core values be preserved as lawyers enter into “strategic alliances”? While lawyers’ opinions will inevitably differ, the integrity of the legal profession depends on legislative bodies’ ability to preserve existing ethical values, even when formulating new and potentially controversial rules, as attempted by the New York House of Delegates. It is advantageous for the legal profession to proactively anticipate potential

267. *Id.*

268. *Id.*

269. Rosenberg, *supra* note 265.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

conflicts and balance client demand with lawyer ethics, instead of falling subject to the rules of other professions.

When presented with new and difficult situations, lawyers are paid to analyze, criticize, and evaluate before taking action. Lawyers must not abandon these skills when presented with new possibilities and conceptions of how the practice of law should be performed and regulated. According to Mary C. Daly, multidisciplinary practices “will mean a heightened consciousness of the day-to-day routine events that may pose a threat to the core values.”²⁷⁵ As Daly suggests, even slight deviations from core values of independence, professionalism, and loyalty should be analyzed with great thought and reflection.

275. Victoria V. Kremksi, *Serving Clients in a Multidisciplinary Practice: As MDPs Become a Reality, Attorneys Must Strictly Uphold the Core Values of Their Profession*, 80 MICH. B.J. 32, 34 (2001).

