Oregon Law Review
Spring 2000 - Volume 79, Number 1
(Cite as: 79 Or. L. Rev. 283)

MULTIDISCIPLINARY PRACTICES AND THE LEGAL PROFESSION: AN UNCERTAIN FUTURE

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Multidisciplinary practices (MDPs) are currently being examined as a way to bring compatible professions together as a single practice. MDPs present the premier ethical and economic issues facing the legal profession and its future. [FN1] An MDP is defined as "a partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one . . . of its purposes the delivery of legal services to [clients] . . . ." [FN2] MDPs hold themselves out to the public as providing nonlegal as well as legal services. [FN3] The idea behind an MDP is to provide clients with convenient "one-stop shopping" for legal, financial, consulting, and insurance services. [FN4] According to one commentator, the controversy surrounding law firm diversification will define the practice of law in the United States for the next century. [FN5]

MDPs started becoming a major issue for the legal profession in the early 1990s as the Big Five accounting firms increased the number of lawyers that they recruited and hired. [FN6] In Europe and Asia, major accounting firms began moving into the legal ***284** services market by establishing, acquiring, and creating relationships with law firms. [FN7] In the United States, however, more strict legal ethics rules drafted by the American Bar Association (ABA), [FN8] and implemented by most state bar associations, [FN9] historically have operated to prohibit lawyers and nonlawyers from partnering to provide professional services or sharing fees. [FN10] An ***285** increasingly global economy makes the need for re-evaluation of those policies inevitable.

In 1998, the ABA created a Commission on Multidisciplinary Practice (Commission) that unanimously recommended changing the rules to allow lawyers to enter into partnerships with other professionals. [FN11] Under the Commission's proposal, lawyers could share fees with nonlawyer professionals on the condition that the lawyers continue to follow all ethical obligations imposed on lawyers generally. The courts would still regulate the practices and apply traditional legal ethics standards to the practices. [FN12]

This Comment will discuss the emergence of MDPs overseas, the positions taken in support of and against MDPs being allowed in the United States, and the ABA's current stance on the topic. The Comment concludes by analyzing the likelihood that MDPs will be able to engage in the practice of law in the United States in the future and the impact that such practices might have on the legal profession.

I The Emergence of MDPs

In the early 1990s, several European countries eased rules that had kept the legal and accounting professions independent. [FN13] As these rules relaxed, accounting firms rapidly hired more lawyers and affiliated with or bought law firms. Corporate clients were interested in obtaining tax and legal advice from a unified professional services team. [FN14]

In countries that prohibit MDPs, accounting firms have been successful in developing legal practices by entering into cooperation agreements and alliances with law firms to circumvent any restrictions. [FN15] In some countries, accounting firms dominate the ***286** legal practice, [FN16] while in other countries accounting firms must focus their legal work in the tax area because local bar associations place insurmountable restrictions on the practice of law by accounting firms and other organizations owned by non- lawyers. [FN17]

Already, the Big Five are informally considered the world's largest law firms. Ernst & Young employs 3,300 tax lawyers worldwide and 850 lawyers in the United States. [FN18] PricewaterhouseCoopers maintains over 3,000

lawyers around the world. [FN19] Globally, these new law practices have not only taken lawyers away from law firms, they have taken a considerable amount of work from law firms as well. [FN20] Although the competition from accounting firms is relatively new for most U.S.-based law firms, [FN21] the intensity of the competition will likely increase in the future as accounting firms' law departments increasingly compete for lucrative legal work. [FN22]

II Evolution of Nonlawyer Privileges

A. Early Development

Two cases provide the contextual background in which to analyze the current reforms because they demonstrate the need other professionals have for a work- product privilege. In Couch v. United States, the Supreme Court ruled that federal law does ***287** not recognize an accountant-client privilege. [FN23] In Couch, a taxpayer hired an independent accountant to whom she regularly delivered various business and tax records that remained in the accountant's continuous possession. The Court ruled that the taxpayer's divestment of possession of such records disqualified the client from being able to invoke the Fifth Amendment. [FN24] The taxpayer was not entitled to invoke the Fifth Amendment to prevent the production of her business and tax records that were in possession of the accountant pursuant to a subpoena served on the accountant in connection with investigation of tax liability. [FN25]

A decade later, the Supreme Court reaffirmed Couch in United States v. Arthur Young & Co. [FN26] In Arthur Young, the Court held that creation of an accountant work-product privilege would be misplaced and conflict with Congress' clear intent. [FN27] The Court stated that work-product immunity for an accountant's tax accrual workpapers was not an analogue to the lawyer work-product doctrine. An independent certified public accountant performs a different role from an attorney whose duty, as his client's confidential adviser and advocate, is to present the client's case in the most favorable light. [FN28] In certifying the public reports that depict a corporation's financial status, the accountant performs a public responsibility transcending any employment relationship with the client, and owes allegiance to the corporation's creditors and stockholders, as well as to the investing public. [FN29]

The accounting profession's desire to have an accountant- confidentiality privilege increased as the Internal Revenue Service ***288** (IRS) audit policies have evolved. The IRS's policy, as described in the Internal Revenue Manual (IRM), is to seek tax accrual workpapers only in unusual circumstances. [FN30] However, in recent years, the IRS has become more aggressive. This new policy is demonstrated by the use of financial status or lifestyle auditing, Information Document Requests, summonses, and subpoenas to seek tax accrual workpapers, internal tax memos, tax opinions, tax engagement letters, billing statements, and other similar documents from taxpayers and their accountants. [FN31] This led the AICPA's Tax Executive Committee to recommend that the IRS amend the IRM to include similar limits on seeking tax advice communicated between CPAs and their clients. The IRS National Office declined to expand the IRM workpaper policy. [FN32]

B. Internal Revenue Service Restructuring and Reform Act of 1998

With the recent enactment of the Internal Revenue Service Restructuring and Reform Act of 1998 (Act), legislators in the United States have taken a significant step toward allowing accounting firms to practice law. [FN33] The Act provided legislation to restructure the IRS, including a provision to give accountants who offer tax advice the same confidentiality privileges formerly available only to attorneys. [FN34] The Act extended the privilege of confidentiality for noncriminal federal tax matters, formerly available only for communications between attorneys and clients, to CPAs and other federally authorized tax practitioners. [FN35] The ***289** Act also extended the attorney-client privilege to certain communications between a client and an authorized tax practitioner, which includes parties authorized to practice before the IRS. [FN36] Such authorized parties include certified public accountants, enrolled agents, and enrolled actuaries. [FN37] This privilege of confidentiality can only be asserted in noncriminal tax proceedings before the IRS and noncriminal tax proceedings in the federal courts brought by or against the United States. [FN38] The privilege does not apply to communications that would not be protected by the attorney-client privilege. [FN39] For example, information disclosed to an attorney for purposes of preparing a tax return is not privileged. [FN40] Similarly, the privilege is waived under the same rules that apply to the

attorney-client privilege. [FN41]

While the new accountant-confidentiality privilege is similar to the attorney-client privilege in many respects, the privilege does not provide accountants with the confidentiality privilege in advising corporate clients on tax shelters. [FN42] Corporate tax shelters have been broadly defined in recent legislation. [FN43] Section 6662 defines a tax shelter as any partnership, entity, investment plan or arrangement, or any other plan or arrangement "a significant purpose" of which is the avoidance or evasion of federal income tax. [FN44]

***290** The Conference Report on the Act indicates that legislators did not believe that the promotion of tax shelters is part of the routine relationship between a tax practitioner and a client; accordingly, legislators did not anticipate that the tax shelter limitation will adversely affect such routine relationships. [FN45] This is strange language given that an accountant's routine relationship with a corporate client will often result in offering the client advice on ways to minimize the federal income tax consequences of a proposed transaction. [FN46] Action of this nature can be properly classified as avoidance under section 7525(b). However, accountants argue that the language appears to create a distinction between relationships with recurring and nonrecurring clients, such that the promotion of a corporate tax shelter may not refer to the rendering of tax planning ideas to recurring clients. [FN47] Resolving this point will be crucial to the success of accounting firms' efforts to take an increasing amount of business from law firms because accounting firms will be in a position to take care of all of a large corporate client's needs. [FN48]

III ABA Model Rules of Professional Conduct

In the United States, the ABA's current Model Rules of Professional Conduct (Model Rules), [FN49] which have been adopted by most states in some form, [FN50] prevent nonlawyers from providing legal services, limit the association of lawyers with nonlawyers, and control lawyers' nonlegal services. [FN51] Every jurisdiction in the United States, except the District of Columbia, has adopted the ***291** position of the ABA regarding fee-splitting with non-lawyers. [FN52]

The Model Rules prohibit nonlawyers from holding an ownership interest in a legal practice. [FN53] Model Rule 5.4 prohibits lawyers from sharing fees for legal services and forming partnerships to provide legal services with nonlawyers. [FN54] In addition, Model Rule 5.4 forbids lawyers from practicing law in an organization practicing for profit if a nonlawyer owns an interest, is a corporate officer, or has the right to direct lawyers' professional judgment. [FN55]

Model Rule 5.4's comment states that the limitations set forth in the rule serve to protect lawyers' independent professional judgment. [FN56] Similarly, the Model Code Ethical Considerations explain that lawyers should not practice law with nonlawyers because lawyers should not assist or encourage nonlawyers to practice law. [FN57] Essentially, the ABA prohibits nonlawyers from managing law firms because the ABA thinks that nonlawyer managers would be tempted to interfere with the professional relationships of lawyers in order to make a profit. [FN58]

IV Opposition to MDPs Remains Strong

In the past, the ABA was adamantly opposed to accountant- confidentiality privileges because these privileges signaled the ***292** beginning of a new era in the legal services industry. [FN59] Many legal experts see the creation of accountant-confidentiality privileges as the first step for accounting firms to lawfully engage in the practice of law. In reality though, accounting firms have been forming partnerships with law firms overseas and engaging in the practice of law for several years. [FN60] As accounting firms are given more opportunities to engage in activities typically reserved for law firms, accounting firms will continue to take clients away from law firms. [FN61] As a whole, lawyers do not appear well-organized to fight the accounting firms. [FN62] Suprisingly few lawyers seem concerned by the threat that accounting firms pose. [FN63] The opinions of lawyers are varied and widely held: some feel threatened by the MDP movement while others do not; some regard MDPs as an ethical abomination, while others regard them as an economic inevitability. [FN64] To be sure, accounting firms have greater financial resources than law firms. The largest accounting firms have billions of dollars in revenues, making "even the largest law firms appear as specks in the marketplace . . . ." [FN65] Further, no professional service

providers, except for lawyers, have voiced opposition to being able to split fees with lawyers.

While MDPs may affect lawyer independence, zealous representation, and the maintenance of client confidences, the main argument that lawyers advance against accounting firms engaging in law practice is that accounting firms will be unable to resolve conflicts of interest among their clients. [FN66] Lawyers argue that the huge size of the major accounting firms would create major conflicts of interest if MDPs were allowed in the United States. [FN67] That issue, however, does not create an insurmountable obstacle. ***293** While unheard of in law firms, accounting firms often represent both parties to a corporate merger or acquisition. [FN68] Clients generally consent to such representation, and an accounting firm can handle each side's interests and preserve confidentiality by keeping employees on each side of the deal separate from each other. [FN69] For lawyers, it is nearly impossible to represent clients with adverse interests due to current professional rules of conduct. [FN70]

Further, lawyers are sensitive about MDPs with accountants because of the fundamental and inherently conflicting differences between the professions. [FN71] Accountants have duties to be objective and to publicly disclose corporate information, while lawyers are obligated to act as zealous advocates and strictly maintain client confidentiality. [FN72] In order to succeed in the MDP arena, lawyers and accountants will have to cooperate and be willing to accept changes in their traditional roles.

V MDPs Provide Lawyers and Clients with Opportunity

Supporters of MDPs portray them as ending a restrictive practice and offering more consumer choice. They argue that lawyers' objections are motivated by self-preservation as much as by ***294** ethical scruples. [FN73] They are concerned that rules limiting access to the U.S. legal market result in higher prices and fewer services to the legal services consumer. [FN74] Government regulation of legal services typically results in a cartel in the legal services market. [FN75] The creation of cartels acts to increase the prices that consumers pay and reduce the services consumers receive when compared to prices and services in more competitive markets. [FN76] Stephen Gillers, a legal scholar, argues that Model Rule 5.4's prohibition of MDPs harms consumers of legal services by suppressing competition in the supply of legal services and increasing prices for legal services. [FN77] In addition, many supporters of MDPs believe "the legal services market would benefit from the increased competition and investment that would result from allowing banks, retailers, and insurance companies to expand into legal services." [FN78]

A persuasive argument in favor of MDPs is that allowing accounting firms to practice law is in the public interest. Full disclosure to an accountant enables a client to conform their conduct to the law and present claims or defenses when litigation arises. [FN79] Courts "commonly have permitted nonlawyer professionals to work in areas traditionally associated with law practice when the other professionals have expertise in those fields." [FN80] ***295** Accounting firms can currently sell insurance and securities in some states. [FN81] With the addition of legal services, accounting firms will offer consumers seamless one-stop shopping for professional services. In holding that brokers and title company officers could conduct real estate closings without lawyers, the New Jersey Supreme Court stressed the role that the public interest plays in such decisions: "[L]ike all of our powers, this power over the practice of law must be exercised in the public interest; more specifically, it is not a power given to us in order to protect lawyers, but in order to protect the public . . . ." [FN82]

Allowing lawyers to split fees with other professionals will not only help the big accounting firms; small law firms will also benefit. [FN83] For example, consider a sole practitioner that specializes in elder law. The lawyer faces competition from accountants, financial planners, banks, and a host of other businesses eager to better serve his clients. He would like to "form a consortium with a CPA and a money manager, and provide comprehensive services on a fee basis that's split among the members of the consortium . . . ." [FN84] Being able to do so would help him better serve his clients by providing all the services under one roof. Clients do not like the idea of being sent out to different professionals to receive related services. [FN85] Lawyers like him need to find new ways to expand businesses and compete with accountants, financial planners, and health care managers. An MDP also would be financially rewarding to the lawyer because he could share in the fees generated from the sale of nonlegal products like insurance policies and financial planning. [FN86] Though local and national bar associations are reluctant to believe it, getting rid of fee-splitting restraints would open up new opportunities for lawyers in firms of various sizes. [FN87]

Accounting firms have had little difficulty practicing law in ***296** Europe. [FN88] Most European countries either allow accounting firms to engage in law practice themselves or to affiliate closely with law firms. [FN89]All of the Big Five accounting firms have recently established, acquired, or otherwise associated with law firms outside of the United States, giving the major accounting firms extensive law practices overseas. [FN90] In some markets, accounting firms are the largest providers of legal services for businesses. [FN91] Allowing similar arrangements makes sense in the United States as well.

Those that support the use of MDPs further believe MDPs nurture client comfort and confidence with legal representation. [FN92] The Big Five accounting firms maintain that their worldwide offices enable them to satisfy the needs of multi-national corporate and financial business consulting clients. [FN93] For example, as a Big Five firm's client becomes involved in transactions in countries where that firm has a presence, the client will be comfortable that the firm's employees are familiar with the client's accountant who will be assisting with the transactions. [FN94]

MDP supporters also believe that the ethical concerns can be dealt with. On conflicts of interest, some maintain that for undisputed legal work, potential problems could be avoided if clients granted the MDP express permission to act for a rival. This type of consent is often obtained in the course of a consulting practice. Accounting firms generally employ "Chinese walls" in their practices, where teams serving one client are separated from teams offering different services to the same client or from colleagues advising rivals. [FN95]

***297** However, it is also widely accepted that, where legal work is concerned, the lawyers' tighter standards on confidentiality should apply, and that lawyers should continue to be regulated by their professional bodies and managed by fellow lawyers.

With accounting firms successfully practicing law overseas, it is only a matter of time before accounting firms are allowed to bring these practices to the United States. Legal consultants to the major accounting firms are confident that law practices will not be reserved for law firms in the future. [FN96] "'Neither the bar associations nor the courts are going to be able to stop this movement,' . . . 'The market will prevail.'" [FN97]

As accounting firms continue to recruit record numbers of lawyers and law students, many lawyers see the accounting firms adding opportunities to a tight legal job market, while others see it as the beginning of the end of the profession. [FN98] The legal profession will be hard-pressed to develop a position that does not exhibit a sense of elitism and self-preservation. [FN99] In this consumer-driven era, professionalism and ethics arguments probably will not carry lawyers very far. [FN100]

Lawyers should be aware of other professionals interested in participating in MDPs beside the traditional accounting firms. For example, the American Express Bank has been aggressively acquiring accounting firms and providing accounting services to its clients. [FN101] Like accounting firms, banks and insurers, with the deregulation of the financial services industries, are pervasive.

While the ABA has not voted on the MDP issue yet, some local bar associations are moving forward. In the spring of 2000, the Philadelphia Bar Association became the first state or local bar association in the nation to ratify pro-multidisciplinary practice legislation. [FN102] The Philadelphia Bar Association's board of governors approved a proposal that allows MDPs as long as the practice is at least fifty-one percent lawyer-owned. [FN103] It is ***298** necessary for the ABA to act quickly because other bar associations are sure to follow with their own resolutions.

Ernst & Young, one of the Big Five accounting firms, recently financed the launch of a Washington, D.C., law firm in an unusual development that underscores how the traditional walls are falling between U.S. law firms and accounting firms. [FN104] The new law firm is headed by two former partners from a prestigious Atlanta law firm. While the new firm is not owned by Ernst & Young, the firm is backed by an Ernst & Young loan, is called McKee Nelson Ernst & Young, and will move into Ernst & Young's Washington, D.C., offices. [FN105] If successful, the arrangement could serve as a model for other major accounting and law firms eager to join forces when the fee-splitting barriers come down. [FN106] These examples demonstrate the need for action by the ABA. If the ABA waits too long, it may lose the ability to regulate lawyers that are involved in MDPs.

Conclusion

The ABA's current prohibition against nonlawyer ownership of law firms attempts to protect the independence of lawyers and the confidences of their clients. The basis of those rules is that nonlawyer involvement in law firms creates problems with conflicts of interest, confidentiality, and client solicitation, and threatens the autonomy of the legal profession. However, the prohibition appears to serve only the interests of lawyers and not the public at large.

It is widely accepted that legal matters often contain nonlegal elements, and clients are increasingly seeking many professional services from a single source. As the work that lawyers confront has steadily grown in sophistication, both lawyers' and clients' needs have changed. Preserving a century-old restriction during a time of economic globalization does not satisfy the current needs of lawyers or clients. As the legal profession enters a new millennium, it is crucial that rules of ethics that prohibit nonlawyer ownership of legal service providers yield to provisions permitting and regulating MDPs so that U.S. firms may provide ***299** clients with quality legal services in an effective and efficient manner.

[FN1]. William G. Paul, President of the American Bar Association, stated that "[w]e are now confronted with an issue of profound significance to our profession and to the public we serve...." William G. Paul, To MDP or Not to MDP, A.B.A. J., Dec. 1999, at 6.

[FN2]. Commission on Multidisciplinary Practice, Report (last modified June 8, 1999) <http://www.abanet.org/cpr/mdpreport.html> [hereinafter Commission Report]; see also L. Harold Levinson, Independent Law Firms that Practice Law Only: Society's Need, the Legal Profession's Responsibility, 51 Ohio St. L.J. 229, 261 (1990) (defining MDPs).

[FN3]. Commission Report, supra note 2.

[FN4]. Larry Smith, One Stop Shopping to the Nth Degree... Toronto the Latest Tell Tale Sign of Big-6 Legal Ambitions, Couns., July 7, 1997, at 3.

[FN5]. See Gary A. Munneke, Dances with Nonlawyers: A New Perspective on Law Firm Diversification, 61 Fordham L. Rev. 559, 560 (1992).

[FN6]. "Big Five" is a term that refers to the five largest accounting firms in the world. It includes Arthur Andersen, Deloitte & Touche, Ernst & Young, KPMG, and PricewaterhouseCoopers. See Accountants and Lawyers: Disciplinary Measures, Economist, Mar. 6, 1999, at 68.

[FN7]. See Joel F. Henning, The New Reality in the Legal Profession, 70 Temp. L. Rev. 1247, 1250 (1997); Gianluca Morello, Note, Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should be Permitted in the United States, 21 Fordham Int'l L.J. 190, 190 n.3 (1997); see also Lawrence J. Fox, Accountant Bosses Pose Ethical Threat, Nat'l L.J., Oct. 6, 1997, at A23; Chris Klein, Gold Rush, Thin Stakes: U.S. Branches Face Fierce Competition from U.K. Solicitors, Accountants, Nat'l L.J., Aug. 12, 1996, at A1; John E. Morris, London Braces for the Big Six Invasion, Am. Law., Dec. 1996, at 5 (discussing major accounting firms' presence in European legal markets); Accountants on the Brink of Taking Law into Their Hands, Law., Nov. 12, 1996, at 7; E&Y in One-Stop Shop Threat, Law., July 15, 1997, at 5.

[FN8]. See Geoffrey C. Hazard, Jr. et al., The Law and Ethics of Lawyering 13 (3d ed. 1999) (describing the American Bar Association). The ABA "has long been recognized as the leading national organization of lawyers, and it has succeeded in convincing state courts, state legislatures, federal courts and federal agencies to adopt some form of its model codes, giving the codes, as so adopted, the effect of law." Id.

[FN9]. See id. at 13-18.

[FN10]. See John Gibeaut, Squeeze Play, A.B.A. J., Feb. 1998, at 42-47; see also Hazard, supra note 8, at 13-18. One ethical rule provides:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed upon purchase price; and
(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.
(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) a nonlawyer is a corporate director or officer thereof; or
(3) a nonlawyer has the right to direct or control the professional judgement of a lawyer.

Model Rules of Professional Conduct Rule 5.4 (1999) [hereinafter Model Rules].

[FN11]. See Commission Report, supra note 2. The Commission was appointed in 1998 and included nationally known lawyers, academics, and judges.

[FN12]. See id.; Judson Hand, Lawyers Weigh Eliminating Barriers to Extra-Legal Partnerships, Star-Ledger (Newark, N.J.), June 13, 1999, at 001.

[FN13]. See David Segal, Rivals Call Law Firms to Account: Tax Advisers Hope to Cross a Line and Compete for Legal Clients, Wash. Post, Nov. 12, 1998, at F1.

[FN14]. See id.

[FN15]. Morello, supra note 7, at 191-92.

[FN16]. In 1996, six of the ten largest law firms in France were law departments of accounting firms. See Klein, supra note 7, at A1. Arthur Andersen claims that it is the largest legal services provider on the European continent. See Morris, supra note 7, at 5.

[FN17]. See Klein, supra note 7, at A1 (explaining that accounting firms' legal work mainly focuses on tax law

because local bar associations restrict accounting firms' law-related activities).

[FN18]. Segal, supra note 13, at F1.

[FN19]. Id.

[FN20]. See Klein, supra note 7, at A1 (discussing competition between accounting firms and law firms). Multinational accounting firms primarily provide advice on countries' tax laws, though they have increasingly advised on laws governing other subjects. See Richard L. Abel, Transnational Law Practice, 44 Case W. Res. L. Rev. 737, 762 (1994).

[FN21]. See Klein, supra note 7, at A1.

[FN22]. One commentator notes that "[n]ew legal business is increasingly being snapped up by international accounting firms." Id. A principal of a Pennsylvania management consulting firm believes that the major accounting firms "present a significant threat to law firm practices--a threat that has yet to pierce the consciousness of many lawyers." Ward Bower, The New Competition: Time for a Wake-Up Call?, Am. Law., Oct. 1994, at 23; see also Smith, supra note 4, at 3.

[FN23]. 409 U.S. 322, 335 (1973) (noting that "no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases.").

[FN24]. Id. at 334-36.

[FN25]. Id.

[FN26]. 465 U.S. 805, 817 (1984).

[FN27]. Id. In Arthur Young, both the certified public accounting firm and its client were respondents. Id. at 808. Arthur Young & Co. was responsible for reviewing the corporation's financial statements as required by federal securities laws. Id. In the course of reviewing these statements, the accounting firm verified the corporation's statement of contingent tax liabilities and prepared tax accrual workpapers relating to the evaluation of the corporation's reserves for the liabilities. Id. When a routine audit by the IRS revealed that the corporation had made questionable payments from a "special disbursement account," the IRS instituted a criminal investigation of the corporation's tax returns. Id.

[FN28]. Id. at 817.

[FN29]. Id. at 817-18.

[FN30]. Guidelines for Requesting Audit or Tax Accrual Workpapers, Internal Revenue Manual (RIA) ß 4024.4 (June 8, 1976).

[FN31]. Dan L. Mendelson et al., The New CPA-Client Confidentiality Privilege, Tax Adviser, Oct. 11, 1998, at 676.

[FN32]. Id. AICPA refers to the American Institute of Certified Public Accountants. For more information on AICPA, see AICPA Mission Statement (visited Oct. 5, 2000) <http://www.aicpa.org/about/mission.htm>.

[FN33]. Section 3411(a) of the Act added section 7525 to the Internal Revenue Code on July 22, 1998. Pub. L. No. 105-206, 112 Stat. 750 (codified at 26 U.S.C. ß 7525 (West Supp. IV 1998)).

[FN34]. 26 U.S.C. ß 7525. Section 7525(a)(1) provides:

With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

[FN35]. See 26 U.S.C. ß 7525.

[FN36]. Id.

[FN37]. The Act defines the term "federally authorized tax practitioner" as "any individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation under section 330 of title 31...." 26 U.S.C. ß 7525(a)(3)(A). Further, the Act defines the term "tax advice" as any "advice given by an individual with respect to a matter which is within the scope of the individual's authority to practice described in subparagraph (A)." 26 U.S.C. ß 7525(a)(3)(B).

[FN38]. 26 U.S.C. ß 7525(a)(2)(A), (B).

[FN39]. Mendelson et al., supra note 31, at 676.

[FN40]. Because federal tax returns are intended to be disclosed to revenue officials, and are not intended to be confidential, the confidentiality privilege does not extend to these returns, nor to the basis for the numbers and calculations included in the returns. See id.

[FN41]. Id.

[FN42]. Section 7525(b) provides:

The privilege under subsection (a) shall not apply to any written communication between a federally authorized tax practitioner and a director, shareholder, officer, or employee, agent, or representative of a corporation in connection with the promotion of the direct or indirect participation of such corporation in any tax shelter (as defined in section 6662(d)(2)(C)(iii)).

[FN43]. See 26 U.S.C. ß 6662(d)(2)(C)(iii) (1994 & Supp. III 1997).

[FN44]. Id.

[FN45]. See H.R. Res. 2676, 105th Cong. (1998) (enacted).

[FN46]. See Mendelson et al., supra note 31, at 676.

[FN47]. Id.

[FN48]. Gibeaut, supra note 10, at 44 (quoting Roger L. Page, national tax practice director for Deloitte & Touche LLP, who states that accounting firms are winning the war for who is going to represent big business from stem to stern).

[FN49]. See Hazard, supra note 8, at 15 (describing Model Rules).

[FN50]. See id. (discussing the adoption of the Model Rules by U.S. jurisdictions). As of July, 1999, the Model Rules have been adopted in some form by 41 states and the District of Columbia while other states have retained their versions of the Model Code of Professional Responsibility (1982) [hereinafter Model Code]. Id.

[FN51]. See Model Rules Rule 2.1 (independent professional judgment), Rule 5.4 (fee-sharing, lawyer-nonlawyer partnership, and independent professional judgment), Rule 5.5 (unauthorized practice of law), and Rule 5.7 (law-related services).

[FN52]. 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, 597 (1989).

[FN53]. See Model Rules Rule 5.4.

[FN54]. Model Rules Rule 5.4 provides: "(a) A lawyer or law firm shall not share legal fees with a nonlawyer.... (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."

[FN55]. Model Rules Rule 5.4(d) provides:
A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) a nonlawyer is a corporate director or officer thereof; or
(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

[FN56]. Model Rules Rule 5.4 cmt.

[FN57]. Model Code EC 3-8 ("Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman.").

[FN58]. See Hazard, supra note 8, at 1041-42 (discussing reasons for restricting lawyer-nonlawyer relationships).

[FN59]. See Reid Ackley, Attorneys Voice Concern as CPAs Enter Their Turf, Rochester Bus. J., July 24, 1998, at 6.

[FN60]. See Commission Report, supra note 2.

[FN61]. See id.

[FN62]. Gibeaut, supra note 10, at 43.

[FN63]. See Ward Bower, Multidisciplinary Partnerships and Other Non- Traditional Legal Service Providers (visited Mar. 6, 2000) <http:// www.altmanweil.com/publications/articles/management/mgt3a.htm>.

[FN64]. Celia Cohen, MDP: Law Profession's Salvation or the Devil in Disguise?, Del. L. Wkly., Apr. 4, 2000, at 1.

[FN65]. Gibeaut, supra note 10, at 43.

[FN66]. Id. at 47; see also Paul, supra note 1, at 6.

[FN67]. Tug of War, Int'l Acct. Bull., Mar. 25, 1998, at 5 ("Conflicts thus pose a potentially insurmountable quandary for accountants who want to get into the law business, especially firms at the Big [Five] level that already compete for an elite yet limited client base.").

[FN68]. Gibeaut, supra note 10, at 47.

[FN69]. Id.

[FN70]. Model Rules Rule 1.7 covers conflicts of interest generally. Rule 1.7 provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client....

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests....

Further, Model Rules Rule 1.9 extends the conflicts of interest rule to former clients as well. Rule 1.9 provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client....

[FN71]. Anna Snider, Lawyers Wary of Accountant-Client Privilege, N.Y.L.J., July 17, 1998, at 1.

[FN72]. Id.

[FN73]. See Gibeaut, supra note 10.

[FN74]. Morello, supra note 7, at 240; see also Michael J. Chapman & Paul J. Tauber, Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services, 16 Mich. J. Int'l L. 941, 954 (1995), which states:

The most visible effect of governmental regulation of legal services is that it typically results in the establishment of a cartel in the domestic legal services market.... In cartelized markets, prices paid by consumers tend to be higher and fewer goods or services tend to be provided than in competitive markets.

[FN75]. See Chapman & Tauber, supra note 74, at 954. "A cartel is a group of sellers of a product who join together to control the product's production, sale, and price in the hope of obtaining the advantages of a monopoly." Morello, supra note 7, at 240 n.308.

[FN76]. See Chapman & Tauber, supra note 74, at 954.

[FN77]. Stephen Gillers, What We Talked About When We Talked About Ethics: A Critical View of the Model Rules, 46 Ohio St. L.J. 243, 268 (1985) (stating that Model Rules Rule 5.4 "suppresses competition on the supply side. The fewer the consumer alternatives, the more lawyer-employers can charge for their employees' time"), cited in Morello, supra note 7, at 240 n.312.

[FN78]. Morello, supra note 7, at 241; see also Edward Brodsky, Accountants and the Practice of Law, N.Y.L.J., Aug. 12, 1998, at 3.

[FN79]. See Upjohn Co. v. United States, 449 U.S. 383 (1981).

[FN80]. Gibeaut, supra note 10, at 47.

[FN81]. Id. at 46.

[FN82]. In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344, 1346 (N.J. 1995).

[FN83]. See Gibeaut, supra note 10, at 46 (providing the illustrative example discussed infra note 84 and accompanying text).

[FN84]. Gibeaut, supra note 10, at 46 (quoting Charles F. Robinson, a member of a two-person law firm).

[FN85]. See Jill Schachner Chanen, MDP: The View from Main Street, A.B.A. J., Dec. 1999, at 77.

[FN86]. See id.

[FN87]. Gibeaut, supra note 10, at 46.

[FN88]. See Commission Report, supra note 2 (discussing the legal practices of large accounting firms).

[FN89]. See id.

[FN90]. See Morello, supra note 7, at 198-203.

[FN91]. Id. at 192.

[FN92]. See Nigel Page, Taxing Times: Quality vs Quantity?, Legal Bus., July/Aug. 1991, at 18, 21.

[FN93]. See id. (explaining that accountants argue that their worldwide offices equip them to service the needs of the emerging multinational corporate and financial players.).

[FN94]. Id.

[FN95]. However, in December, 1999, Great Britain's highest court "found that KPMG's Chinese walls were not sufficiently strong to enable it to take on a case for the Brunei Investment Authority, having previously been employed as a forensic accountant by Prince Jefri, a former chairman of the authority, and the sultan's younger brother." Accountants and Lawyers: Disciplinary Measures, The Economist, Mar. 6, 1999, at 68.

[FN96]. Gibeaut, supra note 10, at 44.

[FN97]. Id. (quoting Joel F. Henning, the legal consultant who helped Ernst & Young establish law practices in Europe).

[FN98]. Id.

[FN99]. See id. at 47.

[FN100]. Id. at 44-45.

[FN101]. Anthony E. Davis, Collision Course with Disaster--Changes in 'MDP,' 'MJP' and 'UPL', N.Y.L.J., Mar. 6, 2000, at 5.

[FN102]. Jeff Blumenthal, Philly Bar First to Approve Lawyer-Owned MDPs, Pa. L. Wkly., Apr. 3, 2000, at 10.

[FN103]. Id.

[FN104]. See Mark Hansen, All Aboard for MDP Train, A.B.A. J., Jan. 2000, at 28.

[FN105]. Id.

[FN106]. Id. (quoting William Lipton, vice-chair of Ernst & Young's tax services).

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