Towards a Reformed Conception of Multidisciplinary Practice

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TOWARDS A REFORMED CONCEPTION OF MULTIDISCIPLINARY PRACTICE

GEORGE C. NNONA

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ABSTRACT

Drawing out the deeper questions of pragmatism, professional autonomy, separation of powers and cultural legitimacy implicated in the subject, this article

*Professor, School of Law, Roger Williams University. In pursuing the subject matter of this article, I have benefited from discussions with Professors Detlev Vagts, Thomas DeLong,
argues, contrary to the dominant academic opinion in the field, that the empirical underpinnings of multidisciplinary practice (MDP) are weak as are its theoretical justifications and overall compatibility with the policy imperatives of true professionalism. The Article is in a sense a response to the observation of the eminent scholar of the legal profession, Professor Charles Wolfram that, “shockingly little has been written in opposition to MDP.” See Charles Wolfram, ABA and MDPs: Context, History and Process, 84 MINN. L. REV., 1625, 1626 nn.3-4 (2000). The Article critically examines and refutes the arguments deployed in support of MDP, a subject that has attracted much attention in recent times as manifest in the Sarbanes-Oxley Act of 2002, which addressed the issue primarily from the perspective of safeguarding the independence of the accountant. Unlike the Sarbanes-Oxley Act, however, this Article approaches the subject primarily from the perspective of safeguarding the lawyers’ independence and ancillary democratic values.

I. INTRODUCTION

The term “multidisciplinary practice” (“MDP”) may be defined as joint practice by lawyers and members of other professions, where their professional activities in pursuit of such practice involve the offer of legal services to the public. Depending on the context, the term may also mean the professional grouping or entity under which or through which such joint practice is undertaken, i.e. a multidisciplinary partnership.¹

In the last few years, MDP has become a contentious aspect of the broad discourse on the regulation of the legal profession, with its proponents and opponents sparring on different dimensions of the phenomenon, particularly the primary question of whether the Model Rules of Professional Conduct should be amended to permit lawyers to share fees with non-lawyers,² especially the Big 5 firms.³ A key

¹The term will be used in this article in these two senses only, even though, generally, it can also encompass joint practice by persons belonging to any two or more professions none of whom is a lawyer. MDP is distinguishable from a situation involving an individual with dual professional qualifications who is as such licensed to practice law and one or more other professions. See American Bar Association’s (ABA) MODEL RULES OF PROF’L CONDUCT R. 5.4; R. 5.7 (2002) [hereinafter “Model Rules” or “Model Rules of Professional Conduct”]. Model Rule 5.7, dealing with a lawyer’s responsibilities regarding law-related (ancillary) services, substantially governs such a professional, as distinct from MDP which primarily implicates Model Rule 5.4.

²See Rule 5.4, which prohibits such fee sharing and thereby prevents partnerships between lawyers and non-lawyers if the purpose of such partnership involves the rendering of legal services. Rule 5.4, or equivalent provisions, is adopted by bar regulators in every state of the Union, but not Washington, D.C. A sense of the breadth and intensity of this debate can be obtained from an exploration of the testimony of the various parties who appeared before or wrote to the MDP Commission established by the American Bar Association (ABA) in 1998.
aspect of the argument against MDP is the point widely made by MDP opponents, that the resultant structures and conditions of legal practice would be deeply corrosive of lawyer independence and the associated ethical rules that support it, especially the rules on conflict of interest and client confidentiality. Proponents of MDP counter with a set of arguments that has found resonance in important segments of the public.

Three classes of argument are discernible among the arguments made by MDP proponents. The first class encompasses those arguments which claim that MDP and its incidents are largely compatible with the independence of the legal profession and related rules such as the rules against conflict of interests; in essence, that there is no real tension between MDP and the rules that undergird the independence of the legal profession. Arguments in this class tend to relatively side step any value judgment on the ethical rules undergirding professional independence as well as related rules. They typically involve an assertion that MDP does not raise any new problems or that such problems as may exist, especially with regard to potential conflict of interest and breaches of client confidences, can be managed by the use of various techniques, especially Chinese walls. This class of arguments is by far the most

The term “Big 5” or “Big Five” refers to Arthur Andersen, Deloitte & Touche, Ernst & Young, KPMG and PricewaterhouseCoopers. Notwithstanding the 2002 functional demise of Arthur Andersen LLP in the wake of the Enron Corporation scandals, the term “Big 5” will be used throughout this Article to refer collectively to the major global accounting firms. This is done to maintain terminological continuity and consistency between this class of firms and the existing literature on them, which largely identifies them as the Big 5 rather than the Big 4, the latter term not having been in usage for long.

See Mary C. Daly, Monopolist, Aristocrat, or Entrepreneur?: A Comparative Perspective on the Future of Multidisciplinary Partnerships in the United States, France, Germany, and the United Kingdom After the Disintegration of Andersen Legal, 80 WASH. U. L.Q. 589, 599 (2002).

This is the tactic usually taken, for obvious reasons of diplomacy and tact, by persons associated with the accounting profession in advancing MDP. See, e.g., Remarks of Richard Spivak (Mar. 31, 1999), http://www.abanet.org/cpr/mdp/spivak3.html (last visited June 29, 2004) (demonstrating Mr. Spivak’s testimony before the MDP Commission in which he emphasized that the ethical adjustments needed for the legal profession to permit MDP were minimal); Oral Remarks of Kathryn A. Oberly, Vice Chair and General Counsel, Ernst & Young LLP, (Feb. 4, 1999) (demonstrating Ms. Oberly’s testimony before the MDP Commission), http://www.abanet.org/cpr/mdp/oberly2.html (last visited June 29, 2004); Charles W. Wolfram, The ABA and MDPs: Context, History and Process, 84 MINN. L. REV. 1625, 1627, n.7 (2000) (citing a discussion of Big 5 representatives who emphasized that the core values of the legal and accounting professions are essentially the same). For other instances of this line of argument outside the accounting profession, see Gary A. Munneke, Lawyers, Accountants, and the Battle to Own Professional Services, 20 PACE L. REV. 73, 87-88, 90 (1999); Geoffrey C. Hazard, Jr., Foreword: The Future of the Profession, 84 MINN. L. REV. 1083, 1087, 1093 (2000); James W. Jones & Bayless Manning, Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice, 84 MINN. L. REV. 1159, 1200 (2000). For a judicial consideration of the threat that MDP poses to client confidentiality, see the decision in Bolkiah v. KPMG, [1999] 2 A.C. 222, 235-40 (Eng.). This is a British House of Lords decision involving considerations of whether, as argued by the accounting firm KPMG, the internal processes (ethical screens or Chinese
pervasive among MDP proponents. It is indeed reflected in the pro-MDP recommendation of the MDP Commission set up by the American Bar Association (ABA) in 1998 to assist the legal profession in charting a course on the matter.\(^6\)

The second class of arguments made by MDP proponents concedes that MDP may be significantly incompatible with aspects of professional independence, but contends directly or implicitly that the benefits that flow from MDP, especially that of enhanced client choice, outweigh its costs in terms of lost professional independence and the impairment of related ethical rules.\(^7\) Arguments falling within this class significantly reflect the liberal idea of client or party autonomy as an overriding good that transcends the ethical costs entailed.

The third class of arguments in support of MDP substantially or totally discountenances the ethical norm of lawyer independence and or the ethical rules that undergird it, contending that they lack much value and should therefore not constitute an impediment to the de-proscription of MDP.\(^8\) This class of arguments dovetails into the broader critique of lawyer ethics and regulatory regime, which is sometimes anchored on the methods and ideologies of law and economics and less directly, critical legal studies.\(^9\) At its core, this argument is a largely political one, walls) of the firm were truly sufficient to mitigate the risk of breach of client confidentiality, in its practice as a global accounting firm which combines accounting with litigation support services.


\(^7\)Apart from the intrinsic value of enhanced client choice, other benefits sometimes claimed in support of MDP include cost reduction and service quality improvement through the upward pressure exerted on lawyers' practices by the divergent ethos of professionals working within MDPs. On service quality enhancement, see, for example, Peter C. Kostant, *Paradigm Regained: How Competition from Accounting Firms May Help Corporate Attorneys to Recapture the Ethical High Ground*, 20 PACE L. REV. 43, 44-46 (1999) [hereinafter Kostant, *Paradigm Regained*]. Enhanced client choice, however, provides the most persuasive and overarching benefit here, encompassing somewhat the benefit of improved service quality, since such improvement is predicated on lawyers' consciousness of and sensitivity to the fact of alternative choices being available to clients.

In relation to this class of arguments, see Letter from Robert Gordon, Professor, Yale Law School, to Sherwin Simmons, Chair, ABA MDP Commission (May 21, 1999), http://www.abanet.org/cpr/mdp/gordon.html (last visited Aug. 1, 2004); Carol A. Needham, *Permitting Lawyers to Participate in Multidisciplinary Practices: Business As Usual or the End of the Profession as We Know It?*, 84 MINN. L. REV. 1315, 1331-32 (2000) (pointing out the appeal of the notion of client choice as a primary value); Peter C. Kostant, *Breeding Better Watchdogs: Multidisciplinary Partnerships in Corporate Legal Practice*, 84 MINN. L. REV. 1213, 1216-17 (2000) (emphasizing that the existing model of legal ethics is flawed and that MDP by transcending it, would make lawyers in the corporate context better able to serve as corporate watchdogs or gate-keepers—a function they are unable to perform effectively under the existing model of legal ethics).


\(^9\)See RICHARD A. POSNER, *OVERCOMING LAW* 33, 47-56 (1995) (describing the legal profession's history as one of cartelization in which many of its ethical rules are
inviting an inquiry into how society should make choices as to values deserving of endorsement and, following from that, whether the legal profession's independence qualifies as a value worthy of continued endorsement by society. This argument is rendered even more potent in the MDP context by the fact that MDP presents an opportunity, not just for abstract futuristic posturing and speculation, but also for broad and immediate transformative action in the theater of professional regulation. The MDP debate is nothing less than a plebiscite on the future of law as an independent profession. Arguments that totally discountenance the profession's independence thus acquire an immediacy and potency that they hitherto lacked.

As indicated above the arguments made by MDP proponents have found resonance in key segments of the public, such as consumer advocacy groups. See also Richard L. Abel, Why Does the ABA Promulgate Ethical Rules?, 59 Tex. L. Rev. 639, 653-57 (1981) (characterizing the legal profession's quest for self-regulation as supply control); Deborah L. Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 Tex. L. Rev. 681, 692-706 (1981) (arguing in a similar vein). Roberto Mangabeira Unger, a leading voice in the critical legal studies movement, as part of the broader project of social transformation through deviationist doctrine, questions the very character and necessity of a distinct legal profession, and by clear implication, the rules of the profession on independence. His words are instructive:

As legal analysis approached deviationist doctrine and society came to execute the institutional program described earlier, the character of professional expertise in law would change. The contrast between lawyers and laymen would give way to a situation of multiple points of entry into the more or less authoritative resolution of problems that we now define as legal. If legal doctrine is acknowledged to be continuous with other modes of normative arguments, if the institutional plan that decrees the existence of a distinct judiciary alongside only one or two other branches of government is reconstructed, and if long before this reconstruction the belief in a logic of inherent institutional roles is abandoned, legal expertise can survive only as a loose collection of different types of insight and responsibility. Each type would combine elements of current legal professionalism with allegedly nonlegal forms of special knowledge and experience as well as with varieties of political representation. This disintegration of the bar might serve as a model for what would happen, in a more democratic and less superstitious society, to all claims to monopolize an instrument of power in the name of expert knowledge.

ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 111 (1983). If society were to endorse the program of deconstruction and deviation that lies at the center of the critical legal studies movement, the independence of the bar would indeed be a moot question.

It is instructive that the positions of several consumer advocacy groups on MDP were correlated to the position taken by the American Institute of Certified Public Accountants (AICPA) and the major accounting firms. For instance, notwithstanding the rather radical recommendation by the MDP Commission that MDPs be permitted, the AICPA, among other reasons, rejected the Commission's report as being too restrictive and thus constituting an impediment to the development of MDP, especially by way of its imposition of lawyers' ethical rules on all professionals working in MDPs. See Letter dated July 30, 1999 from Olivia F. Kirtley, Chair, AICPA Board of Directors, to Arthur Garwin, ABA MDP Commission (transmitting AICPA Board resolution of July 15, 1999), http://www.abanet.org/cpr/mdp/aicpa2.html (last visited Aug. 26, 2006). Subsequently, six consumer advocacy groups issued a joint statement expressing misgivings similar to the AICPA's, seemingly taking little stock of the bigger point that the MDP Commission had come out firmly in favor of the consumer groups' long-standing position by recommending
has left MDP opponents operating from a defensive position, especially prior to the Enron accounting scandals of 2001 and 2002. That scandal had the effect of neutralizing MDP proponents by politically and socially delegitimating the major accounting firms that had been at the forefront of the quest for MDP. The arguments made by the opponents of MDP have historically proved ineffective in general appeal relative to those of MDP proponents. Their ineffectiveness may be read as suggesting that the case for MDP is intrinsically strong. Contrary to this suggestion, however, this Article is aimed at exposing the weakness of the case for MDP by subjecting the arguments made in its support to critical analysis from empirical, doctrinal and policy perspectives. The Article’s thesis is that, contrary to the apparent strength often ascribed to it, the case for MDP is weak, not just on account of the contingent circumstances that de-legitimized accountants and the quest for MDP in the post-Enron environment, but rather as a fundamental conceptual matter, the assumed conceptual rigor and coherence of the arguments deployed in favor of MDP being borne of error. The conceptual strength of the cases for and against MDP is an issue likely to receive policy making and legislative attention in the future, given that nothing in the Enron scandals or the legislative response thereafter fundamentally addressed the basic issue of competing visions of professionalism raised by MDP. In this regard, the Sarbanes-Oxley Act and allied regulatory responses constitute but mere stop-gap measures. The situation thus invites deeper inquiry towards the ultimate resolution of the difficult questions of professionalism implicated.

Looking more closely at the classes of argument deployed by MDP proponents, it is observed that the first and second classes of arguments are differentiated only by the degree of tension they ascribe to the relationship between the ethical norms of the profession and the realities of MDP, and their concomitant treatment or disposition of those ethical norms in the circumstances. As against the third class of arguments, the first and second classes are unified by their admission of the value of the ethical norms of the profession (or at least their neutrality regarding the value of those norms). Arguments of the first and second classes therefore implicitly or expressly assume:

1. That there are immense benefits to be obtained from MDP generally, and

2. That any tension between the ethical norms or core values of the legal profession, especially the independence norm, and the imperatives of MDP are manageable or tolerable.

In Part II of this article, I question these assumptions, and in so doing challenge the first and second classes of argument. I show in particular that the envisaged benefits of MDP flow not from MDP generally but rather from one narrow form of MDP only—the fully integrated form—to the exclusion of intermediate MDP forms.


See, e.g., Written Remarks of Lawrence J. Fox, You’ve Got the Soul of the Profession in Your Hands (Feb. 4, 1999), http://www.abanet.org/cpr/mdp/fox1.html (last visited June 29, 2006).
advanced by MDP proponents. I additionally show that the imperatives of even the fully integrated MDP are not easily manageable or tolerable. This is because these imperatives necessarily make this form of MDP incompatible with the core values of the legal profession, contrary to the assumptions that MDP proponents make when they advance the first and second classes of arguments.

Regarding the third class of arguments deployed by MDP proponents, I show in Part III the centrality of professional independence—in terms of the lawyer’s control of his work and the terms thereof—to the lawyer’s being and professional essence and attempt a reinforcement of the case for the independence of lawyers in the context of the threat posed to that independence by MDP. In this regard, I do three things in particular: First, I show that concern for the professional as a supplier of services, as distinct from an exclusive focus on consumer interests, is legitimate and that the literature on the sociology of professions evinces the legitimacy of that concern as well as the centrality of workplace control to a profession. This is in the context of an exclusive focus on consumer interests by both proponents and opponents of MDP and the underlying view that only the interest of consumers, and not the lawyers’ as service suppliers, is legitimate in the debate. Second, I show that MDP, as a threat to professional independence of lawyers, poses a threat to consumer interests as well. This threat is not in the traditional sense in which the erosion of lawyers’ independence is perceived as inimical to their loyalty to clients, but rather in the different sense of implicating exacerbated lawyer disillusionment with their work: Such disillusionment portends ill for the consumer, in that it threatens to make the legal profession progressively of little interest to the best minds who often have alternative callings to choose from. Third, I make a case for the independence of lawyers by revisiting and reinforcing existing arguments for lawyer independence, especially the separation of powers argument, and also by deploying a cultural argument for lawyer independence.

This Article is therefore a treatise against MDP and the arguments deployed by its proponents. It proceeds by exploring the gaps and oversights in these arguments and the limitations that these gaps and oversights impose on them. In so doing, the Article attempts to show that the position taken by MDP proponents lacks the normative and theoretical strength often ascribed to it, and that novel ways of thinking about these issues throw light on such weaknesses and neighboring concerns. In terms of methodology, Part II examines the factual bases of the arguments made by proponents of MDP, testing them against empirical observations and the conceptual imperatives and realities of professional service firms as a distinct group operating within parameters prescribed by the peculiarities of their form, function and environment. It indicates that many of the factual assumptions are not empirically supportable nor are they in line with conceptual imperatives and realities of the professional service firm, and following therefrom, that the claims made for MDP by its proponents are not credible. Part III, adopting a largely sociological framework, attempts a reinforcement of the argument in Part II, by showing the social and political relevance of lawyer independence in the sense of control by lawyers of their workplace, MDP being essentially a debate about the necessity or otherwise of the legal profession’s relaxation of control over its work.
II. SUBSTANCE AS A FUNCTION OF FORM

The twelve-person MDP Commission tabled its final report and recommendation to the ABA House of Delegates in July 2000. Prior to that, it had produced two other reports. The first report, with recommendation and appendices, was released in August 1999. This was followed by a draft recommendation/report released around March 2000. Related to these is a set of background papers explaining salient aspects of the MDP Commission’s work. Cumulatively, these documents not only encapsulate the thinking of the MDP Commission on the important questions over which it deliberated, but also capture the essence of the many-sided debate concerning MDP. They, therefore, constitute a fulcrum on which an examination of the Commission’s conclusions and—even more importantly—the broad MDP debate can profitably be hinged.

In March, 1999, the MDP Commission, on the heels of its earlier publications, presented the following five models, accompanied by various hypotheticals, of how a multidisciplinary practice might be organized.

i.) Model 1: The Cooperative Model

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12Regarding this Final Report and Recommendation, with the appendix, see Commission on Multidisciplinary Practice, Report to the House of Delegates, http://www.abanet.org/cpr/mdp/mdpfinalrep2000.html (last visited October 1 2008). The MDP Commission’s recommendation was essentially the same as its earlier recommendation in August 1999: that the Model Rules of Professional Conduct be amended, subject to certain restrictions, to permit a lawyer to partner with a non-lawyer even if the activities of the enterprise consisted of the practice of law and to share legal fees with a non-lawyer. The recommendation was in effect rejected by the House of Delegates, which had similarly rejected the earlier recommendation at its Aug. 10, 1999 meeting. The House passed resolution 1OF on July 11, 2000, discharging the MDP Commission, affirming the ethical restrictions against lawyer-lay combinations and asking ABA Standing Committee on Ethics and Professional Responsibility to examine possibilities of accommodating less radical forms of association between lawyers and non-lawyers, by way of strategic alliances and contractual relationships.


16The MDP Commission’s report and related papers have been adopted widely as a framework for the analysis of MDP structures. See Daly, supra note 4, at 593-99.
TOWARDS A REFORMED CONCEPTION

This is the current structure. There would be no changes in Rule 5.4. of the ABA Model Rules Of Professional Conduct (the Model Rules) which effectively bars lawyers from entering into a partnership or other fee-sharing agreement with non-lawyers. Collaboration between lawyers and nonlawyers is still possible only in the sense that lawyers are free to employ nonlawyer professionals on their staffs to assist them in advising clients and are also free to work with nonlawyer professionals whom they directly retain or who are retained by the client. In essence, lawyers and law firms can still work collaboratively with, but independently from, non-lawyer professionals and firms.

ii.) Model 2: The Command and Control Model

This model is based on the District of Columbia adaptation of Model Rule 5.4. This permits a non-lawyer to become a partner in a law firm, but only if (a) the firm limits its activities to the practice of law, (b) all non-lawyers with managerial authority or a financial interest in the firm agree to be bound by the Model Rules, and (c) the lawyers in the firm accept responsibility for the non-lawyer participants to the same extent as if they were lawyers.

iii.) Model 3: The Ancillary Business Model

In this model a law firm operates an ancillary business which, pursuant to Model Rule 5.7, makes sure that its clients know that the ancillary business is distinct from the law firm and does not offer legal services, and that the protections of the lawyer-client relationship do not apply to dealings between the client and the ancillary business. (The clients of both the law firm and the ancillary business would very likely be cross-cutting.) Lawyers and nonlawyer professionals are partners in the ancillary business, sharing fees and jointly making management decisions. The non-lawyers are however not members of the law firm and make no decisions concerning it.

iv.) Model 4: The Contract Model

In this model the lawyer or law firm remains independent, but enters into a contract relationship with another professional or professional services firm. The contract provides for such things as joint marketing (including identification of the affiliation), reciprocal referral, and the provision to the law firm of management services, communications technology, non-lawyer staffing, and office space and equipment by the professional firm.

v.) Model 5: The Fully Integrated Model

In this model there is no free-standing independent law firm. There is a single professional service firm which has lawyers as well as nonlawyers as members on equal footing. Lawyers are partners or employees of this single professional services firm, which provides a number of services to clients, including legal services.17

These models have justifiably elicited substantial attention from the MDP Commission and other interested parties, for they evince the potential future shape of practice structures, with attendant implications for both practitioners and clients.

17See Hypotheticals and Models, supra note 15.
A pervasive but overlooked aspect of the discussion of these models is the tension between them and the justification given ex ante in support of MDP. The discussion of the MDP Commission’s reports have tended to focus largely on the question of whether there is a demand for MDP, and the capacity of MDP to erode the ethical fabrics of the legal profession, especially its tradition of loyalty to clients. This focus led the MDP Commission to seek, rather late in the process, expert advice on whether there exists a demand for legal services provided through MDP firms.\footnote{See Center for Professional Responsibility, https://www.abanet.org/cpr/mdp/flbar_rec.html (last visited Oct. 5, 2008). This embodies the text of the ABA House of Delegate Resolution of August 10, 1999, the so-called Florida recommendation, which decreed: That the American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession’s tradition of loyalty to clients. Id.}

The fit of the models or structures themselves to the envisaged benefits of MDP has however been ignored.

The fundamental reason given in support of MDP by its proponents is that MDP would make possible “one-stop-shopping,” defined broadly to mean the seamless provision of several professional services to consumers at one point, a firm, through multidisciplinary teams of professionals working without structural boundaries.\footnote{See Written Remarks of Stefan F. Tucker (Feb. 4 1999), https://www.abanet.org/cpr/mdp/tucker1.html (last visited Oct. 1, 2008). In Section II (Summary), Mr. Tucker spoke of “sophisticated clients seeking advice on increasingly complex matters, often involving an inextricable mix of finance, accounting, law and other disciplines.” Id. He went to speak in Section IV of the common client belief that they benefit from “‘one-stop-shopping,’ from looking to one source,” insisting further that “[w]e recognize that there is often little, if any, real distinction or variance between business or financial advice and legal advice, and, in fact, the two are inextricably intertwined.” Id. Finally, in Section V he declares that MDP has evolved in response to an increasingly consumer-driven, global economy, which presents fewer and fewer “pure legal issues.” Id. See also Letter from Haydee Velazquez Tillotson, Tillotson Enterprises, to Arthur Garwin, American Bar Association (Feb. 19, 1999), https://www.abanet.org/cpr/mdp/tillotson.html (last visited Oct. 1, 2008). Mr. Tillotson spoke of the advantage of obtaining “several types of services ‘under one roof,’ instead of spending a great deal of time ‘consultant shopping,’ and then bringing each of these consultants up to speed on my particular needs at the time.” Id. He added that “in addition to the obvious cost

The MDP Commission subsequently responded to this resolution in its final report, Commission on Multidisciplinary Practice, Report to the House of Delegates, supra note 12, under the sub-heading titled: “The August 1999 House Resolution.” The Commission reported therein that it consulted with the Institute for Social Research at the University of Michigan as well as top economists appointed by the American Bar Association on the question of determining consumer demand for MDP. See also New York County Lawyers’ Association Special Committee on MDP, Resolution Regarding Multidisciplinary Practice. Adopted by the New York County Lawyers’ Association, http://www.nycla.org/publications/multi.htm#resolution (last visited Oct. 5, 2008). In the subsection titled “Lack of Evidence of Professional or Societal Advantage” this Committee addressed the question of demand for MDP.
leading to efficiencies particularly cost reduction and higher quality services. As shown below however, the suggested models or structures for MDP hold no reasonable prospect of yielding the envisaged benefits, but are rather in tension with such benefits.

Before examining how the proposed structures belie the envisaged gains, it bears mentioning that, conceptually, there is some element of superfluity in the structures themselves. Strictly speaking, there are only two models, Model 1 and Model 5. Model 1 is a restrictive, narrow model that excludes Models 2 to 5. Model 5 is an expansive model that excludes Model 1, while capturing Models 2 to 4. This is readily realized once we note that if Model 5 becomes permitted, it would be functionally unnecessary to prohibit Models 2 to 4. Models 2 to 4 may then be viewed as a progression of liberalized practice structures leading up in a continuum to Model 5.

The tension in the models vis-à-vis the envisaged benefits is discernible from the following aspects of the proposed arrangements: While the structures exhibit progressive liberalization, the envisaged benefits of MDP are not realizable pari passu with the degree of liberalization, but rather seem capable of realization only in the context of the fifth model, the fully integrated model. Thus Models 2 to 4 yield little or no gains, when measured against the fundamental justification for MDP— one-stop-shopping. Apart from reinforcing the lack of integrity of Models 2 to 4, this observation is interesting in itself. For, it ties the benefits of MDP inextricably to the costliest regime of all, viewing cost in terms of the degree of ethical risk to both consumers and producers of legal services and ultimate adjustments necessary to give effect to a model. In essence, the payoff for Model 5 is the highest, with a correlated level of cost. Models 2 to 4 lead to some cost but yield sub-optimal or no benefits.

savings of MDPs, there would be the added benefit of a seamless flow of information among professionals who are all familiar with my business.” Id. The MDP Commission subsequently cited Mr. Tucker and Mr. Tillotson, among others, as evidence of the demand and need for MDP and the nature of the structures necessary to satisfy such demand. Id. The MDP Commission noted in particular “the inefficiencies in attempting to satisfy that need through the coordinated advice of professionals in nonaffiliated firms,” thus implicating seamless services, not just stand-alone services obtained at one point as a necessary attribute of that demand. See Commission on Multidisciplinary Practice, Report to the House of Delegates, supra note 12, at n.2 in the Appendix, (as distinct from note 2 to the primary text). Also worthy of particular note is the MDP Commission’s citation of America Corporate Counsel Association’s Board of Director’s resolution of Feb. 6, 1999: “The America Corporate Counsel Association supports a broader range of choice for clients to select from service providers capable of formulating comprehensive solutions which address not only the legal aspect of their problems but various other facets as well . . . .” See Commission on Multidisciplinary Practice, Report to the House of Delegates, supra note 12, at n.18 of the Appendix as distinct from note 18 to the primary text). The Commission also had the following to say:

As the Baby Boomer generation ages, individual clients more than ever before need coordinated advice from lawyers, financial planners, accountants, social workers, and psychologists. As the global economy expands, both Wall Street and Main Street business clients look to teams of professionals from different disciplines for consolidated advice on complex commercial and regulatory issues. See Background Paper on Multidisciplinary Practice: Issues and Developments, supra note 15, at the subsection titled “Introduction.”
The foregoing propositions can be tested by a conceptual exploration of the logistics of one-stop-shopping in the context of the peculiar demands of the modern-day professional service firm, whether small or large. Along this line, we must assume that best practices in management science will hold sway in the context of the average MDP, given that efficiency is at the root of the quest for MDP. It would be contradictory to legalize MDP in expectation of more efficient services, while expecting antediluvian management practices and attendant inefficiencies from the average MDP firm.

Specifically, one-stop-shopping functionally assumes a level of interaction and collaborative freedom between professionals that is not possible under the current regulatory regime for lawyers. A model is therefore meaningful only to the extent that it can accommodate such interaction. As a corollary, a model is valueless to the extent that it does not involve an enhancement in the level of interaction that is possible between professionals, but rather maintains a level that is functionally capable of attainment under the current regime. Second, even without showing that the degree of inter-professional interaction afforded by a model in the work place is capable of attainment under the current regulatory regime, such a model would still be valueless if it can be shown that on its own terms it is not amenable to the attainment of the promised ideal of one-stop-shopping and seamless services. This two-pronged, disjunctive test involves a look at the manner in which professionals would actually carry out their work under such structures.

A related point merits clarification: collaborative freedom is the test of seamlessness of service and seamlessness of service is the true test of one-stop-shopping. The idea of seamless services is therefore cardinal in the proposal for MDP. How then is seamless service to be defined? Seamless service must be defined with reference to the process by which a service is produced. This is necessarily so because, excepting those occasions when services lead to the production of tangible goods, it is almost impossible to objectively define the parameters for measuring the quality of a service ex ante, without reference to the process by which it is produced. Especially is this so in sensitive areas of socio-economic life, such as legal, medical, arbitral and social work, where we cannot obtain easily or without undue experimental risks and costs, a real-life sampling of a professional’s service ex ante. Hence, the frequent resort to licensure, as a form of ex ante, process-based assessment. Otherwise than through an assessment of the process involved, it is well nigh impossible to test this sort of service ab initio before consumption, which, unlike the scenario with goods, occurs simultaneously with production, given the intangibility of services, and the consequently unmediated link between their production and their consumption. In any case, the argument for such a test is stronger in the context of the debate on MDP, since we cannot truly get a real-life sampling of such services before MDP is permitted. Accordingly we may

20 The discussion here relies in part on the writer’s field experience in the course of five years of work from 1993 to 1998 with an international professional service firm, as well as discussions with other professionals who had worked both in managerial and other capacities in similar firms. Many of the latter discussions occurred in the context of a Harvard Business School professional services course, which the writer took in the spring of 2000.

21 “Real-life sampling” for this purpose clearly excludes samples from other jurisdictions with their distinctive social and economic circumstances far at variance with the U.S. situation.
define seamless service as service that is produced through a process that affords the producers full freedom to collaborate in seeking out optimal solutions to the client's problem, with no restriction on this freedom of collaboration except such restriction as is prescribed or permitted by the client. Seamlessness is then primarily a style of service production which should yield a certain level or quality of service. In line with the foregoing, seamless service is produced when there is complete freedom of collaboration between the professionals in a one-stop-shop environment. It is not enough that the professionals operate under the same firm, in the same building or under the same franchise or even without any structural boundaries. The key test is the freedom and capability of the various professionals to collaborate unfettered across disciplinarily lines.

Sydney Cone touched somewhat indirectly on the essence of one-stop-shopping as elaborated here, when he questioned its value in relation to the purchase of distinct services all at the same point. Such a purchase at one point, he argued, did not necessarily in itself offer any prospect of enhanced value or reduced prices. This observation being correct, the essence of one-stop-shopping must be sought elsewhere, namely in the seamlessness of the process and the enhanced potentials for efficiency that go with the admixture of expertise. It is this process, rather than the mere purchase of services at one point that provides a unique prospect of synergy for the one-stop-shop.

Following from the foregoing, it becomes apparent that the seamless services of one-stop-shopping, if it is to something radically new and incapable of realization within the ambit of existing regime for lawyer regulation, must be something flowing from an unrestricted interaction between professionals; an interaction of such a nature as to permit a fully coordinated approach that necessarily cuts off wastes resulting from the separate structures and restrictions that would otherwise be maintained. The seamless services of one-stop-shopping admit of no half measures.

Using the foregoing framework, we easily observe that Model 2 has no prospect of delivering the promised goody of seamless services provided through a multidisciplinary team of professionals. This is because, strictly speaking, Model 2 by its very definition is restricted to the provision of legal services. It must have the rendition of legal services as its only purpose, notwithstanding the presence of other professionals within the firm. It cannot offer a web of services, seamless or otherwise. It is however arguable that legal services just like the related term "law practice," is incapable of precise definition, so that some of the services regarded as...
legal services can also qualify as non-legal services. As such, when rendered jointly with other forms of legal services in the context of Model 2, such services would functionally constitute multidisciplinary services. A response to this argument would be that it does rest on a contingency, by assuming that a disputed service would ultimately be adjudged by a court or other relevant authority to be of a non-legal nature; something that is very uncertain, notwithstanding the liberality shown by the judiciary in the related question of permitting in-house corporate counsel, staff lawyers for labor union members, lawyers in legal services organizations for the needy and in-house insurance lawyers for the insured. A better response, however, is that anything defined or regarded by lawyer regulatory bodies as a legal service is service that is of such a nature that a lawyer by training and disposition can comfortably render it, notwithstanding the possibility that other professionals may also be able to do so. As such, functionally speaking, Model 2 does not afford clients a range or type of service that is otherwise unavailable under the current regime of lawyer regulation, a range that can be said to provide genuine opportunities for one-stop-shopping.

Model 3, the ancillary business model, adds no new value. The model on its own terms does not achieve the ideal of one-stop-shopping, since it effectively decrees a functional separation of the lawyer's work qua lawyer from the work that the lawyer performs with other professionals. The lawyer, though capable of rendering seamless services to the client in every other area, working in conjunction with other professionals, is effectively incapable of doing so with regard to legal services. He is effectively barred from doing so through the stringent requirements, procedures and safeguards which he has to implement in order to render legal services in the context of Model 3. For instance, the joint interview of clients, unhindered exchange of information between the lawyer and other professionals, and overall collaboration in the rendition of legal and other services is compromised and impeded by the requirements that attend Model 3. These include the need to constantly explain to the client the nature of services he is receiving at any time and the capacity in which the lawyer is operating as the lawyer moves between legal and non-legal services, constantly calling a client's attention to issues of confidentiality and privilege. Particularly vexing is the necessity of constantly distinguishing and bearing in mind the three types of service covered by Rule 5.7 of the Model Rules, and constantly charting a course accordingly. Each of the three types of service—legal services,

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25 In relation to most of these instances, the courts have made an exception allowing lawyers to render legal services to third parties while working within organizations controlled or run by non-lawyers. The MDP Commission appears to have been particularly impressed by these exceptions. See Updated Background and Informational Report and Request for Comment, supra note 15, at Part I and Part II item 2.

26 An example would be tax services. By being permitted to render tax law advice to a law firm's clients as a partner in the law firm, an accountant does not functionally add to the firm's repertoire of services anything new or incapable of being offered by a lawyer. Lawyers have shown the capacity to render high quality advice in tax law especially at the high end, where corporate clients are involved.
TOWARDS A REFORMED CONCEPTION

law-related services and non-law-related services—dictates its own peculiar requirements. Also conceptually, Model 3 need not even involve more than one lawyer since a single professional in a solo practice can render some other type of service as an ancillary to the legal services rendered. As such, many ancillary business firms can exist without the promised ideal of multidisciplinary teams of professionals working in tandem towards seamless services. Arguably, though, the lawyer could still qualify as a one-stop-shop of seamless legal and non-legal services, given that the external, ethical safeguards notwithstanding, very little separation can exist in reality in the mind of such a lawyer between the legal and ancillary services rendered. He is therefore apt to conceive and treat a client’s problems holistically, bringing all his knowledge of the client’s affairs to bear at once on any client issues whether legal or non-legal. This sort of scenario does not, however, present the same problem as a scenario involving more than one professional, since the absence of other professionals means that the opportunity for impairment of the solo practitioner’s legal judgment and independence by his professional collaborators is absent. This opportunity for impairment of the lawyer’s independent judgment by third party non-lawyer professionals is the crux of the objections against MDP. Where the opportunity is lacking or largely diminished as with the solo practitioner in question, most if not all arguments against MDP become mute, so mute that the situation can hardly be described as one involving MDP. As importantly, an element of multidisciplinary expertise attends every individual lawyer’s practice to an extent. This is because, besides strictly legal knowledge, every lawyer is apt to bring his general knowledge of a client’s affairs—whatever the nature or provenance of such knowledge—to bear on any client issue. Indeed, standard practice in many firms is to encourage lawyers to acquaint themselves with not just the law but also relevant non-legal information concerning a client or potential client’s business and industry. The belief is that such non-legal knowledge enhances the quality of legal services offered by the lawyer.

Model 4, the contract model, assumes an independent law firm, which enters into contracts for several kinds of services with a separate professional services firm. Given that the firms are required to be independent of themselves, this arrangement does not by itself make for seamlessness of services, since unrestricted collaboration is ordinarily impeded by the restrictions necessary to maintain independence.

It is in Model 5, the fully integrated MDP, that we encounter a structure capable of appropriating the full benefits of one-stop-shopping by facilitating the unimpeded interaction of multidisciplinary teams of professionals, working in sync to serve client needs. With no functional separation between them, these professionals are able to combine and collaborate in ever-evolving teams and styles to serve clients in whatever way deemed necessary. To accommodate this sort of collaboration between lawyers and other professionals, far more substantive changes would have to be made to the current ethical framework for lawyer regulation beyond merely permitting a sharing of fees under Rule 5.4 of the Model Rules. Among others, Rule 1.6 governing confidentiality would certainly need to be relaxed, and Rule 1.10 for conflict imputation and Rules 5.1 to 5.3 regarding lawyer supervision of lawyer subordinates would have to be adjusted to accommodate non-lawyer supervision of lawyer subordinates. Indeed, a new administrative arrangement for the regulation of
MDPs may have to be established, even if not direct supervision by courts as initially suggested by the MDP Commission.27

It should be noted that the MDP Commission’s subsequent adjustments to the models did not ameliorate the tension between the progressively liberal MDP structures and the exclusive location of the envisaged MDP benefits in Model 5. Perhaps this tension is not amenable to attenuation. For instance, if we attempt to adjust Model 2 to accommodate more than legal services, the result will simply be a merger of Model 2 with Model 5.28 Similar results occur when we attempt meaningful adjustments to Models 3 and 4. Perhaps in recognition of this, the Reporter’s Notes prepared by the MDP Commission’s Reporter Professor Mary Daly admitted that Models 2 and 4 did not qualify as MDPs under the Commission’s definition of an MDP, namely:

a partnership, professional association 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 organization itself or that holds itself out to the public as providing nonlegal, as well as legal, services . . . , and there is a direct or indirect sharing of profits as part of the arrangement. 29

If so, one wonders why Models 2 and 4 are retained in the mix of possible MDP structures. In the introductory section of the MDP Hypotheticals, the MDP Commission had clearly stated that “many different models for the delivery of multidisciplinary services exist.”30 Proffering the five models, it went on to invite the public and all interested parties to “comment on the following models for the delivery of such services.”31 Discussions have subsequently proceeded, both within the MDP Commission and elsewhere, prior as well as subsequent to the Reporter’s


28See PostScript to February 2000 Midyear Meeting, supra note 15. In Part I the MDP Commission contemplated a major modification to Model 2 to “provide for greater flexibility in the structuring of MDPs and lead to expanded choices for MDP clients.” Id. It specifically contemplated a relaxation of the restriction of Model 2 to one sole purpose—the provision of legal services, so as to permit it to provide a range of other services. Id. Realizing perhaps that this would effectively convert Model 2 into Model 5, the MDP Commission sought to qualify the modification by suggesting a slim fifty-one percent lawyer control of the MDP. Id. In this way, the whole arrangement became nothing more that a fully integrated MDP under lawyer control, a sub-specie that the MDP Commission had expressly dealt with in its August 1999 report under the rubric of Model 5. See Appendix A – Possible Amendments to the Model Rules of Professional Conduct, supra note 27, at proposed Rule 5.8.


30See Hypotheticals and Models, supra note 15, at Introduction.

31See id.
Notes, on the assumption that Models 2 and 3, not just 4 and 5, are alternative structures for MDP.\textsuperscript{32} An aspect of the MDP Commission's report that merits attention at this juncture is the contradiction between Model 5, for which the Commission seemed to have a preference, and the proposed changes to the legal profession's ethical framework.\textsuperscript{33} This is particularly important given the divergence between some of the changes highlighted above as necessary incidents of Model 5, and those highlighted in the MDP Commission's report. Specifically, while the analysis above assumes a relaxation of the rules relating to confidentiality, conflict imputation and lawyer supervision, the Commission's proposed amendments to the Model Rules assume that these rules can be maintained or strengthened in the context of the MDP.\textsuperscript{34} In this wise, it may be said that the MDP Commission, having proposed Model 5, chose to understage the costs, in terms of the inherent ethical risks implicated by the envisaged degree of collaboration between lawyers and non-lawyers. In so doing, the MDP Commission exhibited a certain degree of word fetishism—the belief that words, once promulgated as law, have an inherent capacity to regulate action without reference to the specific context and milieu in which action is sought to be regulated. Repeatedly, the MDP Commission would respond to a specific risk by proposing a

\textsuperscript{32}See PostScript to February 2000 Midyear Meeting, supra note 15; see also Updated Background and Informational Report and Request for Comments, supra note 15 (discussing models in Part III).

\textsuperscript{33}See Commission on Multidisciplinary Practice, Report to the House of Delegates, supra note 12, at Appendix A.

\textsuperscript{34}See Appendix A – Possible Amendments to the Model Rules of Professional Conduct, supra note 27 (discussing the MDP Commission’s proposed amendment to the respective rules). In relation to confidentiality of client information for instance, the MDP Commission proposed three new comments to Rule 1.6:

[23] A lawyer in an MDP who provides legal services to the MDP's clients may encounter confidentiality problems that require special attention. The lawyer should scrupulously observe the rules of professional conduct relating to the protection of confidential client information.

[24] A lawyer in an MDP who delivers legal services to the MDP's clients and who works with, or is assisted by, a nonlawyer in the MDP who is delivering nonlegal services in connection with the delivery of legal services to a client should make reasonable efforts to ensure that the nonlawyer behaves in a manner that discharges the lawyer's obligation of confidentiality. (See Comment, Rule 5.3)

[25] In the context of an MDP, there is a particular concern about the potential loss of the attorney-client privilege, arising out of the possibility that the MDP's clients might not be properly informed as to the separate functions performed by the MDP and that the members of the MDP would not treat legal matters in a fashion appropriate to the preservation of the privilege. A lawyer in an MDP should take special care to avoid endangering the privilege by either the lawyer's own conduct or that of the MDP itself, or its nonlawyer members, and should take such measures as shall be necessary to prevent disclosure of confidential information to members of the MDP who are not providing services in connection with the delivery of the legal services to the client. Id. at Rule 1.6, Comment. Indeed, the MDP Commission's August 1999 recommendation proceeds on the basic principle that the legal profession can maintain its core values while still permitting MDP. American Bar Association Commission on Multidisciplinary Practice Report to the House of Delegates, supra note 13.
rule, with sanctions, aimed at those persons who have incentives to actualize those risks, without an assessment of the nature of the incentives and the capacity of the rule to displace the incentives in the context of the MDP.

The MDP Commission’s treatment of the relationship between a non-lawyer superior and a lawyer subordinate is a case in point. Model Rule 5.2(b) absolves a subordinate lawyer of responsibilities for rule violations if he acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty. The MDP Commission’s proposed Comment 3 to this rule, however, attempts to reverse this position when a non-lawyer supervisor is involved. The proposed comment provides that “[t]he exception contained in paragraph (b) does not apply to acts of the lawyer in accordance with the instructions of a nonlawyer supervisor.”

In making this prescription, which seeks to place responsibility for a subordinate’s decisions or actions squarely on such subordinate’s shoulders, MDP Commission was clearly oblivious of the internal dynamics of organizational management, especially in multidisciplinary professional service firms, and indeed of the workaday demands of employment in such environment, these dynamics and demands being aspects of such firm’s competitive postures without which their survival becomes threatened. A subordinate lawyer in a professional service firm, especially a large, modern firm, is often not in a position to dispute ethical determinations made by superior non-lawyer partners. First is the fact that given the typically high associate-partner ratio, contact with partner-level superiors is limited. Second is the fact that the immediate supervisor would himself often not be a lawyer. A very well oiled multidisciplinary team does not need any particular type of professional at its head. The leader could as likely as not be a non-lawyer, or even more likely so in very large organizations. In that case, the ethical remonstrations of the lawyer subordinate with his non-lawyer supervisor may often be lost on the latter. Last is the homogenizing culture of the average multi-service firm, which exerts substantial pressures towards conformity with group objectives, thus stifling individual tendencies towards dissent on workaday issues, ethical or otherwise.

The problem with the MDP Commission, and indeed many other proponents of the fully integrated MDP, is that it seems incapable of coming to terms with the idea that a lawyer could work, in the context of such MDPs, in scenarios in which the composition of the multidisciplinary team is so often in a flux that the lawyer’s sense of himself as a professional distinct from his other colleagues disintegrates, receding far into the background. The MDP Commission seems to assume, without stating so, that multidisciplinary teams in the context of an MDP would—whatever else the scenario—involve distinct groups or departments of lawyers working qua lawyers, coming together as occasion demands to collaborate with groups of other professionals in the same MDP, also working in their distinct capacities, and that the

35Appendix A – Possible Amendments to the Model Rules of Professional Conduct, supra note 27.

36The associate-partner ratio in major law firms is in the neighborhood of 2:1, which is much less than the ratio in large consulting or accounting firms, which can be in the neighborhood of 15:1.
assignments would involve major projects, the terms for which would have to be negotiated jointly by the leaders of the various groups or departments. This is a possibility, but only one in a myriad of possible scenarios under which a lawyer may find himself in an MDP, many of which scenarios do not afford him the luxury of constant ruminations on ethical considerations, notwithstanding the accentuated need for ethical caution in such an environment.

This brings us quite close to a related, also unspoken, assumption of the MDP Commission: that the lawyer will often have de facto control of his immediate work environment, even if other professionals have de jure control of the wider MDP firm. Indeed, to some extent, it is this perhaps subconscious assumption concerning de facto control that provides a basis for the idea that an MDP lawyer would likely work in sufficient sequestration from non-lawyers in the MDP to afford him room to contemplate the ethical demands of his position as an officer of the law. Thus in comments 5 and 6 to proposed Rule 5.8 on “Responsibilities of a Lawyer in a Multidisciplinary Practice Firm” the MDP Commission said:

[5] . . . The lawyer should communicate to the client receiving the nonlegal services, in a manner sufficient to assure that the client understands the significance of the distinction between nonlegal and legal services and that their relationship will not be a client-lawyer relationship. The communication should be made before entering into an agreement for the provision of, or providing, nonlegal services and preferably should be in writing.

[6] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding and that the client understands that the MDP is not rendering legal services in this matter. A sophisticated user of the services offered by an MDP, such as a publicly held corporation, may require a lesser explanation than an individual client seeking advice from a lawyer-accountant or lawyer-social worker. The failure to take reasonable measures to insure that the client understands the nonlegal nature of the services constitutes a material misrepresentation of facts in violation of Rule 7.1.

In making these comments, the MDP Commission assumes that the lawyer, whether possessed of dual professional qualifications or not, would always or often

37 See Commission on Multidisciplinary Practice, Report to the House of Delegates, supra note 12, at “Control and Authority” sub-headings 1, 3. See also Appendix A – Possible Amendments to the Model Rules of Professional Conduct, supra note 27.

38 The portion of comment [5] preceding the part cited here indicates that the MDP Commission intended to address MDP lawyers with dual professional qualifications. But this makes no difference to the analysis here, as every other lawyer in an MDP is susceptible to such problems when he renders services to a client who may be out to purchase several services in a composite way, with the lawyer perhaps as the primary contact person for such composite services.

39 Appendix A – Possible Amendments to the Model Rules of Professional Conduct, supra note 27.
be in a position to address the sort of concerns covered by the comments; more specifically, that the lawyer would be at the forefront of receiving client instructions and screening same. As such the lawyer would readily be able to administer the prescribed cautionary statement to prospective recipients of the MDP’s services, much in the manner of police administering Miranda warnings.

None of these assumptions holds true for the variegated structure and practice of any sizeable professional service firm. Even in a small-town MDP firm, it will rarely be functional to limit the client’s first contact to the lawyer member, or insist on the lawyer’s participation in the screening of every client before the client’s assignment is accepted by the MDP, at least not without some sort of power imbalance in the lawyer’s favor. Generally, the demands of an integrated practice would have a lawyer come into contact with a client’s assignment at any of several stages. The lawyer may come in at the initial stage in which case, depending again on his stature within the firm, he may be able to bring the necessary ethical issues up and have them addressed. As likely, or even more likely, a lawyer may come into a client’s problem in the middle or towards the end, after the assignment has been accepted and worked on by another professional with little or no consideration for the lawyer’s position, beyond a knowledge of the lawyer’s fee rates which would have been factored into the client’s fee schedule ahead of time, assuming the billing arrangement demands such up-front specificity. The lawyer may as easily spend two hours on a client task, as he could several months, depending on the nature of the assignment, among other factors. The lawyer could easily spend months without direct contact with clients, his services being used only as input into an array of consulting and other projects big and small, the complete details of which he may never fully comprehend. So also could he spend several months working solely on a single client’s assignment.

Indeed, the lawyer could receive supplementary training of such a nature as would enable him to fill in for other non-lawyer professionals in moments of shortage for such professionals, or simply enable him to be deployed to sectors of the MDP’s work experiencing an unanticipated upsurge in demand. A lawyer could as easily be rustled up at a moment’s notice to join a team several hundred miles away on an urgent project, as he could have several weeks’ advance notice of an anticipated project. The possibilities are endless, and necessarily so, as a corollary of the flexibility inherent in the very idea of producing seamless, efficient services. To

\[Cf. \text{ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS} 1, 65 (1988). Discussing the reality of the organization as a multi-professional workplace, Abbott states that in an organization: “[t]he standard interprofessional division of labor is replaced by the intraorganizational one. More often than not, this locates professionals where they must assume many extraprofessional tasks and cede many professional ones. To be sure, the organizational division of labor may be formalized in job descriptions that recognize professional boundaries, but these have a rather vague relation to reality. In most professional work settings, actual divisions of labor are established, through negotiation and custom, that embody situation-specific rules of professional jurisdiction. . . . They are extremely vulnerable to organizational perturbations. Professional staff are often replaced by paraprofessional or untrained staff without corresponding change of function. The division of labor must then be renegotiated, with the common result that boundaries of actual professional jurisdiction change to accommodate organizational imperatives.]

Ibid.
insist that the lawyer’s services be restricted to major projects, to which he would likely come at the initial stages when he can better iron out ethical concerns, is to jeopardize the very essence of the MDP: efficiency resulting from unimpeded interprofessional collaboration. So also would be an insistence that the lawyer raise ethical concerns with non-lawyers regarding the myriad workaday assignments or questions that may come his way. All these are further exacerbated by the difficulties of arriving at a generally accepted definition of legal practice, a difficulty of such a nature that questions which may be treated by a lawyer as involving legal ethics might with some justification be regarded by other professionals as involving a different body of ethics. In this milieu, independent professional judgment and other ethical considerations easily become contingencies for the lawyer-subordinate, notwithstanding assurances to the contrary.

Concerning the possibility of having lawyers work largely or only in their own distinct division or captive law firm, we may pause at this stage to examine a related paradox. While such separation marginally increases lawyers’ capacity for independence, it also diminishes their long-term potentials for attaining the heights of the MDP’s leadership hierarchy, in the context of the large non-lawyer controlled MDP. For it shields them from participating in firm-wide initiatives on the same terms as other professionals. In so doing it not only diminishes the opportunity for them to acquire a full knowledge of the ways and workings of the firm, but as importantly, entrenches the impression among other professionals that they are hybrids that do not fit in squarely within the parameters of the organization. Against the background of the pervasive need of the modern firm to build a cohesive, unifying internal culture as a major component of competitive strategy, this situation is fundamentally disabling and inauspicious for any group of professionals sequestered into a near-hermetic division within the organization. This possibility is amply demonstrated by the genesis of the feud between Arthur Andersen and its

41 See Updated Background and Informational Report and Request for Comments, supra note 15. This issue is already foreshadowed by the objection of the AICPA to the MDP Commission’s definition of legal practice:

The AICPA objects to the definition of the practice of law proposed by the Commission. This definition is a dramatic expansion of the current understanding of the practice of law, and captures within its ambit services—in particular tax related services—that historically and properly have been performed by AICPA members and their firms. Under this new definition, accountants may find themselves suddenly charged with the unauthorized practice of law in areas of their practice which, under federal law, they have specifically been given the right to practice. Additionally, individuals licensed as lawyers, and those who are both lawyers and CPAs, would be regulated as lawyers even though they do not hold themselves out as lawyers and do not create any client expectation that an attorney-client relationship is created. We understand that the Commission based its definition “in great part” on the rule in the District of Columbia, but we take issue with the Commission’s exclusions of the exceptions and commentary to the D.C. rule which would have ameliorated much of our concern in this regard.

See Letter from Olivia F. Kirtley, supra note 10. Even though this AICPA Board resolution speaks in terms of apprehension over the risk of accountants being prosecuted for unauthorized practice, the Board’s objection to the MDP Commission’s definition of “the practice of law” is consistent with the need to maintain flexibility in the resolution of ethical issues by a non-lawyer superior in the context of an MDP with lawyers. Id.
consulting arm, Andersen Consulting. In the early period prior to the feud, both consultants and accountants worked together, with consultants mandated to spend at least two years working as auditors. In the 1960s, this practice of having newly hired consultants work as auditors for a minimum of two years was rescinded, creating a hiatus between the auditors and consultants that would grow into a huge schism as the years went by. Following the separation of the two functions into different divisions in 1989, the consultants began to create their own distinct identity and priorities. Ultimately a situation arose in which partners’ votes on leadership questions were cast along divisional lines. With the accounting partners outnumbering the consulting partners, the consultants had little hopes of ever attaining the heights of leadership within the wider firm. This, along with the question of income distribution, ultimately led to a formal dispute and consequent arbitration between both sides.42

In summary, not only are the benefits of seamless services possible only in the context of fully integrated Model 5 MDP, it is also in that context that lawyers as a group have a meaningful chance of rising to the commanding heights of these organizations in the long-term. Lawyers’ assumption of positions of authority in such firms should have the salutary effect of raising the profile of ethical concerns, but it is unlikely to do much to effectively attenuate the problems involved, since they flow from the very nature of such organizations.

Similar to the MDP Commission’s position on non-lawyer supervision of lawyers within an MDP, is its position on confidentiality of client information and imputation of conflicts. Its proposals on confidentiality and conflicts display a sanguine belief that lawyers would have the opportunity to insist within an MDP that due regard be given to lawyers’ ethical concerns.43 However, the same operational realities discussed above in relation to lawyer supervision by non-lawyers militate against any such belief. The myriad circumstances in which a lawyer may find himself in an MDP, sometimes for a few fleeting hours, often under the control of non-lawyer

42 See ASHISH NANDA & S. LANDRY, FAMILY FEUD (A): ANDERSEN VERSUS ANDERSEN, 1-12 (Harv. Bus. Sch. Nov. 17, 1999). See generally Andersen's Android Wars, THE ECONOMIST, Aug. 12, 2000, at 12 (speaking of a time before the 1989 creation of a distinct consulting division, when the two practices “were sufficiently similar to share the name ‘androids’ in honor of their robotic qualities”).

43 See Appendix A – Possible Amendments to the Model Rules of Professional Conduct, supra note 27, at Rule 1.10, Comment. Concerning imputation disqualification for conflicts of interest, the MDP Commission’s proposed comment [4] to Model Rule 1.10 is particularly instructive. The comment is as follows:

[4] With respect to an MDP, imputed disqualification of a lawyer applies if the conflict in regard to the legal services the lawyer is providing is with any client of the MDP, not just a client of a legal services division of the MDP or of an individual lawyer member of the MDP.

Id. The phrase “legal services division” in the above comment indicates clearly the mindset of the MDP Commission towards the MDP. It is ample evidence that the MDP Commission conceived of a lawyer in an MDP as inherently operating from a legal division, which though not a separate firm, would be capable of insulating him and his values, de facto, from the vagaries of MDP practice. The reality is, however far at variance with this conception, no such legal division is necessarily guaranteed. Moreover even if it exists, it may be an administrative center for coordinating lawyers as a group rather than a locus within which their work as MDP lawyers is focused.
superiors, some of whom may come from far-flung branches of the MDP firm, indicate that detailed attention to these kinds of ethical concerns is not feasible if seamless services are envisaged. Regarding MDP-wide imputation of conflicts in particular, the MDP Commission did not rigorously articulate a basis for going against not just the jurisprudence of several courts, but also the factual findings implicit in such jurisprudence, both of which at best indicate a case by case assessment of ethical screens or Chinese walls as a cure for conflicts, and at worse discountenance their efficacy. Chinese walls or ethical screens are clearly not a sure-fire cure for imputed conflicts. The decision of the British House of Lords in *Bolkiah v. KPMG*\(^5\) is particularly instructive in this regard, in the context of the intertwined practices of a multi-national professionals services firm. Recognizing the perpetual ebb and flow of personnel in a large MDP firm, with employees constantly combining and recombining in an endless possibility of arrangements as well as the incentives and forces at play in an MDP, the court denounced ad hoc Chinese walls, as distinguished from those established as part of the organizational structure of the firm. Field experience shows however that whatever the nature of the Chinese wall—whether ad hoc or standing—in a multi-service professional service firm, it can be penetrated with ease once there is an incentive, particularly on the part of any management-cadre personnel, to do so.\(^6\) Truly, "there is no Chinese wall over which a grapevine cannot grow"\(^7\) and "those who live in that real world know the inevitability of Chinese walls being breached, as long as human beings continue to talk and socialize with each other and their employees continue to chase the last buck."\(^8\)


\(^6\)[1999] 2 A.C. 222, 239 (Eng.). The court's deprecation of ad hoc Chinese walls is particularly significant, for these are the sort of firewalls implicated in the range of services likely on offer at the average MDP and the ever-evolving teams necessary for efficient rendition of these services seamlessly. See also ASHISH NANDA, COMPETITION BETWEEN THE PROFESSIONS: LAW FIRMS vs. ACCOUNTING FIRMS 1, 7 (Harv. Bus. Sch. June 20, 1999) (quoting the deprecating remarks of Justice Ipp of the Western Australian Supreme Court in connection with the use of Chinese walls, even by sedate law firms: "The derivation of the nomenclature is obscure. It appears to me to be an attempt to clad with respectable antiquity and impenetrability something that is relatively novel and potentially porous.").

\(^7\)An informal survey conducted on Feb. 17, 2000, in the course of the professional services course at Harvard Business School, involving about fifty graduate business students with varied experience as employees and managers in professional service firms, especially consulting, investment banking and auditing, indicated about seventy percent acquiescence in the proposition that Chinese walls are liable to be easily breached. Instances of partners specifically asking lower-level cadre to traverse the boundaries of such Chinese walls were recounted.


To further explore the overarching sanguineness of the MDP Commission’s hopes regarding ethical integrity in the context of the fully integrated MDP, we need to look at the reaction to its proposals by another key player in the MDP debate, the American Institute of Certified Public Accountants (AICPA). The AICPA Board of Directors reacted to the MDP Commission’s report with the following resolutions:

**RESOLVED** that the AICPA applauds and supports the vision of the American Bar Association’s Commission on Multidisciplinary Practices (the “Commission”) in recognizing the need to broaden the choices clients have in choosing their professionals and to make available to clients fully integrated multidisciplinary solutions to their problems; and be it

**FURTHER RESOLVED** that the AICPA Board of Directors supports amendment of the ABA Model Rules to allow lawyers and non-lawyers to form partnerships and share fees with one another; and be it

**FURTHER RESOLVED** that the AICPA Board of Directors objects to and opposes the regulatory approach to multidisciplinary practices recommended by the Commission. We believe the Commission’s approach will have the exact opposite of its desired effect by significantly restricting client choice and impairing the formation of multidisciplinary practices. Specifically:

The AICPA further objects, as clearly inappropriate and overreaching, to the Commission’s proposal to unilaterally impose the legal rules of conduct on accounting firms that include lawyers. This in turn has the potential to subject any accounting firm that employs an individual licensed as a lawyer to the rules of the legal profession, including the legal profession’s rules concerning conflicts of interest and solicitation of clients, for all firm engagements. This would create conflict situations in the same circumstances where none existed before.

The AICPA further objects to the Commission’s disregard of the extensive ethical codes applicable to other professionals, including CPAs and to its unilateral imposition of the legal rules of conduct on firms governed by such other ethical codes.

**FURTHER RESOLVED** that the AICPA strongly believes that the Commission’s proposal creates significant barriers to the development and operation of multidisciplinary practices and unnecessarily limits consumer choice in the purchase of professional services.49

The AICPA thus leaves no one in doubt that while it is amenable and indeed desires the liberalization of the legal profession’s restrictions on MDP, it has no inclination towards accepting the restrictions implicated by the core ethical values regarding conflicts of interest, among others, which the MDP Commission believes are capable of maintenance within an MDP. The AICPA position is very significant

49See Letter from Olivia F. Kirtley, supra note 10.
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and revealing, not just because accountants are the chief protagonists of the demand for MDP, but more importantly, because it represents the opinion of a group with perhaps the most extensive experience within the United States and globally on the operation of MDPs. It represents the opinion of those who will shape the contours of the modern MDP, not just through their own internal practices but—perhaps more importantly—through ideas transmitted to other entities in the course of disseminating management education as aspects of their general practice. What this opinion reveals is the minimum operational freedom necessary to sustain a one-stop-shop offering seamless services. In insisting on the inapplicability of the legal profession’s ethical rules and in highlighting the significant barriers to the operation of MDPs which these rules implicate, the AICPA underscores the contradictions inherent in the MDP Commission’s position, thereby setting the stage for a realistic confrontation of the difficult choice that must be made between the maintenance of these ethical rules and the operation of the fully integrated MDP.

In effect, the seamless services envisaged as a result of one-stop-shopping are feasible in the context of Model 5. But its corollary is a relaxation, beyond fee sharing, of key aspects of the ethical restraints that constitute the substratum of the legal profession and its mission. Like the two sides of a coin, Model 5 and the related ethical relaxation cannot be separated. The challenge is to determine which of two possibilities—Model 5 seamless services with relaxed ethics on the one hand, or undiluted ethics without seamless services on the other hand—would prevail. The MDP Commission’s efforts to show that Model 5 can be had without the implicated ethical dilution go to no avail.

B. The Source of Competitive Edge in the True MDP and the Question of Lawyer Control

Having isolated Model 5 as the true MDP, capable of providing the seamless services of a one-stop-shop, we may well pause to ask what the true source of this capability is. In essence, how and why is it able to produce seamless services to the exclusion of other structures? In this wise, we undertake an inquiry similar to that undertaken by Hammel and Prahalad in their seminal work, The Core Competence of the Corporation.50 This question is important because, if we are able to isolate the

50 See generally C. Prahalad & Gary Hamel, The Core Competence of the Corporation, HARV. BUS. REV. 79 (May-June 1990). Tracking the performance of several corporations over the years, the authors posit that the true source of competitive and strategic advantage no longer lie in the competitive quality or price of discrete products. Id. at 81. Rather, it lies in the capacity to identify competencies that lie across the several units of a corporation and blend these into a distinct, inimitable source of products uniquely dependent on such competencies. Id. at 82. A truly competitive modern corporation would be a portfolio of such competencies rather than a portfolio of businesses. Id. Protecting these competencies and leveraging on them, such corporations will be able to continuously evolve in line with the demands of the market. Id. Thus Honda, by focusing not on cars or motorcycles, but rather on the capacity to design engines and power trains using resources from across various of its divisions, is able to maintain a leadership in the fast changing world of cars, lawn mowers, generators, etc. Similarly, Canon’s core competencies in optics, imaging and microprocessor controls have been the source of its dominance in seemingly diverse markets: photocopiers, laser printers, cameras and image scanners, even when its research and development budget was a fraction of Xerox’s. Core competencies are therefore:
essence of Model 5—its core competence so to say—we will be able to appreciate its real strengths and limitations and the imperatives that attend it as a structure for the delivery of legal services. This question is also important because if we are able to isolate the essence of Model 5, we may well be able to modify other structures in such a way as to make them approximate, if not attain, the capabilities of Model 5, while repudiating its major costs or risks.

When we come to contemplate the true source of value and competitive advantage for the fully integrated MDP, we are drawn inevitably to concentrate on the point where its operational details diverge from those of other structures such as the regular single-disciplinary firm. In this wise we note that an MDP could to a large extent be viewed as the result of the merger of two or more firms, each representing a different profession, much as the various departments of a corporation can be viewed as distinct entities combined through a merger. This view of a corporation's departments comes into greater relief when we picture the relationship inter se among various departments in a large corporation. Such departments usually synchronize their activities. However, they also compete among themselves discreetly for leverage within the organization, and are often sufficiently independent to permit their being spun off and sold to another entity. As with corporations, so with professional service firms, especially Model 5 type MDPs. One of the Big 5, Ernst & Young, has for instance had to spin off and sell the consulting arm of its business to Cap Gemini of France. Similarly, KPMG sold a significant portion of its consulting branch to Cisco Systems amidst talk of further divestment. These developments mirror Arthur Andersen's forced spin-off of its consulting arm, following an arbitration award delivered on July 28, 2000.\(^\text{51}\) Excluding other common factors, such as technology and quality of management, how do these divisions, which are so easily independent and separable, achieve coordinated service, especially with regard to a specific assignment? What is the means by which firms achieve synergy across these divisions, many of which could in other circumstances simply equate to distinct firms? The answer lies in their use of similar or unified methodologies in cardinal areas of client service, especially personnel training and product presentation. Firms, including MDPs, achieve synergy across boundaries through a honed harmonization of their work approach. Of course, such harmonization is facilitated by being under a unified ownership and chain of

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the collective learning in the organization, especially how to coordinate diverse production skills and integrate multiple streams of technologies . . . . It is also about the organization of work and the delivery of value. Among Sony's competencies is miniaturization. To bring miniaturization to its products, Sony must ensure that technologists, engineers and marketers have a shared understanding of customer needs and of technological possibilities. The force of core competence is felt as decisively in services as in manufacturing . . . . Core competence is communication, involvement, and a deep commitment to working across organizational boundaries. It involves many levels of people and all functions.

\[^{\text{Id.}}\]

\[^{\text{51}}\]See The Ties that Bind Auditors, THE ECONOMIST, Aug. 12, 2000, at 71, chronicling these developments. A discussion of the circumstances leading up to this spate of divestments is also given in Elizabeth MacDonald & David Woodruff, Ernst & Young May Sell Unit to Cap Gemini, WALL ST. J., Dec. 7, 1999, at A3. See also the final award in: Andersen Consulting Unit Member Firms v. Arthur Andersen Business Unit Member Firms, Case No. 9797/CK/AER/ACS (Int'l Ct. Arb. July 28, 2000).
command, but such ownership and command are not a *sine qua non* for the desired degree of harmonization. Two distinct entities harmonizing their procedure for an assignment or series of assignments can achieve synergy of a sort that may elude the distinct departments of a single entity in similar situations. This does not necessarily have anything to do with ownership structures.\(^2\)

The foregoing analysis holds significance for the argument in favor of MDPs, and the concomitant relaxation of ownership restrictions in Model Rule 5.4 as a necessary aspect of the production of seamless services. For, what it suggests is that such a relaxation is unnecessary, if seamless service is all that is promised thereby. Such seamless services can be achieved by discrete groups of professionals each in a separate firm, governed by its own management and specific ethical rules, if any, working across firm boundaries using a harmonized methodology. Such a methodology would, in particular, lay emphasis on joint training programs aimed at getting the members of the different firms to internalize a single approach—in terms of the logistics of shared assignments, task distribution, information sharing, command structure on assignments and the style of packaging and presentation of results or work products to client. The aim of such a program would be to get the members of the various firms to hit the ground running on given assignments, much in the manner of team members from different parts of a far-flung Model 5 MDP.

It may be argued that the absence of formal control between two different firms of lawyers and non-lawyers intent on offering seamless services through a coordinated approach would ultimately bring the arrangement under strain, rendering them inefficient. The response to this argument would be that this is precisely the point at which the invisible hand of the market should intervene to prune away the parties to such arrangements, by making them unable to compete in a market populated by other groups having a similar design and strategy. A more potent criticism of the program would be that it contemplates only the deployment of professionals on major assignments that are in the nature of projects, but not the use of a professional, say a lawyer, in meeting the myriad workday requests of clients which can be readily fulfilled in a Model 5 MDP by immediately pressing the professional into service on short notice for a few hours. Such short-term service can add immense value either by itself or by contributing to a broader assignment regarding which its necessity was previously unanticipated. A response to this argument would be to admit that some of the most routine and menial instances of professional deployment possible in a fully integrated MDP may not be possible under the proposed program of harmonized methodology among free standing firms.

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\(^2\)See Bente R. Lowendahl, *Co-operative Strategies for Professional Service Firms: Unique Opportunities and Challenge, in Coalitions and Competition: The Globalization of Professional Business Services* 160, at 164-67 (Yair Aharoni ed., 1993). The author gives the example of a twelve-firm engineering consulting consortium working together under a cooperative venture. Though involving only a single group of professionals and engineers, the consortium in this study evinces the degree of coordination that can be achieved by different service firms across formal ownership boundaries in pursuit of a discrete purpose. Though the arrangement ultimately became strained, it is significant to note that this strain was a result of the tension between the need to maintain a focus on the original purpose for which the arrangement was designed (i.e. the pursuit of joint engineering projects by free standing firms offering seamless services across engineering lines) and the new desire of some members to formalize and expand the structure.
However, this is not the same as saying that the program is limited to major assignments of the project kind, as it can be adapted to use in many situations approximating the routine capabilities of a fully integrated MDP. This could be, for instance, through the designation of a few lawyers within the law firm to handle such routine inquiries and needs as may be referred to them by members of other professional firms participating in the program.

It should by now be clear that the proposed structure of harmonized methodology among free standing firms from different professions is a version of the MDP Commission's Model 4, the contract model. What distinguishes it from the Commission's prescription, however, is the fact that only one type of contractual arrangement is permitted, namely an arrangement for the use of same methodology. No arrangement for the sharing of fees for instance is implicated or necessary. Nor would it be necessary to relax the rules of disqualification for conflict, each firm being responsible for the implications of its past activities in the context of the usual requirements of disqualification. Each firm makes a quote for its own services, which quote goes into a package that ultimately constitutes the cost of the service to the client. Upon payment by the client, each firm appropriates its own portion of the fees. The detailed logistics of the arrangement can be worked out, but it would most likely involve the use of a joint agent of the different firms whose main task would be a coordination of certain routine administrative aspects of an assignment that would ordinary not merit the attention of the different firms' partner-level or lower-level employees.

An alternative to the structure suggested in the foregoing analysis is the lawyer-controlled MDP. Without being conceptually related to the idea of synergy across boundaries, it also provides an opportunity to attenuate the ethical concerns raised within the broad MDP debate. It merits attention at this stage as a corollary of the conclusion above that Models 2 to 4, simpliciter, do not fulfill the promised ideal of seamless service in a one-stop-shop, and that Model 5, which does so, would be pyrrhic in ethical terms. Others have put it forward as a middle course towards satisfying the demands for MDP while maintaining the ethical fabrics of the legal profession. Like the program of harmonized methodology the lawyer-controlled MDP entails some loss of efficiency, but such loss is largely contingent, not intrinsic, with the possible exception of limitations on its potential size, which limitation flows from the wide conflict imputation rules of lawyer ethics. There could for instance


54 A possible approach to getting around this could be to examine the international reach of lawyer imputation rules. If it is accepted that U.S. legislation have no extra territorial reach, even for international branches of U.S. firms with no U.S. licensed lawyer member (a currently contentious point), then lawyer-controlled MDPs could transcend the limitations imposed on them by conflict rules applicable within the United States and grow horizontally in size on the international plane. Such expansion will be particularly helpful to lawyer-controlled MDPs to meet the competitive challenges of other professional service firms whose strength derives in large part from their international ubiquity.
be an initial incapacity to offer certain mixes of services potentially available at MDPs involving larger professional service firms. But this would not be intrinsic, as the lawyer-controlled MDP can grow to fill up the niches, in response to market demand. Already, a few law firms adopting ancillary-business-type models have developed novel approaches to meeting client demands in new niches.55

A more fundamental problem could be the fee structure of the market for legal services vis-à-vis other services that would constitute the mix in an MDP's composite of seamless services. If, as is generally believed, legal services command higher fees on average than some other services notably auditing services, the incentives for a lawyer-controlled MDP firm to add such other services to its mix of services may not ordinarily be there, unless partner and employee stratification of some sort is effected within the firm to ensure that lawyers offering higher-margin legal services are remunerated pari passu with this margin.56 This could of course cause tension within the firm, given that the structural difference in earnings would be along professional lines. The converse could also be the case, if there is an attempt to maintain an even level of earnings across the board for all disciplines. This was indeed a major factor precipitating the dispute between Andersen Consulting and Arthur Andersen, the business consulting and general professional services arms respectively of Andersen Worldwide Organization, leading ultimately to a split between both arms 57 with Andersen Consulting becoming a new firm, Accenture. This sort of problem may however not be a major concern for small town MDPs involving a few professionals, where all the parties involved are more likely to have a closer affinity to their joint clientele and an inter-personal relationship transcending market-place considerations of profit.

As significantly, the difference in fee margins between law and other professions is likely to be attenuated in the context of a small town practice, as distinct from big city or international commercial practice. In essence, the lawyer-controlled MDP seems, in this respect, well-adapted to the needs of the small town practice where the bulk of America's personal legal services needs are still met. The position of small town MDPs is particularly important because the most evocative and insistent calls

55 See generally THOMAS DELONG & ASHISH NANDA, VENTURE LAW GROUP (A) 1 (Harv. Bus. Sch. Feb. 24, 2000). An example is Venture Law Group, a Silicon Valley law firm that, in the words of Craig Johnson, its founder and former law partner at Wilson Sonsini, is "part investment bank, law firm, [venture capital] fund and consultant." Id. at 4. It offers both legal, business and strategic advice to start-up technology companies. Id. at 14. Its many clients include Yahoo, eToys, Netcentives and Chemdex. Id. at 15.

56 On the low growth rate of audit and traditional accounting services vis-à-vis the other disciplines into which accounting firms have recently begun to penetrate, see NANDA, supra note 45, at 2 (citing Accountants and Lawyers: Disciplinary Measures, THE ECONOMIST, Mar. 6, 1999). It indicates that, by 1998, income from traditional accounting services had shrunk to two-fifths or less of revenue for the Big 5. Id. On the question of low margins and growth in audit and traditional accounting services further, see Background Paper on Multidisciplinary Practices: Issues and Developments, supra note 15; Colin Boyd, The Transformation of the Accounting Profession: The History Behind the Big 5 Accounting Firms Diversifying into Law, Can. Bar Ass'n, May 1999, at 8-17 (report prepared for the Special Committee of the International Practice of Law); Fox, supra note 24, at 1098. See generally Michael Chambers, AMERICAN LAWYERS SAY NO, 4 COMMERCIAL LAWYER 40 (1999).

57 See NANDA & LANDRY, supra note 42, at 1-4.
for MDP has come from solo practitioners and consumer groups most likely to patronize their services. Such solo practitioners are most likely to be the ones combining with other professionals in small town practices to form MDPs, and their position is evocative not necessarily because of its overpowering logic, but rather because a necessary test—indeed an index of legitimacy—for modern regulatory schemes is the extent to which it considers and provides for less well-placed members of the community, who without such consideration, may end up bearing the brunt of a scheme. This indeed implicates the problem of externalities that has dogged law and economics scholarship for long.

We may well pause to ask why lawyer control attenuates the risk of ethical dilution inherent in the Model 5 MDP. In essence, why is it that the minority non-lawyer members in an MDP are likely incapable of diluting the ethical focus of such a firm, especially since even with minority shareholding and vote, they can still wield de facto control through several other means. Several responses are possible here including the fact that the de jure illegitimacy of such de facto control would exert considerable psychological counter-pressure on those intent on wielding it. More importantly, in the absence of passive investment in such firms, the majority lawyer ownership, especially if they constitute a super majority, is likely to correlate with a majority lawyer population in the firm. Such a majority ensures the entrenchment of lawyers’ culture, of which the formal ethics is but a subset. Thus the ethics become internalized and pervasive in the firm, eliminating the possibility of their being readily jettisoned in the heat of workaday pursuit of lucrative briefs. Even without such a majority lawyer population, lawyer control in terms of majority ownership by itself is likely to present a long-term bulwark against such corrosion of lawyer ethics, given the ever-present possibility of legal challenge to such de facto control as may be wielded by non-lawyers. The problem of ethical corrosion in a non-lawyer controlled MDP is exacerbated by its capacity to become entrenched and systemic given the location of de jure control in persons who do not by training and association place an intrinsic premium on lawyers’ ethics. As such, ethical refurbishment of the enterprise is likely to come only from outside, say the regulatory agencies, rather than being internally generated. Lawyer control, even in the absence of a majority lawyer population is more apt to generate ethical refurbishment from within, but the protection afforded would be of a weaker sort absent reinforcement from the social impact within the firm of a majority lawyer population.

Part of the coordinated methodology that lawyers bring to their work comes from the culture inculcated through a uniform training scheme and indoctrination at law school. This shared culture enables lawyers for instance to work seamlessly across

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58 See Commission on Multidisciplinary Practice, Report to the House of Delegates, supra note 12, at nn.8-17. See also Appendix A, Possible Amendments to the Model Rules of Professional Conduct, supra note 27.


60 The MDP Commission in its various recommendations expressly rejected passive investments in MDPs. Not even the AICPA in its resolutions opposing major aspects of the MDP Commission’s recommendations contested this rejection. Updated Background and Informational Report and Request for Comments, supra note 15.
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jurisdictions and even across geographically separated departments in large law firms. Both on account of its methodological significance as well as its intrinsic aesthetic merit in an increasingly materialistic society, it is surprising that there has been no focus on the cardinal place of lawyers’ professional culture as a factor which, beyond the formal ethical rules themselves, including the disparate common law rules on lawyer regulation, shape the incentives that lawyers have to obey those ethical rules and work in other ways towards the dictates of a shared ethos. The absence of this culture in an MDP controlled by non-lawyers will mean the absence of an essential control that mediates between the lawyer’s other competing incentives and the necessity to uphold the ethical values of the profession, shielding the latter from the full glare of the former. When mergers of distinct corporations or firms are contemplated, the cultures of the different entities are a major focus ex ante, given that a clash between these can spell doom for the merger. It is curious that such cultural compatibility has been downplayed or overlooked by the MDP Commission and various commentators on the question of MDP which, in a sense, is a broad-based merger of professions.

Chinese walls and related arrangements, such as the MDP Commission’s insistence that senior lawyers in MDPs retain exclusive supervisory oversight of junior lawyer associates, ostensibly constitute alternatives to the lawyer-controlled MDP. This is because they essentially try to carve out zones of autonomy or pockets of control for lawyers in an MDP, in order to obviate the need for lawyers to control the whole organization as an antidote to the erosion of lawyer autonomy. The futility of such arrangements bear exploration at this juncture.

C. The Futility of Attempts at Attenuating Loss of Lawyer Autonomy in an MDP

The attempt to anticipate and ameliorate the effect of removing workplace control from lawyers, has taken the form of suggestions for the creation of pockets of control for lawyers in MDPs, as evinced in the pervasive insistence on some form of ad hoc separation of lawyers from other professionals in the MDP. Whether such separation takes the form of permanent, as distinct from ad hoc, Chinese walls or otherwise, it is attended by inescapable tensions. This is quite apart from such suggestions denoting the MDP proponents’ misgivings about the resultant power structure of an MDP. The tensions flow particularly from two points: (1) the nature of the professional service firm and its organization, and (2) the character of a profession’s relationship with capital and the forces of the market.

1. The Nature of the Professional Service Firm and Its Organization

Regarding the first point, the modern professional service firm has peculiar features that dictate its character as an organization. Chief of these is the nature of 61This dovetails into Emile Durkheim’s now overwhelmed conceptualization of the professions as a hedge against the anomic of modern society, a benefit that results from the creation of communities out of the occupations and professions. See Richard Able, The Legal Profession in England and Wales 4-7 (1988). See also Emile Durkheim, Anomie and Modern Division of Labor reprinted in Social Theory, The Multicultural and Classic Readings 77 (Charles Lemert ed., 1993). Durkheim’s may seem an overly optimistic expectation from the professions but anyone with experience of small town practice knows that it is not a completely misplaced expectation. But it is almost completely negated in the context of the mega-million-bucks practices of the modern cosmopolis.
the major input, professional expertise embodied and entrenched in experts from whom they cannot be divested. These highly trained experts, especially the most creative of them, tend to think independently, with a high measure of originality, showing individual initiative in their activities. This scenario challenges the managers of professional service firms, for while such originality and initiative are conducive to individual productivity, they indicate an overarching attitude of independence and may thus impede overall efficiency by inducing dissonance in situations that demand joint action. Thus managing professionals has sometimes been aptly described as akin to herding cats. The response to the challenges posed by the professional's disposition towards independence has been not to dictate to professionals at the individual level, but rather to seek to achieve some form of broad cultural homogeneity within the firm, as a means of attaining the desired degree of personnel alignment with the firm's objectives. This approach can in some cases bother on intense indoctrination. Generally, its effect is to refocus the individual professional on the firm as the major source of professional obligation.

Andrew Abbott captures this feature in another context, in relation to consultants, when he writes that,

by hiring at the [Bachelor of Arts] level, these firms reserve the recruit's loyalty to the firm rather than allowing it to an occupation. Training, usually internally provided, may be exactly equivalent to some profession’s training—in computer work, accounting, information or data processing. But the association of work with profession is broken, and with it much of the professional association's power. In such settings, jurisdiction must be contested within a supposedly single-function firm by individuals whose attachment to the profession claiming their expertise has been already broken at the very outset." He notes a similar approach for accounting firms.62 Abbott's comments are made as proof of the loss of associational power by the professions. His statement does not address the primary managerial objective behind such hiring, since such a focus was unnecessary for the point he was trying to establish. However the primary objective is to achieve harmonization and efficiency within the firm through intellectual and ideological realignment of the professional. That other professions are gored in the process is a secondary, even if necessary, consequence.

The implication of the foregoing for lawyers in an MDP is not far-fetched. It indicates that the capacity of MDPs to uphold the fundamental principles and ethics that guide the legal profession in its work will be seriously circumscribed, not necessarily by the willful desire of other groups in the MDP to violate the rules, but necessarily by the otherwise inevitable demands of MDP itself—the requirements of the modern firm. Just as many firms have been compelled by forces largely beyond their control to grow or risk atrophy, so also are they compelled by the very demands of the MDP as a union of disparate professions to subvert the rules of these various professions, including law, in order to achieve employee realignment and overall cultural synthesis. The pockets of control—both ad hoc and otherwise—created for

lawyers within such MDPs would be to no avail, ending up as hollow mementos of the gallant effort to preserve a modicum of workplace control for them in the face of overriding business realities. In the final analysis, no firm can in the long-run persist with professionals who constantly throw the books at the firm and its set objectives, especially if the books are the codes of one profession amongst a motley group of several. It is significant that Andrew Abbott writes in the context of consulting and accounting firms populated by professionals who by their college-level training can be said to be really from different professions or occupations—essentially firms that are multidisciplinary in the broadest sense of the term.

This point is significant because the need to indoctrinate and realign the new recruit is heightened in such firms, as a basic requirement of constructing a common culture. As significantly, indoctrination towards a homogenized allegiance to the firm is further informed by the need to reduce the use of the professional workplace by the disparate professions as a locus of inter-professional competition. In a firm made up of professionals with same educational and professional background, who perform broadly identical types of work, the need for such an approach is highly attenuated if not eliminated, for the general ideology of the profession provides a framework for interaction between the professionals inter se, and between them and the firm. Such ideology consists of both the broad culture of the profession and the specific ethical rules prescribed by its regulatory authorities, these having been designed bearing in mind the peculiar needs of these professionals and their work vis-à-vis the general public. Indeed, the relationship between the Big 5 professional service firms—erstwhile accounting firms—and the professional regulatory body for accountants is instructive in this regard, accounting being hitherto the primary regulated profession within these professional service firms.

Colin Boyd suggests that the Big 5 have come to dominate the professional regulators for accounting, the accounting institutes, via three avenues. The first is through diversification into other services thereby inherently weakening the control of the accounting institutes over the Big 5, since accounting contributes an increasingly smaller percentage of their revenues. The second is the further loss of control over that part of the Big 5's functions that involve accounting properly so called, resulting from the requirements of due process and litigation, especially in the context of a global business. 63 The third is through the Big 5's dominant influence within those institutes themselves, resulting from the sheer number of their employees who are members of the institutes. 64 The first and third are particularly

63 Accounting institutes are, in serious cases of misconduct involving the Big 5, effectively unable to conduct disciplinary inquiry into the affair while litigation against a member of the the Big 5 is pending in court. This is because the institutes would not be able to make their own findings and discipline the firm before the conclusion of the lawsuits so as not to prejudice, through such findings, the resolution of the legal case against the firm. Given the long period between the commencement of such cases and their conclusion, the tempo for disciplinary action by an accounting institute is often lost by the time the case against the erring firm is concluded. Also, the spread of the Big 5 to several jurisdictions around the world similarly constrains the capacity of individual institutes to reach them effectively. See Boyd, supra note 56, at 28-29. It is instructive that following the Enron accounting scandals, it took a federal indictment to bring Arthur Andersen to book, rather than action by state accounting regulators who clearly lacked the reach to regulate a behemoth like Arthur Andersen.

64 Boyd, supra note 56, at 24-33.
noteworthy, for unlike the second, they are necessary corollaries of the MDP structure. In essence they would be replicated in any MDP setting involving the Big 5 and members of the legal profession. The regulatory authorities of the profession would necessarily have a diminished jurisdiction over them, given that such of their services as they admit to constitute legal services (as distinct from business consulting)\(^{65}\) would form just a proportion of the overall activities of the MDP, while their employees progressively constitute a growing number of legal professionals and by virtue of this a significant block within the profession. The New York State Special Committee on Multi-Disciplinary Practice and The Legal Profession made a pertinent point in this wise in its January 8, 1999 report. It declared thus:

The power of the Big Five to convince Congress to allow at least some penetration has recently been demonstrated in the recent IRS reform act. Whether they will be able to convince the state bar authorities to relax existing ethical constraints is less obvious, since those authorities, be they judges or state bar ethics committees, are lawyers themselves. Still, by hiring ever more lawyers, the Big Five put themselves in a position to claim with ever greater force that they represent the interests of a substantial portion of the bar. This phenomenon was demonstrated in the evident angst of the Tax Section of the American Bar Association, in which lawyer-employees of accounting firms are heavily represented, in deciding on its position on the IRS reform act.\(^{66}\)

A similar scenario has been noted in relation to a portion of the French Bar, the Bar of Nanterre (Hauts-de-Seine) where lawyers employed by the Big 5 represent almost seventy percent of the individual membership, such that the legal practices of the Big 5 are on the Bar’s governing body Conseil de l’Ordre. Using their power, the Big 5 have acquired the capacity “to dominate the Bar of Nanterre and to influence the professional body in charge of monitoring them.”\(^{67}\)

From a sociological point of view, Keith Macdonald locates this tendency of the Big 5 within the paradigm of the professional project. In this regard, he posits that

\[\text{[i]t is the pursuit of the professional project . . . that has led to the emergence of the big huge accountancy firms, who in turn have disproportionately great interest in the direction that the professional}\]

\(^{65}\)Typically, accounting firms engaged in MDP claim that the services rendered to clients by the lawyers in their ranks are consulting or similar services, not legal services. They have thus been able to engage de facto in MDP, even in places like the United States where MDP is prohibited. In this way, see Munneke, \textit{supra} note 5, at 76 (emphasizing the difficulty of defining legal services and the leeway it gives accountants to offer arguably legal services by characterizing them as consulting or planning service). \textit{See also} Fox, \textit{supra} note 24, at 1097 (similarly noting the claim by lawyers practicing within the Big 5 accounting firms that their activities do not amount to legal practice but rather the practice of tax, ERISA, mergers and acquisition and the like).


TOWARDS A REFORMED CONCEPTION

project takes. At the other end of the scale, solo practitioners in accountancy are content if their professional body maintains the status quo, provides them with the services they need and does not ask for too large a subscription. The big firms by contrast are keen to see a pro-active professional association, one that is sufficiently ahead of the game to forestall any increase in state involvement in setting the accountancy agenda, and to ensure that accountancy improves its position in the competition for “jurisdiction[.]” This leads to the interest that the large firms show in having their partners actively involved in their professional association: in consequence, the big firms have a disproportionate say in its affairs, although this is partly due to their much greater ability to spare the personnel to perform these duties. It is not much of an exaggeration to say that in Britain the big firms—the worldwide finns—are the Institute, both Scottish and English, and the same is true of other Western industrial societies.68

Thus the expected efficiencies of the MDP, especially in the context of the Big 5 with their peculiar history and circumstances, demand such a control of the workplace as is incapable of accommodating competing demands from professional regulatory bodies. The structure, incentives and needs of such MDPs impel them inexorably towards circumvention, if not elimination of such rules, which objectives are achieved using mutually reinforcing tactics. For these firms, the alternative to such an approach is painful atrophy.

2. The Character of a Profession’s Relationship with Capital and the Forces of the Market

The second source of tension circumscribing the attempt to ameliorate the legal profession’s loss of workplace control in the MDP through the creation of pockets of control for MDP lawyers is the character of a profession’s relationship with capital and the forces of the market. Eliot Krause provides an apposite starting point with a schematic:

Visualize a triangle, with the state, capitalism, and the professions at the corners. The state influences and shapes capitalism and professions, capitalism influences and shapes both the state and professions, and the professions act to influence and confront the power of both capitalism and the state. Who eventually gains or loses power in these relations will eventually depend upon the particular profession and state studied, and upon what the relevant sectors of capitalism are doing, directly or indirectly through the state, to influence the power of each profession.69

So, the professions as a group, and not just the legal profession as emphasized by de Tocqueville, interpose themselves between the forces of capital and government on the one hand, and the people on the other. In relation to capital, the professions essentially embody ideals, going beyond the demands of the market, which ideals are


sustained and sustainable only to the extent that they control the organization of their work, free from the authority of others. Yet the rationalization of such work through forms of organization that emphasize commoditization and routinization is the aim of capital, for that is the path to enhanced efficiency, at least when efficiency is defined with reference to cost of services. To achieve such rationalization, capital necessarily must take over control of the workplace and no pocket of control for lawyers or any other group of professionals in MDPs can shield them from such control.

The acquisition of such control is justified under dominant conceptions of the relations of capital and other interests, in which the interests of capital as represented by shareholders or other equity owners are supreme, notwithstanding recent inroads in the areas of industrial democracy and corporate citizenship. Various approaches suggest themselves for the acquisition of such control. But whatever the approach, some professions seem readily more amenable to such control than others, and thus may provide easy outposts for the advancing forces of the market. These professions are usually those for whom the major corporations and institutions of the market serve as the major clientele. Following on the heels of these are those that have a great need for capital infusion, resulting from either the intrinsic nature of the work or advances in technology resulting in enhanced appetite for new technologies. Thus engineering has, given the major locus of its activities in modern times—the corporation—gone far afield in the process of deprofessionalization. Indeed, it is arguable that it was never allowed to professionalize, capital having assumed early control in its area of work. It is no surprise that engineers qua engineers do not wield much influence in the decision-making process of the corporations in which they work, beyond matters of technical detail. Considerations of the social dimensions of their work lie, for instance, outside their control, resting to the extent that they are deemed relevant, in corporate managers. Medicine has more recently encountered this phenomenon. As capital has become increasingly important to modern medicine, so has its increased dependence on such capital weakened it. Witness the influence of Health Maintenance Organizations (HMOs) and big pharmaceutical companies on modern medical practice. The influence of HMOs has become so pervasive and pernicious that a not insignificant number of physicians are finding disillusionment in their profession.

Whether it enhances service quality is a more difficult question, which is perhaps intrinsically value-laden and therefore ultimately amenable only to a political solution. For one can validly argue that shorn of the ideals that should attend them, these services cannot be of the same quality as those provided ordinarily by the professions. Following from this, it can also be argued that the services are not less expensive, since their reduced price correlates to their lower quality.

Lawrence Fox considered this a major factor in his opposition to MDPs, given the potentials for other professions, both established and pip-squeak, to control lawyers’ discretion in such a setting. See Written Comments of Lawrence J. Fox (Jul. 8, 1999), http://www.abanet.org/cpr/mdp/fox4.html (last visited Aug. 6, 2004). See also Written Remarks of Lawrence J. Fox, supra note 11. Fox’s words in the latter piece are quite pointed:

70 Whether it enhances service quality is a more difficult question, which is perhaps intrinsically value-laden and therefore ultimately amenable only to a political solution. For one can validly argue that shorn of the ideals that should attend them, these services cannot be of the same quality as those provided ordinarily by the professions. Following from this, it can also be argued that the services are not less expensive, since their reduced price correlates to their lower quality.

71 See ABBOTT, supra note 40, at 154-56, 359 n.30. Abbott notes that "[t]he impact of capitalization has been noticed most in medicine . . . . The boundary between physical and intellectual capital is fluctuation rapidly, and corporations, as one would expect, are emphasizing their right to as much turf as possible." Id.

72 Lawrence Fox considered this a major factor in his opposition to MDPs, given the potentials for other professions, both established and pip-squeak, to control lawyers’ discretion in such a setting. See Written Comments of Lawrence J. Fox (Jul. 8, 1999), http://www.abanet.org/cpr/mdp/fox4.html (last visited Aug. 6, 2004). See also Written Remarks of Lawrence J. Fox, supra note 11. Fox’s words in the latter piece are quite pointed:
It is curious though, that while some of the clamoring for MDP has been predicated on the need for the infusion of substantial capital into law practice in order to fuel growth and competitive capabilities, no articulation of the basis for this has been given, beyond the occasional mention of investments in information technology (IT), the general cost of which has however steadily reduced in tandem with improvements in technology. The day-to-day practice of law is still a largely human-labor-intensive affair, and such capital as is needed has not gone beyond the capacity of the traditional sources of capital for practitioners. This scenario is further confirmed by the fact that the Big 5 have generally not had to expand through reliance on external equity or related sources of capital. They have instead financed growth through loans and internally generated funds, these being sources open to lawyers currently. Indeed, further uses of capital beyond the acquisition of basic operational equipment run against the grain of good management practice for professional service firms generally. Capital expenditure (Capex) has been recognized in management literature as inimical to the average professional service firm when taken beyond the bare minimum required for a firm's operations. This is on account of the nature of the sector and the factors underlying its noticeable expansion in recent years, especially the widespread use of outsourcing by major industrial concerns, which creates a need for external service providers. The thinking is that in the event of a market contraction, service firms are usually the first to be hit due to cut backs in industrial expenditure, and the last thing such a firm wants to be caught up with during such a downturn are capital assets that it cannot shed quickly. In this wise, it has been said of professional service firms (PSF) that:

First, look at our colleagues in the medical profession. A decade ago they relaxed the rules on physicians working for non-physicians. Suddenly a flood gate of pseudo-prosperity opened up and a tidal wave of cash spread across the land, offering the docs thousands, even millions for their practices. I remember myself looking longingly at my physician friends as they cashed out their patient lists. Why did I decide I hated the sight of blood, I thought.

But where are the physicians today? Can you find a happy doc? Of course not and why would one expect to? Having sold out to Mammon they now find themselves acting as supplicants in endless phone calls with high school clerks who decide for the physicians which medicine to prescribe, which procedures to undertake and how soon their patients are thrown out of their hospital beds. If this is what happens to a vulnerable value—professional independence—when literally matters of life and death are on the line, can we expect a different result when the issue is the preservation of important, if less cosmic values like loyalty, confidentiality and client autonomy?

Id.


\textsuperscript{74} Outsourcing in this sense should be distinguished from the more politically charged sense of the term which is used to refer to the relocation of jobs from the United States or other countries of the west to countries with lower labor costs. In the present context, the term is used to denote a situation in which one firm, without necessarily going outside the United States, delegates an aspect of its production process to another firm which is paid to undertake that process.
The life of a PSF is very different from its industrial counterparts. It does not have to invest in research and development and new productive capital other than IT to keep ahead of the curve. Nor does it have to envision what will be the next turn of the technological road (although it clearly can’t ignore it either). What it has to do instead is make sure that its energies are focused on serving the client with maximum effectiveness and that it invests in the professional resource necessary to maintain standards. This means that, instead of diverting resources into non IT capital expenditure and suffering increasing depreciation charges against earnings which may or may not translate into cash flow down the road, the PSF can focus all its energies on keeping its clients happy.5

Related to the foregoing and the attendant otioseness of fixed costs, is the reality that most service firms do not enjoy substantial economies of scale.6 All these underscore the brittle nature of the argument about capital infusion into legal practice as a justification for MDP.

It may be argued that given the increasing commoditization of aspects of the law into products such as software packages and do-it-yourself kits, substantial capital is required if lawyers are to produce and participate in that market. However, this would be a mistaken view, at least in the context of the thrust of the argument here about the nature of professionalism as an ideal involving the provision of services under certain idealized terms, as well as the inherent nature of these products themselves. The manufacture of these products is nothing more than a bare commercial enterprise, notwithstanding that their function is ultimately to displace legal advice by lawyers. Such an activity is the true province of capital, not the professions. Along this line of reasoning, it should be conceded that when an aspect of the law has become so pliable as to be amenable to routinization and commoditization, say in the form of computer software, that aspect is no longer in need of the special attention and approach that is the hallmark of professionalism, and should as such be consigned to the general domain, unless a clearly-articulated policy reason (such as cultural hallmark of professionalism, and should as such be consigned to the general domain, unless a clearly articulated policy reason, such as a cultural value,77 dictates that lawyers continue to tend such aspects.

75See Mark C. Scott, The Intellect Industry 1, 32 (1998). Of course the picture here is a general one since, for instance, a few of these firms justifiably engage in research and development, as exemplified by the tax practices of some of the Big 5. This does not however detract from the overall strength of the position, just as the position is not compromised by the fact that a few firms such as investment banks may need substantial external capital to fund expansion through acquisition of competitors as distinct from organic growth. The bulk of the costs of a professional service firm consist of staff costs, a direct expense that pays for itself, being directly correlated to revenue, at a staff-revenue ratio of not more than 60% for a healthy firm, but ideally at no more than 40%. Id. at 57. Other major cost would be the cost of leased office space, ideally at around 10% of revenue. See id. at 58.

76Id. at 13.

77For arguments on cultural value, see infra Part III(D), from the paragraph embodying note 180 and onwards.
D. Alternative Reasons Underlying the Quest for MDP

In concluding this part of the essay, it is tempting to explore the reasons behind the MDP Commission’s consideration and recommendation of MDP Models 2 to 4, given that, as already explained in Part II(A), these models stand in tension with the raison d’être of MDP—the attainment of seamless services via a one-stop-shop.

An ostensible reason for Models 2 to 4 could be that these models were put forward in the hope that they would act as stop-gap measures catering to the demand for MDP, while the professions involved worked out the parameters for instituting a Model 5, full service MDP. If this was the reason ex ante for these intermediate models, it would be natural to expect the MDP Commission to clearly indicate so at the onset. This was not the case, however. The MDP Commission did not articulate the value of Models 2 to 4, in a way that shows, in relation to the capacity for seamless services, any essential distinction in purpose between them and Model 5. Any revealed or apparent distinction was one of degree rather than essence. Perhaps terminological conflation of the Model 5 fully integrated MDP with other structures for which there may have been some demand was a factor propelling the MDP Commission towards such a uniform conceptualization of the models.

Beyond this, however, there is an unstated but unifying thread that runs through and explains all the models, except Model 1: They are all capable of sustaining a

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78 Comments by Professor Mary Daly, Professor Bernard Wolfman’s MDP Seminar, Harvard Law School (Feb. 29, 2000).

79 Some of the testimonies before the MDP Commission, upon close inspection, indicate that sections of the public and profession desire a liberalization of aspects of legal service delivery, which, however, does not amount to an MDP. Such constituencies generally get lumped together with those in favor of MDPs, and they do not object to that. This is so because they either conflate their ideas with a Model 5 MDP or they see the latter as an opportunity to get their basic demands, even if they thereby end up with a structure that is way beyond their needs. See Oral Remarks of Larry Ramirez, Chair of the General Practice, Solo and Small Firm Section (Feb. 6, 1999), http://www.abanet.org/cpr/mdp/ramirez1.html (last visited Oct. 6, 2008). In his testimony, Mr. Ramirez expressed his support for MDP. Id. Upon close questioning by a member of the MDP Commission on the possible deterrent effect of conflict imputations in such a small town MDP, Mr. Ramirez agreed that this could be a deterrent to MDPs and that “an ad hoc relationship is the likely option.” Id. Upon further questioning, he stated that he did not think his section would have a problem with a separate entity contractually related to the other professionals, such as would help serve as an explanation to clients that different ethics rules apply depending on whether or not the non-lawyer is working on a particular matter with the lawyer. Id. See also Letter from Michael Horner, President, Tom Sawyer Camps, Inc., to Arthur Garwin, ABA MDP Commission (Feb. 19, 1999), http://www.abanet.org/cpr/mdp/horner.html (last visited Oct. 6, 2008). Mr. Horner wrote to support MDPs. Id. In a paragraph of his letter he stated:

I’m a small business owner who currently uses several separate consulting firms to handle a variety of my business needs. I share the lament of many of my fellow business owners in that as issues come up where I must rely on two or more of these services I’m forced to “ping pong” back and forth among these providers at considerable expense of time and money. The other option is to rely on quasi-legal advice from non-lawyers and simply hope for the best. Neither of these is desirable.

Id. This evinces a desire not necessarily for the seamless services of a true MDP, but for some form of ad hoc coordination between Mr. Horner’s service providers, such as would prevent him from running from pillar to post on multi-sided issues.
passive investment in the legal services industry by non-lawyers. Models 2 to 5 are all capable of sustaining such a passive investment interest in a law practice, using “passive investment” in a narrow sense to mean ostensible participation in the provision of legal services by a qualified partner\(^8\) who does not however take part in any way in the actual work-place rendition of services to clients. The capital contributed to the practice is then the passive investor’s principal input to the enterprise. The difference between such a partner and the average investor lies merely in the former’s professional qualifications, which entitle him to participate in the professional service firm to the exclusion of non-professionals. In the MDP context, such “passive investment” would serve not just the needs of the “passive investor,” but also the need of those who wish to infuse capital into their law practice or sell their law practices out right. The MDP Commission entertained testimonies from several lawyers who were of the latter mind.

It should be noted that the sale of legal service by itself (i.e. without its being seamlessly blended with other services into a composite), is consistent with the intent of providers of lower margin professional services to move into higher margin ones like legal services,\(^8\) an intent that is claimed by MDP opponents to be the major impetus behind the quest for MDP. For then the idea is not necessarily the provision of seamless service but rather the extraction of profit, an extraction that is possible even if the MDP structures itself is along Models 2 to 4, since an essence of MDP is the sharing of profits between different professionals notwithstanding the ultimate choice of model. Indeed the possibility of passive investment in the provision of legal services by all and sundry becomes heightened in the light of the dilemma over the definition or delimitation of the range of professions and occupations that can permitted enter into MDP arrangements with lawyers.\(^8\) If in response to the egalitarian and pragmatic argument that it should not and practically cannot be restricted to a definable class or type of professions, the door is thrown open to arrangements with all legitimate professions or occupations, then it becomes possible for almost anyone to make a “passive investment” in a law practice that takes the form of an MDP. This could be through various multidisciplinary arrangements in which the non-lawyers would ostensibly profess to practice a profession or an occupation with the lawyers, while in reality making a passive investment in a firm predominantly offering legal services. The definition of the range of professions or occupations capable of forming MDPs with lawyers is therefore cardinal to the resilience of the prohibition of passive investment, not because whatever definition is chosen can seal off that possibility completely, but because the wider the definition the more accentuated the potentials for the laity to drive a coach and horses through it.

It is of course arguable that even now lawyers can make “passive investment” of the sort in issue in a law firm in which they have no active participation, and that this is not materially different from the other scenarios involving non-lawyer

\(^8\)Qualified partner” here denotes a member of a partnership operating as an MDP who is qualified to practice a profession other than law, and who by virtue of this qualification is permitted to combine with lawyers in providing legal services to the public. This would be the scenario if Models 2 to 5 were allowed.

\(^8\)See sources cited supra note 41. See also NANDA & LANDRY, supra note 42, at 8.

\(^8\)See PostScript to February 2000 Midyear Meeting, supra note 15.
professionals. Such argument would be remiss, in that it would ignore the cultural capital that the lawyer by training and association brings with him even when he is not actively in practice. This attenuates crass propensities in the practice of law where these would otherwise be accentuated. As importantly, lawyers involved in such “passive investment” are amenable to the regulatory reach of the bar authorities, unlike non-lawyers; and so can answer for the consequences of their omissions or commissions in a way that non-lawyers couldn’t. This in turn exerts a certain pressure on them to show circumspection towards such investment. Finally, the pool of lawyers amenable to such investments is relatively limited, vis-à-vis the general population, even more so the pool of capital available to them.

III. CONTROL OF WORK AND ITS CENTRALITY TO THE MDP QUESTION

MDP is essentially about the control of work. The key questions posed by MDP as such are: (1) whether collaboration by way of MDP detracts from lawyers’ control of their work and hence lawyers’ professional independence; and if so, (2) whether lawyers should indeed be allowed to retain exclusive control of their work and thereby maintain professional independence. While the former question is in significant measure the focus of Part II of this article, this part, Part III, will address the latter question along several dimensions.

A. The Legitimacy of the Suppliers’ Perspective

A pervasive point of agreement between all sides in the MDP debate is the belief that the interest of the consumers of legal services is the paramount and indeed only legitimate interest. This line of reasoning has been a fountain from which all have drawn for political legitimacy. The direct result of this has been a persistent attempt by all sides of the debate to show that its own regulatory recipe is the optimal one for the consumer. This has been particularly so with market-minded analysts who insist on enhanced competition as a desideratum of legitimacy. This focus on demand-side imperatives has meant the neglect of supply-side imperatives, which is all the more surprising given the necessary relationship between supply and demand. It seems,

83See, e.g., Kostant, Paradigm Regained, supra note 7, at 51; James C. Moore, Lawyers and Accountants: Is the Delivery of Legal Services Through the Multidisciplinary Practice in the Best Interest of Clients and the Public?, 20 PACE L. REV. 33, 35 (1999); New York Bar Association, Report of the Special Committee on Multi-Disciplinary Practice and the Legal Profession, Section XV Part D, supra note 66, at § III, ¶ 5; Green, supra note 8, at 1158. But see the statement of Professor Neil W. Hamilton to the Minnesota State Bar Association, quoted in Lowell J. Noteboom, Professions in Convergence: Taking the Next Step, 84 MINN. L. REV. 1359, 1376, n.90 (2000) (“I urge you to make the decision regarding MDP not on the basis of what ‘customers’ want. Make it on the basis of how we can preserve one [of] the great learned professions that is committed (albeit imperfectly) to serving justice.”).

84See generally Daniel Fischel, Multidisciplinary Practice, BUS. LAW. 951 (May 2000). See also Moore, supra note 83, at 37. But see New York County Lawyers’ Association Special Committee on MDP, supra note 18. An exception is the New York County Lawyers’ Association’s Special Committee on MDP which in its report stated, with no emphasis on clients’ interest: “The role of the bar itself in molding the future is to define its own goals and to try to match these to the marketplace which in a free economy can opt to support or turn away from the services of the Bar.” Id. The statement did not however attempt a reconciliation of this market-oriented statement with the bar’s monopoly. Id.
however, beyond question that though the consuming public through the political institutions has the final say as to the nature of regulation it desires, it lies ultimately with the suppliers of legal services to determine whether the terms of those regulations are sufficiently attractive to merit their investment of time and energy in the process of producing those services. This indeed is in the very nature of any market, more so in the liberal socio-economic milieu of the United States.

This proposition can be characterized differently, in a less polarized manner. Specifically, it may be said that it is in the interest of the consuming public that in negotiating the optimal regulatory scheme for legal services, we take into account the interests of the suppliers of those services, in terms of the conditions necessary not just for their persistence in that market, but more importantly, the conditions necessary for their persistence as producers of services that qualitatively accord with basic public expectations. In the light of the foregoing, the interest of lawyers in their work and the terms thereof constitutes a central issue in the MDP debate, one that should be explored with more profundity and less embarrassment than has hitherto been the case.

In exploring lawyers and their work a sociological approach seems apt, not merely because sociologists are the group of scholars who have paid the most attention to the study of the professions, but principally because it is an integrated framework that enables a multi-sided analysis of the MDP debate as a contest concerning the nature, loci and future of the lawyer’s work. Sociology therefore presents us with some interesting frameworks with which to assess the implications of MDP for the professionals who constitute the supply side.

Sociological studies of the profession are divisible into two broad categories: those that focus on the internal consequences of professionalism (i.e. consequences affecting the area of professional work itself—healing, auditing, dispute processing, etc) and those that focus on external consequences of professionalism (i.e. consequences affecting not the area of work itself, but rather the social status and power of the professions). The latter has as its preoccupation the external social consequences that derive from professional status and activity, the professional activity itself being of little importance. Each of these broad categories is further divisible into two dimensions—the social and the individual—thus giving a total of four quadrants as indicated in Figure 1. The individual and social dimensions of the internal consequences involve respectively, a focus on how to structure the relations between the client and the professional in order to attain the basic objectives of professional work (healing, auditing, dispute processing, etc.) and the impact of the existence as well as nature of professional groups on the overall social handling of work. Similarly, the individual and social dimensions of the external consequences involve respectively, the impact of professionalism on the individual professional in terms of his status, income, social mobility, etc, and the impact on the professional group as a body also in terms of enhanced status, income, social mobility, etc. 85

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85 This builds on the basic structure of the sociological scholarship on the professions as noted by Andrew Abbott. See ABBOTT, supra note 40, at 6-7.
The quadrant AX denotes the individual dimension of the internal consequences. The quadrant BX denotes the social dimension of the internal consequences. AY denotes the individual dimension of the external consequences while BY denotes the social dimension of the external consequences. AX thus denotes the point of intense focus on the individual professional and the issues that concern him in relation to the attainment of the basic objective of professional work. The focus on the individual professional is not and cannot be exclusive since it is a focus on him vis-à-vis the client and the client's objective—a focus on the relationship between professional and client. BX indicates the point of focus on professionals as a group vis-à-vis their broader impact on the field in which they practice. It is a macro-focus on the relationship between groups—professionals on the one hand and society (consumers, government, etc.) on the other hand. AY and BY reflect a focus on aspects of the professions that are theoretically secondary and incidental to work, even if practically important, namely, issues of social status, income and the like—issues that are not intrinsic to work and can thus be said to be external to it. AY focuses on these issues from the perspective of the individual professional, while BY takes a macro, group focus.

The trend thus has been to analyze the professions along multiple dimensions which incorporate the individual professional as well as consumers of his services (i.e. the society) rather than one without the other, as the exclusive focus of the MDP debate on consumer interests seem to suggest. Neither the consumer nor the professional is intrinsically antecedent to the other. Sometimes the prior existence of a market for particular services leads to the rise of a profession to meet its demands, while at other times an existing group of professionals propagates a new market for professional services as was the case with the English accounting profession in the area of financial audits.

**B. The Relevance of Workplace Control**

As with the phrase "practice of law," fashioning a rigorous, consistent definition of the term "profession" has proved intractable, leading sociologists to adopt a
One of the most popular attempts is that of Roscoe Pound. Ever the sociologist, he defined a profession as referring to "a group of men pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood." Notwithstanding its high moral tone aspects of the definition, especially the learned nature of the art practiced and the element of common calling, admit an ambiguity that makes the definition susceptible to disparate, conflicting application. It may thus be thought of rather as a description, capable of accommodating more occupational groups than would ordinarily be thought of as professions. Indeed, the debate over the proper delimitation of the occupational groups with which lawyers may potentially enter into MDP arrangements in a sense implicates this definitional problem. For at its core that debate is about trying to sort out professions properly so called from non-professions, so as to foreclose the possibility of integration with the latter, in the event of MDP becoming a permitted feature of legal practice. However defined, a central feature of the definition of a profession has come to be the capacity of such occupational group to exercise control over its own work. This point is sometimes implicit and at other times explicit in the works of scholars of the professions, as may be seen from a short survey of the relevant sociological scholarship.

Eliot Freidson, following a survey of several writings which explore the control of work as the factor distinguishing professions from other forms of occupation, even over and above duration of education and level of skill, states that the single most critical factor explaining differences in same or different occupations across time and space is "the presence or absence of organized power of the workers themselves to control the terms conditions and content of their work." The hallmark of those occupations which become professionalized is the degree to which they achieve control of their work, gaining at once for their members "a labor monopoly and a place in the division of labor that is free of the authority of others over their work." Keith Macdonald traces the autonomy of English professions to at least Tudor times, noting their characterization by Charles II, along with some other non-state agencies, as "lesser governments" a reference to their capacity to share power with government in some respects. He subsequently posits that "in understanding professions, the starting point must be professional work. The content of professional work, the control of that work, differentiation in types of work and the notion of jurisdiction that the profession attempts to claim for its work are the heart of the matter." Such control of work has several ramifications for the professional

86 See, e.g., MACDONALD, supra note 68, at 1, 35 n.1; ELIOT FREIDSON, PROFESSIONALISM REBORN: THEORY, PROPHECY AND POLICY 101, 107 (1994).

87 See ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).

88 See PostScript to February 2000 Midyear Meeting, supra note 15.

89 FREIDSON, supra note 86, at 114-15.

90 MACDONALD, supra note 68, at 73-74.

91 Id. at 163. This emphasis on control of work conflicts somewhat with Macdonald's definition of professions, which emphasizes the quality of knowledge and skill they possess. Id. at 1. This conflict is however more apparent than real, for the term as defined was self-confessedly not a "closely defined technical term" but a mere shorthand. This contrasts with
project of market closure (monopoly) and social mobility, which constitute the twin pillars of Macdonald’s work, inspired as it is by that of Larson, and her theory of the professional project.

Larson’s theory accounts for the profession in terms of its intrinsic inclination towards a project of closure or monopoly of occupational markets as a means of attaining social mobility for its members. A profession’s actions can therefore be explained generally by reference to this framework. For Larson, professionalization is “an attempt to translate one order of scarce resources—special knowledge and skills—into another, namely social and economic rewards. To maintain scarcity implies a tendency to monopoly: monopoly of expertise in the market, monopoly of status in a system of stratification.” She further states that “[t]he process of organization for a market of services . . . has theoretical precedence: for indeed in order to use occupational roles for the conquest of social status, it was necessary first to build a solid base in the social division of labor.” Clearly implicit in this framework is the idea of control of work and its organization, though this is subsumed under market monopolization, which is one of the pillars of Larson’s framework. Power, the locus of its exercise (the workplace) and the ends thereof (workplace control) cannot be separated from the conflicts that constitute the main focus of this line of analysis. Eliot Freidson is perhaps ultimately the most forceful exponent of the centrality of workplace control in understanding and defining the professions. He argues that “a fruitful way of developing theoretical coherence in the field of the sociology of occupations lies in adopting as one’s central problem the analysis of the organization of control over work, and its consequences for work, workers, organizations, and society.” Part of the virtues of this approach, he posits, lies in its capacity to co-opt other theories and bodies of information that ordinarily run independently of the sociology of occupations (of which the sociology of professions is a subset) such as organization theory and industrial sociology.

Workplace control and the resultant autonomy therefore defines a profession, at least in the classic common law jurisdictions where professions have for long had the most robust existence. Most of the general value conferred on society by the professions flow at least in part from this autonomy, from the famed capacity of professions to modulate and temper state power to their potentials as a bulwark against anomie. That liberal theory is increasingly being constrained to re-evaluate its opposition to group-differentiated rights, especially cultural-group rights, and tone down its exclusive focus on the individual, is an indication that the rights of groups such as professions, can be strengthened under the aegis of a new liberalism; a sort of liberalism that has come to terms with society’s need for the communal ideals of

the subsequent exposition of work control as a defining characteristic of professional power, which was an integral part of his exposition of the theory of the professional project.


93 Id. at xvii.

94 Id. at 66.

95 FREIDSON, supra note 86, at 126.
the new civic republicanism.\textsuperscript{96} The besieged autonomy of the professions seems therefore renaissance under more auspicious ideological and theoretical underpinnings.

Embedded in the foregoing analysis on workplace control is the idea of monopolization, which standing by itself, without more, is a source of illegitimacy in contemporary social and economic thought. It is therefore necessary to attempt a separation of the idea of monopolization from the idea of workplace control, for notwithstanding the pervasive conflation of both, there is no intrinsic reason why one cannot conceptually exist independently of the other. In this wise, it bears clarification that the type of control envisaged by the analysis here is simply control of the terms on which a particular group works in producing the services offered to the consuming public, in a market that is open or potentially open to other groups. A monopoly to the extent that there is one, would exist only de facto not de jure, and would not be the result of positive state prescription. While this scenario does not eliminate the possibility of anticompetitive practices by way of occasional restraint of trade among members of the professional group, that is clearly a more limited and therefore less pernicious form of market control than a monopoly properly so called.

What is more, such market restraint is not inherent in the conceptualization of workplace control, but is rather a mere possibility—indeed a possibility open to any other professional grouping, including accountants in respect of whom there has occasionally been speculation of antitrust action in the context of the domination of the industry by the Big 5. In any case, were the legal profession’s official monopoly to be dispensed with as envisaged, such subsidiary anticompetitive effects as may be attributable to the profession on account of the prohibition of MDP should normatively be excusable on account of the professions’ special role in justice administration and the incidences of that role.\textsuperscript{97} Beyond the normative, it would also positively qualify for exemption under the current state action exception to antitrust, given that the prohibition of MDP would be the result of judicial, and therefore governmental, regulations in the context of the judiciary’s regulatory powers over the profession.


\textsuperscript{97}This line of thinking is one already accepted by the European Court of Justice in relation to the Dutch bar’s prohibition of MDP with accountants. Accepting that the members of the Dutch bar carried on an economic activity and thus constituted an association of undertakings as defined under Article 85(1) of the EC Treaty (now Article 81(1)) and that its restrictions on MDP with accountants was anti-competitive, the court nevertheless held that those restrictions were justifiable. \textit{See} Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten, 2002 E.C.R. 1-1577, [2002] 4 C.M.L.R. 27 (2002) at ¶¶ 39, 49, 58, 71, 86, 90, 94. The court concluded that the bar regulation prohibiting MDP with accountants did not infringe competition (i.e. antitrust) rules because the Bar of Netherlands could reasonably have considered that the regulation, despite its restrictive effects on competition, “is necessary for the proper practice of the legal profession . . . .” \textit{Id.} ¶¶ 87-89. This was judicial recognition at the highest levels of the European Court system, that the bar’s rules, including those that impede MDP, embody values that transcend market economics and are therefore normatively deserving of protection from the full glare of market forces.
While the legal profession in the United States is not currently free of state-granted monopoly, the analysis herein proceeds on the assumption that such monopoly is not necessary for the legal profession’s control of its work in the manner canvassed in this article. The absence of such monopoly is therefore assumed for our purposes here, in order to forestall the weakening of the analysis herein by the legal profession’s monopoly—a monopoly that is really as unnecessary for workplace control as it is delegitimizing.98 That market power or monopoly is not necessarily a corollary of workplace control is clear from the framework adopted by Eliot Krause in his analysis of the professions. He posits that if we analyze the history of craft guilds, we can develop a model of the specific dimensions of guild power99 that can be applied to any occupational group at any time and place. He then proposes a model of guild power with the following four dimensions: power and control over (a) the association (b) the workplace (c) the market and (d) the relation to the state.100 What is instructive about his model is the clear separation of control over the workplace from control over the market. He thus breaks away from other analysts in this regard, and his subsequent analysis of the American legal profession is consistent with this separation.101 My analysis in this article would therefore be consistent with a modified version of the legal profession’s guild power where market control by way of a monopoly is not an element. Though necessarily a weaker form of guild power, it is also a more legitimate form given the absence of market monopoly.

98 The long-term implication of this in the context of this article is that, ultimately, a maintenance of the prohibition of MDP would have to exist side-by-side with a loss of the legal profession’s current monopoly over legal services. This presents little problem conceptually since MDP is properly definable not as a question of the legal profession’s monopoly over legal work or the unauthorized practice of law by non-lawyers, but rather in terms of the right of any group of professionals (here, lawyers) to offer their services to the public on terms that accord with those professionals’ knowledge and experience concerning behavior or arrangements (MDP) the avoidance of which is necessary for those professionals to render high-quality service to the public. The country that most closely reflects this situation currently is England, where lawyers have no monopoly outside the courthouse. That MDP is still a contentious issue in England is indicative of the fact that it has little to do with unauthorized practice of law. This is because given the absence of a lawyers’ monopoly, English accountants and other professionals have for long had the right there to offer legal service to their clients, particularly in the lucrative areas of finance in which they are most interested. Yet they continue to seek and insist on the chance to unimpeded collaboration with lawyers by way of MDP. It would seem then that the real issue in question is one of brand name appropriation. The term “lawyer” and its variations constitute a veritable brand name that has acquired through the centuries a dominant appeal in the legal services market, as consumers of such services strongly identify with it and associate it with the highest quality legal service. It is this brand name that MDP proponents wish to tap into for other professions, rather than the mere opportunity to offer legal services.

99 For Krause, “guild” is an apt if even if somewhat disparaging description for occupations generally, including the four professions upon which he focuses: law, medicine, engineering and the academia. “Guild power,” then, is a term that describes the constitutive powers of the professions. See Krause, supra note 69, at 2-3.

100 Id. at 2-3.

101 Id. at 52-53.
That workplace control is a central feature of the MDP debate is readily observed, when we note that a major aspect of the debate has been the condition in which lawyers would work within MDPs. The whole hoopla about the various models of MDP discussed in Part IIA is no more than a negotiation of the structure of the workplace, to which has necessarily been added the question of who calls the shots in the negotiated workplace. It is in essence a negotiation of the terms of work for lawyers vis-à-vis other professions and occupational groups whose interests are implicated, and the tenacity that has attended it befits the strategic importance of the issue. The resultant balance of power in the workplace ultimately shapes an occupational group, determining whether it is elevated or demoted. In this wise, it should be noted that the occupational groups whose interests are implicated in the MDP debate are multifarious, some of them being incipient professions within the legal profession itself. This explains why a sub-group like the ABA section on taxation, whose members have expressed strong interest in working within MDPs and whose members more than any other group already do so de facto, has incentives that impel it consistently towards support for one side of the debate. 102 For, the sub-group represents among other things, a nascent profession that is already beginning to be accepted and treated as such in some quarters. The tax adviser is, for instance, accepted and treated as a distinct profession by the revenue authorities, such that even if a tax lawyer were to become disqualified from legal practice he may still be able to practice before the IRS as a tax adviser, subject to certain qualifying requirements being met. The professional distinctiveness of the tax adviser is even more apparent in the context of the more disparate professional setting in many countries of continental Europe. Thus we observe the willingness of Dutch lawyers to form inter-professional alliances by way of MDPs with tax advisers, while refusing to form the same with accountants. 103 As such the whole environment of the professions may be seen as a galaxy of sorts in which stars (ie various professions) are constantly emerging and dying, the major determinant of survival being a profession’s capacity to control the workplace. Such control comes through a negotiation or some other form of settlement with other groups, of which the MDP debate is a prime instance.

102 See Letter from Paul Sax, Chair, ABA Section on Taxation, to Robert J. Grey, Chair, ABA House of Delegates (Oct. 13, 1999) (on file with the author). The letter communicates the overwhelming vote of the tax section in support of the MDP Commission’s recommendation for the approval of MDPs. The letter shows the same tension between its acknowledged need for the legal profession’s independence and the enforcement of the rules that undergird that independence, on the one hand, and its proposal for fee sharing and the consequent relaxation of related core values, on the other hand. This tension is resolved by viewing the section as an embryonic profession with divided loyalties between its future and that of the parent profession.

103 This situation is reflected in the celebrated N.O.V.A. case in which Arthur Andersen argued before the European Court of Justice for an invalidation of the rules of the Netherlands bar regulators barring lawyers from partnerships with accountants, while permitting same partnerships with tax advisers. See Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten, 2002 E.C.R. I-1577, [2002] 4 C.M.L.R. 27 (2002). The court ruled against the accounting firm, reasoning that though the rule complained of was anticompetitive. It was nevertheless justified as a rule proportionately tailored to the achievement of certain legitimate objectives.
Indeed, this line of thinking is reinforced by recent developments in the professional services industry. Management consultants as a group are a recent addition to the professions, having emerged in the 1950s as an offshoot of the auditing function performed by accounting firms. In the last few years, there has been a spate of divestments involving the sale of their management consulting arms by the major accounting firms. This sale has been rationalized in various ways: as an attempt by the professional service firms to maintain auditor independence in the face of pressure from the Securities and Exchange Commission (SEC)\(^{104}\) as well as an attempt to provide elbow room for unimpeded marketing and image-making by the consulting arms.

However, another potent rationale for these divestments is the realization that management consultants as a group have come into their own, and that absent such a separation from the parent profession, their quest for independence and control of the terms of their work will be a constant and embarrassing feature of their relationship with the accounting firms.

These divestments were then the best-case scenario for the accounting firms, for ultimately a distinguishing feature of professional services is the volatility of the major input—human labor. The management consultants can always walk out and leave the mother firm behind with a shell—trade name and trademarks—taking core expertise and clients with them, as the Andersen Consulting dispute with Arthur Andersen amply demonstrates. Indeed, the Andersen case may properly be seen as the war of independence for the consultants, the declaration of independence having been made when Andersen Consulting partners resolved unanimously in a December 1997 meeting in San Francisco to break away from the mother firm, leading to the immediate institution of arbitration proceedings before the International Court of Arbitration, Paris.\(^{105}\)

As the facts surrounding the case show, the whole dispute was not just about income distribution, but more importantly, about control of the workplace.\(^{106}\) It was literally an attempt by an emergent profession to appropriate control of its workplace as a component of true professionalism. The quality of its work product, public image and personnel, among other essentials, are functions of such control, these being issues the management consultants rather than the accountants are best placed to decide upon for themselves. It is also significant for the purposes of our analysis that management consultants have no professional monopoly and claim none. This is a pointer to the reality that control of work need not be coupled with professional

\(^{104}\)This rationale predates the Sarbanes-Oxley Act of 2002. However the enactment of that legislation gave fillip to this rationale, given the stricture imposed thereby on accounting firms, who with rather limited exceptions, were prohibited under S.201 from offering audit and non-audit services contemporaneously to the same client. For the specifics of some of these sales, see supra, note 51 and accompanying text.

\(^{105}\)For the facts of this case and the surrounding circumstances, see NANDA, supra note 42, at 1-13. For the text of the arbitrator's decision in the case, see Andersen Consulting Unit Member Firms v. Arthur Andersen Business Unit Member Firms, Case No. 9797/CK/AER/ACS (Int'l Ct. Arb. July 28, 2000). See generally sources cited supra note 42 and accompanying text.

\(^{106}\)See NANDA, supra note 42, at 1-13. See generally sources cited supra note 42 and accompanying text.
monopoly. As significant is the fact that the resultant consulting firms are essentially not MDPs but free standing consulting firms, composed of people doing same type of work, guided by same basic principles.

The legal profession's principle of independence and related rules such as those on fee sharing primarily undergird workplace control. (Admittedly they may also serve the purpose of monopolizing the market for legal services, but this latter aspect, as already indicated,\(^{107}\) can be eliminated without impairing the integrity of the basic idea of workplace control.) The accounting profession's insistence on independence—not just in the limited sense of auditor independence, but in the broader sense of professional independence as enshrined in its rules of conduct\(^{108}\)—

\(^{107}\)See supra notes 97-98 and accompanying text.

\(^{108}\)This follows particularly from Rule 505 of the AICPA Code of Professional Conduct. Writing about this provision, the New York State Bar Association's MDP Committee states as follow:

Accountants already have confronted and resolved the issue of allowing persons who are not members of that profession to become owners in and share the profits of accounting firms. Accordingly, the requirements that the AICPA imposed when it allowed non-CPAs to become owners in CPA firms may be instructive. Pursuant to Rule 505 of the AICPA Code of Professional Conduct, non-CPAs may become owners in CPA firms only if:

1. At least two thirds of a firm's owners (in terms of financial interests and voting rights) are CPAs. Non-CPA owners must be actively engaged in providing services to firm clients as their principal occupation. Investors or commercial enterprises not actively engaged as firm members may not acquire equity stakes. Firms that don't comply with these requirements have three years to do so.

2. A CPA takes ultimate responsibility for all the services provided by the firm and for each business unit performing attest and compilation services and other engagements governed by AICPA statements on auditing standards or statements on accounting and review services. (The term business unit applies to both geographic units, such as regional offices, and functional units, such as divisions in the same office that provide different services).

3. Non-CPA owners do not assume ultimate responsibility for any attest or compilation engagement.

4. New non-CPA owners possess a bachelor's degree and, beginning in the year 2010, meet the AICPA 150-hour education requirement.

5. Non-CPA owners do not hold themselves out as CPAs. Such owners may use the title principal, owner, officer, member, shareholder or any other title permitted by state law.

6. Non-CPA owners abide by the AICPA Code of Professional Conduct. AICPA members may be held responsible under the code for all co-owners' acts.

7. Non-CPA members complete the same work-related CPE requirements that AICPA members must fulfill.

8. Non-CPA owners at all times must own their equity in their own right and be the beneficial owners of the equity capital ascribed to them. Provision must be made for the transfer of such ownership to the firm or to other qualified owners if a non-CPA ceases to be actively engaged in the firm.
similarly undergirds the accountants’ workplace control. Those professions that have lost or are in the process of losing control of the workplace are necessarily in the process of deprofessionalization. For, if professionalism is to mean something, it must be something distinct from, or at least additional to, mere productivity and satisfaction of market place demands. In line with Roscoe Pound’s articulation of the professions, it must embody some additional principles—say, ideals—that inform its functions. A profession’s control of its work and the terms thereof is a key element of its capacity to define and incorporate this additional element. Such control is therefore clearly a core attribute of a profession. It may well be that some policymakers today are askance concerning this core attribute of the professions, to the extent that it may impede efficiency in the market for services, but the choice whether to deprofessionalize or not by depriving professions of this control is ultimately a political question of sorts. Whatever may be the ultimate resolution of that question through the political process, it is clear that at this stage deprofessionalization is not an expressed policy towards the legal profession, and no one has in the course of the MDP debate attempted a broad general theory of why it should be. The fact that the law and lawyers have played and still play such a cardinal part in the life of the United States dictates that such a result, if intended, should emanate more directly through the political or governmental process, rather

(9) Non-CPA owners are barred from AICPA membership.

New York Bar Association, Report of the Special Committee on Multi-Disciplinary Practice and the Legal Profession, Section XV Part D, supra note 66, at § 13(D).

The National Association of State Boards of Accountancy (NASBA) which encompasses the statutory bodies vested with regulatory power over accounting at the state level, without taking a stand on the matter, approved guidelines for state boards that decide to allow nonlicensee ownership of CPA firms. See NASBA Issues Guidance on Non-CPA Ownership, J. Acct., Nov. 1995, at 17. Issued in 1995, these guidelines largely reflected AICPA’s 1994 position as embodied in Rule 505. In particular, it insists that “[l]icensees [accountants] must control the firm in fact as well as appearance; two-thirds of the owners must be CPAs.” Id. See also IFAC Proposes Ethics Upgrade, J. Acct., June 1997, at 6, 24. Writing on the exposure draft concerning proposed amendments to the International Federation of Accountants’ (IFAC) Code of Ethics for Professional Accountants, this journal reports that:

The [exposure draft concerning the proposed amendment] also covers guidance for accountants who employ the services of nonaccountants. Because increasingly accounting firms are being called on to do nontraditional accounting work, they often employ the services of other professionals, such as lawyers, actuaries and valuers. According to the proposal, regardless of who actually performs a service for a client, the accountant must take ultimate responsibility. Therefore, the [exposure draft] emphasizes that accountants must communicate to nonaccountants their basic ethical requirements by asking them to read the appropriate ethical code sections and to request consultation when potential conflicts arise.

IFAC Proposes Ethics Upgrade, J. Acct., June 1997, at 6, 24 (emphasis added).

109 Puritan Massachusetts for instance banned lawyers because lawyers were seen as capable of arguing both sides of a case, when only one side could be right and therefore morally justifiable. See KRAUSE, supra note 69, at 49. Thus they took the side of the devil as often as they took the side of God. Id. Also in many parts of the country, the profession was laffied in the 1840s, with no requirement of training or certification. Id. at 30-31. Similar results were attempted in England around the time of the English revolution and also in revolution-era France. See MACDONALD, supra note 68, at 74, 86.
than being subsumed under the question of MDP and the attendant question of making lawyers amenable to lay control in a multidisciplinary setting.

C. Supply Side Dynamics

It is fitting that we examine in a more concrete way, the potential effects of MDP on lawyers as suppliers of legal services who possess alternative options for the investment of their time and energy. In this wise, we will focus on what lawyers expect to gain from investing their time in the law, rather than alternative professions.

The mantra that law is a business like any other, which is oft-repeated even outside the context of the MDP debate, elides the reality that law involves features going beyond a mere business. Part of what attracts aspiring professionals to the law is this additional dimension, which clearly cannot be found institutionally in any profession that is simply a business. What, then, is this additional dimension? If we examine closely the sentiments of aspiring lawyers at the time they decide to invest their energies in the pursuit of a career in law, we will discover that this extra dimension is something in the nature of an ideal. It embodies the belief and faith that in espousing the law as a career, one would find therein an opportunity for service to the community quite distinct from, if not beyond, that available in those careers founded primarily on the pursuit of profits. Those who come to the law therefore do not come to it with the mindset of pursuing only a business endeavor. True, they hope to earn a living thereby, but beyond this they hope to pursue an ideal involving the engagement of the legal and political processes in the advancement of the varied interests and causes begging for channels of orderly articulation and expression in society. The profession to which they aspire is one within whose confines they hope to find conditions most conducive to the pursuit of this mission, by reason of the profession’s avowed focus on the propagation of that mission. When the profession’s focus becomes diverted from maintaining that balance between its business side and its ideals, as MDP necessarily entails given the proponents’ professed pursuit of efficiency gains and the attendant implications as explored above, the essence of the profession for aspiring lawyers would have been grossly impaired if not lost, and the incentive to take to the law grossly diminished. The

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106See Duncan Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic Against the System 1 (1983). Professor Kennedy wrote, albeit in the broader context of a leftist Marxist critique of legal education, that:

A surprisingly large number of law students go to law school with the notion that being a lawyer means something more, something more socially constructive than just doing a highly respectable job. There is the idea of playing the role an earlier generation associated with Brandeis, the role of service through law, carried out with superb technical competence and also with a deep belief that in its essence law is a progressive force, however much it may be distorted by the actual arrangements of capitalism.

Id. Cf. Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. Rev. 1, 75 (1988) (“The legal profession attracts, along with a lot of fairly venal and opportunistic types, a large number of the most public-regarding, socially-conscious people in our society. It’s a total waste to define a lawyer’s role in a way that will deny such people the chance to act on altruistic intentions.”); David B. Wilkins, Who Should Regulate Lawyers?, 105 Harv. L. Rev. 801, 866 n.296 (1992) (“Many students go to law school precisely because they seek a way of life that places public commitments at least on a par with the pursuit of private profit.”).
TOWARDS A REFORMED CONCEPTION

idealism that students bring to law school is the key to personal and institutional fulfillment, and any arrangement that portends the complete erosion of the institutional principles and arrangement on which they hope to hinge their pursuit of this animating ideal is one that directly threatens the profession. Were these ideals and their pursuit to be dislodged, the profession would hold less attraction to the broader audience from which it has hitherto drawn its membership. Atrophy should be the consequence.

To understand the full possibilities here, it must be recalled that professional education in the United States, to the extent that the law is involved, is usually contemplated in the broad context of the various possibilities presented to candidates contemplating a professional career. Unlike the approach in some other countries where a college degree is not a prerequisite for admission to law school, the U.S. approach implies a relatively limited number of good candidates—i.e. basic college degree holders—for professional education. The best of these have a choice between the several established professions. This is in addition to the broader choice of whether to pursue these classic professions or go into something entirely different, especially by way of entrepreneurship, for the business-inclined. MDP and the erosion of control which it implies for members of the legal profession would effectively dampen interest in law as a career. A profession, for many members of the consuming public, may simply appear as a source of services, but for the professional, it is certainly something more. It is among other things an identity, an identity that shapes the professional both within and without the work environment. When this identity is impaired through loss of control, the professional becomes compromised, not just in his work but in other respects. The negative impact on lawyers of the increased stress and partial compromise of ideas flowing from specialization and undue focus on the bottom line, even within the existing structure of practice—especially corporate law practice—has already been noted. The de-proscription of MDP would mark the complete abandonment of the very struggle to rescue the legal profession from this claim which commercialism has staked in the territory of the law. In this final phase of law’s decline, it would be wishful thinking to expect that the brightest minds would invest their efforts in the vestiges of the profession. Indeed, it would make sense to pursue a business career directly in the circumstances, than to approach it indirectly through the backdoor as law would then have become. Certainly, the law inevitably would still attract aspiring candidates, but these would be candidates of a different hue from those which have graced its courts in the past.

Writing of the heightened commercialism—which took an official character with the U.S. Supreme Court decisions of the 1970s and 1980s in important aspects of professional regulation—Mary Ann Glendon states that:

11 See MARY ANN GLENDON, A NATION UNDER LAWYERS 18-19, 34-36 (1994). Glendon specifically reports the “marked rise since 1984 [of] symptoms of physical and mental distress in the lawyer population as a whole.” Id. at 87. The incidence of alcoholism and drug abuse among lawyers as a group, 13% to 18%), is reported as being significantly higher than in the population at large by a margin of between 3% and 5%. Beyond this all segments of the profession report a decline in work satisfaction and overall fulfillment, except to some extent solo practitioners who report a greater sense of personal accomplishment, notwithstanding their having more anxiety about money. See id. at 87–88.
no one can deny that economic changes have transformed the legal landscape. Beneath intensified pressures attributable to competition, however, simmers a deeper misery rooted in meaning. The stories lawyers have always told themselves about professionalism were not just self-serving facades. They were efforts to answer Holmes’s question of questions (by no means unique to lawyers): Does all this “make out a life”? But the old incantations aren’t as comforting as they once were. Routinization has increased the drudgery that has always been inherent in most legal work. Many lawyers are suffering alienation akin to that experienced by manual laborers whose crafts were superseded by mass production. How can we maintain that we belong to a “learned calling” when so many of us are so narrowly specialized that we work on only one part of a large task? How can we claim to be learned in a broader sense when long hours scarcely leave us time to read a novel or attend a concert? The traditional claim that we pursue a livelihood “in the spirit of public service” often has a hollow ring.  

This dissatisfaction, borne of erosion—in the context of free-wheeling adherence to economic imperatives—of the meaning derivable from the pursuit of the profession, would necessarily rise to new heights in the MDP context. Surprisingly, proponents of MDP seem to make an argument that questions the relevance of lawyers’ ideals based on this very malaise currently plaguing the legal profession. They contend that the law is already commercialized and as such it is hypocritical and selfish to use its protection from commercialism as a basis for prohibiting MDP. This indeed presents a paradox whereby previous errors and the perceived irreversibility of their negative consequences on the profession become the justification for advancing those very errors or enthroning new ones. Mistakes then become self-replicating and self-legitimating, the fact that the system has managed to absorb and survive them being taken as evidence in itself that what was done was correct after all, or at least that lawyers resisted them merely to protect their turf and economic self-interest.  

112 Id. at 91.  
113 The MDP Commission responding to the concern about unforeseen ethical problems in relation to MDPs, stated:

[T]he Commission does not believe that the question carries enough weight to bar a relaxation of the present prohibitions on fee sharing and partnership with nonlawyers. If a similar concern had carried the day with respect to the provision of legal services by in-house counsel to corporate clients, by staff lawyers to union members, or by lawyers in legal services organization to needy clients, important innovations in the delivery of legal services would not have occurred.  

Updated Background and Informational Report and Request for Comments, supra note 15, at pt. 2 ¶ 2. That these developments are all to the good is, however, a contested matter. Especially is this so in relation to the innovations in advertising and provision of legal counsel by insurer to the insured. And even if they are all good, that does not by itself show that lawyer resistance to them was ab initio, ill-motivated or ill-advised. The current shapes of the innovations would owe in-built structural and other safeguards to the fact of their having been tried and tested through such initial resistance.

Robert Gordon notes the early attempt of the profession to stanch a section of the profession’s nascent alignment with the interests of big corporations whether as independent practitioners or general counsel. See Gordon, supra note 7, at ¶ 16. He also notes the bar's
Bar of Ariz.\textsuperscript{114} have been blamed for worsening the negative public image of lawyers, thus contributing to declining prestige for the profession and loss of public respect for it in the last three decades.\textsuperscript{115} Yet these decisions are latched upon as bases for canvassing further “liberalization” in line with the dictates of the market, with little reluctance over permitting group legal services for labor unions, especially the “closed panel” type. \textit{Id.} ¶ 18. He ends up concluding that notwithstanding the sincerity of those who believe that MDPs pose a threat to professional independence of judgment, the historical background of that ideal and the bar’s reaction to change indicate that “a lawyer’s lofty conception of professional ideals often conceals what is also a narrow factional or guild interest.” \textit{Id.} ¶ 28.

One must note that Gordon’s posture in this debate is somewhat at variance with the fervor and enthusiasm shown in an earlier oft-cited work towards the independence of lawyers and lawyers’ capacity for transformative rejuvenation and meaningful—even if cautious—political activism and action. \textit{See} Gordon, \textit{supra} note 110, at 68-83. In that work he presented a robust defense of lawyer independence based on both historical and current realities. He asserted for instance, that:

\begin{quote}
The vision of lawyering as a public profession has real historical content, even if the “republican” tradition that gave it content happens for the moment to be in recession. It even has a real current content, meaning that in some forms it is (and as I’ll argue must be) actually though differentially instantiated in the conventional practices of lawyers. Finally the vision has tremendous—though mostly as yet unrealized—potential to transform lawyers’ practical conceptions of their work in constructive ways.
\end{quote}

\textit{Id.} at 13.

Further in the article, he mentions nascent transformative changes among corporate lawyers, expressing the belief that such changes portend greater ones; every context including that of corporate law presenting opportunities for positive social and political action. \textit{Id.} at 80-83. Though the quoted remarks were made in the immediate context of lawyer independence from clients, the remark is set within the wider context of Gordon’s work, which is a general argument for the relevance of lawyers’ political independence. \textit{Id.} at 9-10. At the very least, one can say that such fervor about law and law practice sits uneasily with support for MDP with its potentials for further constraining lawyers through a subordinated role, in which role the capacity for transformative political involvement of the sort previously articulated by Gordon will increasingly become chimerical. Although in his letter to the MDP commission Gordon cites his article as evidence of his expertise and work on lawyer regulation, he seems impervious to this tension, or perhaps his views simply have shifted without his noticing.


\textit{115} After analyzing an extensive range of data sourced over an extended period, professors of government Amy Black and Stanley Rothman conclude that:

At the same time that public perceptions of lawyers have been declining, the role of lawyers and the legal profession has undergone dramatic changes . . . . The legal profession in this country (\textit{aided and abetted by various court decisions that changed its professional parameters}) seems, to many, to have lost its moral bearings. Our data suggest that lawyers realize this trend and are ambivalent about it, even as they correctly recognize that their public prestige has declined substantially.

attention to the impact on the individuals who presently and prospectively constitute the corps of the profession. The same goes for attempts by the profession in the past to accommodate the pressures of the market through concessions and amendments in the ethical rules. Each concession becomes further evidence of its own inherent goodness and the need for more concessions. In so asserting, the proponents comfortably forget the cost to the service providers in terms of receding control over their increasingly rationalized and routinized work, and the attendant loss of meaning and essence for the professional at a personal level. That polls consistently report high dissatisfaction by lawyers with their declining profession, with as much as twenty-five percent of those polled contemplating an abandonment of the profession, is no cause for concern for those who see the profession as purely a business. For them, MDP is but another logical step in the march of the market, where the consumer holds sway, and the service producer is but an inconsequential adjunct in the grand scheme of consumer empowerment.

It is instructive however that the full implications of regulating the economy in line with free-wheeling economic principles are not lost on some of the best minds among its proponents. In this wise, they implicitly recognize the stark choice that must be made between the morals of the market and the ideals of the law. Richard Posner, for instance, recognizes that competition, while serving the customer, can be a disservice to the court and the wider community, for “competition implies the subordination of every other interest to those of the consumer.” It should be added that one clear way by which it disserves the community—in the peculiar context of the legal profession—is through disillusionment of the very professionals on which the community ultimately relies for the provision of the desired services. Their progressive psychological and emotional impoverishment bodes no good for the community as a whole. For Posner, the personal disillusionment of many lawyers in the wake of the competitive pressure unleashed on them is only a natural consequence of the pressure to work harder. The practice of law “naturally . . . is less fun. Competitive markets are no fun at all for most sellers; the effect of competition is to transform most producer surplus into consumer surplus and in more or less time to drive the less efficient producers out of business.”

In tandem with the acclaimed benefits to the enthroned consumer, Posner quite realistically recognizes that the implications of this scenario for legal ethics are complex. In this wise, he distinguishes between two types of ethical obligations. The first type is owed to the client, and includes the rule against conflicts of interest and above all the rule that the lawyer must recognize himself as a fiduciary of the client who should be treated as the lawyer would treat himself. The second type is owed to the court and community, and includes the duties not to suborn perjury or abuse pretrial discovery. Competition would not erode the duty owed to the client but could, however, significantly erode the duty owed to people and institutions that are not clients. In making this distinction, Posner recognizes that other than

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16 See Glendon, supra note 111, at 85; see also Deborah Arron, Running from the Law: Why Good Lawyers Are Getting Out of the Legal Profession 9-22 (3d ed. 2004).

17 See Posner, supra note 9, at 93.

18 See id. at 92.

19 See id. at 92-93.
TOWARDS A REFORMED CONCEPTION

customers or clients, there are important constituencies implicated in the debate concerning superimposition of the paradigm of competitive markets on the legal profession, of which the MDP debate is to a significant extent the latest and clearly most important dimension. Thus the question becomes one open to value judgment and amenable at best to a political solution. Posner’s distinction, however, loses sight of the fact that consumers are not a homogenous group, and that even with regard to ethical obligations owed to clients, intense competition can lead to the disservice of the lowest-paying clients and breach of the duties owed them vis-à-vis wealthier clients. Widely recognized aspects of economic analysis such as the doctrine of efficient breach would ordinarily support such a result.

That Posner does not expressly recognize legal professionals themselves as a constituency whose interest merit attention in the envisaged market framework may be viewed as a failing or oversight. Though he recognizes that the market would rid itself of inefficient producers of legal services, he ignores the potential that the market may indeed ultimately eliminate not just those who are unable to measure up to the exigencies of competitive markets, but also those who are capable of competition but who see such an approach to the provision of legal services as pernicious and unfulfilling, even if economically rewarding. This would include a large portion of the current group of lawyers and aspiring lawyers who attend to the law in the hope that there would be something to it beyond market place profits—the group recorded by Mary Ann Glendon as seeing in the law only dashed hopes for the attainment of long-held ideals of self-accomplishment through service unfrosted by the cold breath of the market.

To view Posner’s position as mistaken rather than deliberate would however be oblivious of Posner’s broader, even if unstated, project of deprofessionalizing the law, of which the foregoing may be seen as an aspect. Posner has, for instance,

120A response to this might be that the customer is better off when this group of lawyers exit the market, so that the customers can obtain cheaper and better quality services from others willing to offer them under the new terms. But there is no assurance that cheaper and better services necessarily result from the new scenario. This is against the background that many of those who would exit the profession would not be doing so on account of monetary considerations. Indeed, in this category could be public service lawyers willing to accept very lowly pay under current circumstances. Also in that category would be lawyers whose pay should be discounted by the amount attributable to the pro bono work they perform. Indeed, it is possible that those exiting the profession would include many who would—barring antitrust concerns—be willing to accept a general cap on chargeable fees, were such to be prescribed. Besides this is the more general point made earlier in relation to determining whether the quality of services in such a context is necessarily better. See supra note 70 and accompanying text. For one can validly argue that shorn of the ideals that should attend them, services under the new dispensation are necessarily not of the same quality as those provided ordinarily by the profession. Following from this, it can also be argued that the services are not less expensive, since their price correlates to their diminished quality.

121Posner opines that the transformation of the legal profession in the direction of competitive enterprise “does not signify the deprofessionalization, let alone the proletarianization, of the legal profession.” Posner, supra note 9, at 64. This perhaps is a function of his focus on esoteric knowledge and its abstraction as the defining characteristics of professionalism, Id. at 37; see also Richard Posner, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 186 (1999) [hereinafter Posner, MORAL AND LEGAL THEORY], a factor whose independent significance is misplaced, since ultimately, esoteric knowledge is only an instrument in the service of the profession’s goals of which autonomy is a key aspect. He,
argued that legal education should be reduced to a two-year affair, eliminating the third year of studies. This, in his view, would not only reduce the cost of legal education and lead to quicker returns on a student’s investment in legal education, but also stanch the propensity of law professors for research lacking in pragmatic value, which tends to find an audience among students only because of the forced extended stay for the third year. He goes on to posit that, “[l]aw is fast becoming a business, and law schools cannot reverse the trend. As business ethics are not clearly inferior to legal ethics, the trend is not greatly to be regretted on moral grounds, and law schools ought therefore to adjust to it rather than fight it.” Yet in a surprising twist of circumspection and ambivalence, he immediately concedes that:

the concern about the trend is not entirely misplaced. Some important tasks in society require the use of highly specialized skills to produce services that are difficult for outsiders to evaluate. This is true of such disparate professions as law, medicine, and military leadership. Because the evaluation of these professionals (given their esoteric skills) is difficult, we want them to be inculcated with values of service and integrity that will give them internal incentives to provide reliable, honest, high-quality service. In short, we want them to have not only the requisite

however, cites Sharyn L. Roach Anleu in support of the position that “specialization, large firms, advertising and other trends in the legal profession need not result in ‘deprofessionalization’ in the sense of loss of autonomy and status, though it is likely to alter the distribution of rewards within the profession.” POSNER, supra note 9, at 64 n.45 (citing Sharyn L. Roach Anleu, The Legal Profession in the United States and Australia: Deprofessionalization or Reorganization, 19 WORK & OCCUPATIONS 184 (1992)). This proposition certainly depends on how one defines deprofessionalization, and is therefore to some extent value laden. Unless deprofessionalization is an “on or off” i.e. all or nothing phenomenon, it is bound to be a continuum, and the point in that continuum when it can be said definitively to have occurred is once again open to judgment.

Whatever the case, if loss of autonomy is the major index (as canvassed by this writer and apparently by Anleu in the quoted portion of her piece), then one is constrained to insist that the effect of Posner’s much-cherished transformation of the legal profession in the direction of competitive enterprise has, at the minimum, been to set the profession on its path towards deprofessionalization. As shown by the empirical work of Black and Rothman, advertising and related trends towards liberalization of the market for legal services in the last three decades or so have done much to substantially diminish the status and social standing of law as a profession. Black & Rothman, supra note 115. It is thus significant that in referring approvingly to Anleu’s statement, Posner apparently endorses the significance of status in the definition of a profession. Of course this endorsement is not relevant to the threshold (political) question whether law should continue as a profession, but it does indicate an acceptance that enhanced social standing—and not just protracted training and the possession of esoteric knowledge—stemming from control of its work, is of the essence to a profession. And in this wise, status need not be seen as denoting a pernicious non-egalitarian social phenomenon, given that the profession is open to all and sundry subject to the satisfaction of minimum guidelines. Indeed, many aspects of social life inherently involve status in this egalitarian sense, from owning a nice car to obtaining a university education.

122 See POSNER, MORAL AND LEGAL THEORY, supra note 121, at 281, 286–88. See also RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 433 (1990) [hereinafter POSNER, JURISPRUDENCE].

123 See POSNER, MORAL AND LEGAL THEORY, supra note 121, at 289.
skills but also an esprit de corps, a sense of being different and special. A prolonged period of specialized training is one method of imparting such a spirit. Truncate the period, and the spirit may flag.\textsuperscript{124}

One is tempted to rest on this admission regarding the limitations of enhanced competition, as proof that this is a matter where human discretion and intuition—perhaps aided in discrete aspects by insight from social science—should hold sway. However the position bears further exploration, since Posner’s concession seems to focus largely on the “values of service and integrity” inculcated through this elongated training, rather than substantive gains in skill levels derivable from such extended training. Indeed such a partial concession is quite consistent with his position that such extended training (i.e. the third year of basic law school education) really does not add much by way of substance to bored students who are forced to endure homilies from the priests of high theory. It is also consistent with his broader point concerning the decline of law as an autonomous discipline, a discipline without any distinctive method to impart to aspiring candidates.\textsuperscript{125} One is therefore constrained to point out that beyond the highly important values inculcated thereby, an extended period of training is valuable, indeed indispensable at the substantive level, due to the inherent nature of services as products which cannot be realistically evaluated \textit{ex ante} (as we would goods) before consumption.\textsuperscript{126} The only reliable way to ensure quality substantively, is to insist on extensive, even overly extensive, training as a prophylactic against the dangers presented by the intrinsic character of services.

The fact that this argument applies to all services, not just legal services, accounts independently of other reasons for the extended training that is the staple of all major professions. A related point is thus that, even if the extended training offers no real substantive knowledge gains, it is in the nature of a placebo which can have real substantive benefits to the customer. Faith in the competence of one’s adviser by virtue of his training, without more, is comforting and therefore inherently valuable in and of itself. The values inculcated via extensive training and the extensive substantive knowledge obtained thereby are therefore mutually reinforcing, since they tend towards the same goal of quality assurance. The only difference is that

\textsuperscript{124}See id. at 289.

\textsuperscript{125}See Posner, Jurisprudence, \textit{supra} note 122, at 111, 374, 424-32, 437. Posner’s focus is on the epistemology and general methodology of the profession, especially its academic branch in its traditional mode, and the profession’s lack of a core, distinct and autonomous approach. The implication drawn however and made clearer in subsequent works, see, e.g., Posner, \textit{supra} note 9, at 15, is that this absence of an autonomous approach goes with a loss of professional autonomy at the level of the profession’s organization and work. One may accept the epistemological and general methodological point made by Posner without accepting that it implies the loss of professional autonomy in the work place. Few professions, if any, are methodologically distinct. Medicine may be said to be nothing other than the confluence of other more basic sciences. Accounting is even worse, being a cornucopia of everything from basic bookkeeping (the nearest thing to a core methodology) to law and business management. If epistemological and methodological integrity were the benchmark for professional survival, perhaps no profession would be left standing.

\textsuperscript{126}This point was made previously in relation to the definition of “seamless service.” See \textit{supra} text in the paragraph immediately preceding the paragraph embodying note 23.
inculcated values as a means of attaining that objective is process-focused while the
other is substantive in character.

In characteristic fashion, Posner appreciates the limits of his own approach,
though he ultimately does not reconcile these limits—which he points out—with the
broad, sweeping recommendations he makes. In a critique of Oliver Wendell
Holmes, which could as well be directed at himself and his supersession of law
thesis, Posner posits that

if through the application of rational methods the practice of law is made
as routinized, as cut and dried, as the work now done by paralegals,
bookkeepers, inventory clerks, ticket agents, and medical technicians, the
legal profession may cease to attract the ablest people and the quality of
law may suffer.\textsuperscript{127}

His recommendations for legal education ultimately lead to (and perhaps even
assume) legal practice of such a denuded nature.

Incidentally, Posner believes that his prescriptions for the legal profession as well
as the enhanced competition in the legal services industry are the sources of true
professionalism, devoid of the mystique and other unnecessary encrustations with
which the profession has been cloistered for the sole purpose of intimidating the laity
and fostering the professional monopoly.\textsuperscript{128} For him, increased competition and other
rationalizing changes in the organization of lawyers’ work rescue the profession
from, and attenuate its recent history as, “an intricately and ingeniously reticulated
though imperfect cartel, held together against the dangers that beset and ordinarily
would destroy a cartel of many members by governmental regulations designed to
secure it against competition and new entry from without and centrifugal,
disintegrative competitive pressures from within.”\textsuperscript{129}

Even while recognizing that the legal profession’s history has not been
blemishless, one feels constrained to point out that this by itself does not justify the
profession’s annulment through innovations like MDP that impair its autonomy and
ultimately lead to deprofessionalization. The ideals, especially that of independence,
pursued—albeit imperfectly—by the profession are worthy of societal support and
advancement both on account of their significance for the protection of basic
individual liberties, as well as their moral, aesthetic and cultural significance. The
ideal of the lawyer-statesman—sans the unsavory, ingalitarian Aristotelian
dimensions—for which Anthony Kronman has provided a philosophical and
sociological grounding,\textsuperscript{130} is both aesthetically and functionally valuable: Society has

\textsuperscript{127} Posner, Moral and Legal Theory, supra note 121, at 209-10.
\textsuperscript{128} Id. at 190-97.
\textsuperscript{129} See Posner, supra note 9, at 33-34.
\textsuperscript{130} See Anthony Kronman, The Lost Lawyer, Failing Ideals of the Legal
Profession 4-6 (1993). Part One of the book entitled “Ideals” (especially chapters 1 and 2) is
a particularly bold attempt at philosophical refurbishment of the lawyer-statesman ideal and
vicariously, lawyers’ ideals generally. Especially is this so in the attempt to rescue the ideal
from the ingalitarian dimensions of its Aristotelian antecedents—a dimension that has
alienated constituencies that would otherwise have found the ideal attractive and defensible.
Kronman also, without stating so expressly, addresses, id. at 109-62, 359-64, a criticism
earlier directed at him by Posner in The Problems of Jurisprudence, supra note 127, at 448,
an interest in encouraging broad civic mindedness and the humane habits of
deliberation, expostulation and guarded social activism inherent in that ideal, and any
group that makes it a center piece of its philosophy deserve encouragement beyond
that afforded by competitive markets; more so for a profession like law which directs
human activities in relation to societal precepts, through advice provided at the very
threshold of individual and group action on critical issues. For, as Posner himself
has admitted, it is beyond economics to determine certain of society’s goals and—
one should add—to support certain of society’s identified goals.\textsuperscript{131}

As significantly, through the pursuit of its ideals, with all the imperfections, the
profession makes a significant moral point concerning altruism, emphasizing that the
totality of human values are not comprehended by the rational, value maximizing
individual of economic analysis, a point that becomes all the more salient as
individualism and runaway commercialism threaten the foundations of American
society. It is immaterial for this purpose that the profession often falls short of the
ideals. There is inherent value in having these ideals as guiding beacons and in
posting a credible effort to attain them. As Archibald Cox wrote, even much-
maligned ethics codes are not completely useless, for we need them “both to express
our moral sense and to sharpen awareness of its applications.”\textsuperscript{132}

One can therefore surmise that the urge of efficiency proponents to expose the
legal profession to the full glare of the market of which MDP represents the apogee,
proceeds from the assumption that the profession does not embody values to which
efficiency should be subjugated. Whether it embodies such values is, however, an
inherently political question, quite beyond the ken and prerogative of economic
analysis.

The role of law in American society goes beyond its role in other societies. It
orders and regulates areas of life, which in many societies are consigned de jure or
de facto to other structures of social regulation. Naturally, the lawyers who, as a
group, administer it have come to perform functions beyond those performed by
lawyers in other climes, in terms of access to justice—for all manner and shades of
causes, whether economically viable or not—and broader social regulation—through

\textsuperscript{131} In Posner’s words:

The illiberal implications of typical utilitarian and economic thinking, implications
that seem to include condoning torture and gruesome punishments, enforcing contracts
of self-enslavement, permitting gladiatorial contests in which the contestants fight to
the death, enforcing Shylock’s pound-of-flesh bond, and abolishing all welfare
programs and other forms of social insurance, cannot be brushed aside on the ground
that we ought to give efficiency priority over liberty. Why should we? Our liberal
intuitions are as deep as our utilitarian ones, and there is no intellectual procedure that
will or should force us to abandon them.

\textsc{Posner, supra} note 9, at 23. It is significant that this statement appears in a portion of the
book “which contains the fullest articulation to date of [Posner’s] overall theoretical stance.”
\textsc{Id.} at viii–ix.

\textsuperscript{132} See Archibald Cox, Ethics in Government: The Cornerstone of Public Trust, 94 W. VA.
L. REV. 281, 300 (1992), cited in \textsc{Glendon, supra} note 111, at 83.
general advisory services to clients, engagement of the political process both generally and on behalf of clients, and policy making or shaping through litigation undertaken in the context of the country’s peculiarly malleable constitution and the fluid, activist interpretive approach of the courts. In the context of America’s law-dependent democratic experiment,

[1] Lawyers of all sorts, for better or worse, will continue to have much influence on how America deals with the great issues of our time—the deterioration of natural and social environments, crime, poverty, education, race relations, the plight of child-raising families, decaying infrastructure, intense international competition, and so on. Traditionally, the country has depended on the legal profession to supply most of [its] needs for consensus builders, problem solvers, troubleshooters, dispute avoiders, and dispute settlers. The country’s need for talented persons in such roles is greater than it has ever been. The opportunities for satisfaction and a sense of personal accomplishment are unparalleled.133

To entrust the regulation of such functions to the full forces of competitive markets is to further empower an already overly powerful market, assigning to it a sort of sovereign power that it has not hitherto claimed or shown the capacity to manage.

One senses an inability on the part of MDP proponents as well as proponents of broader market-oriented ideas to transcend the legal profession’s past failings, and recognize its capacity—already shown—for transformation and evolution towards enhanced social responsiveness, without being subjugated to the full force of competitive markets.134 It may be, for instance, that the ideal of the lawyer-statesman had in the past a less-than-egalitarian connotation. But this need not be so, and indeed is not necessarily so today as Kronman shows. The ideal is capable of deployment in a manner not overly antagonistic to the dictates of modern day liberalism. It is now an ideal rooted in the nature of lawyers’ work, training and general socialization rather than on any notions of class differentiation or the like.135 We do know that institutions and ideas can evolve for the better, that they can transcend their shortcomings and advance enunciated aspirations in a socially useful way. The legal profession qualifies as one of such.

133 See GLENDON, supra note 111, at 100-01.

134 Thus for Gordon, supra note 7, at ¶ 28, the sincerity of those who believe that MDPs pose a threat to professional independence of judgment does not attenuate the historical background of the bar’s ideal and the bar’s reaction to change which indicate that “a lawyer’s lofty conception of professional ideals often conceals what is also a narrow factional or guild interest.”

135 This echoes the point made by Robert Gordon, that an argument in favor of lawyers playing an independent role in counseling and politics is the nature of legal training and experience, legal education being to an extent, an education in applied political theory. Lawyers are articulate in one of the major media of public discourse, legal language. They often have diverse experience . . . . They are professionally capable of detachment, able to see different sides of a problem and analyze motivations . . . . Thus legal training and experience provide a firm foundation for the exercise of independent judgment. Gordon, Independence of Lawyers, supra note 110, at 74-75.
D. The Legitimacy of Workplace Control and the Independence of Lawyers

An issue that must be addressed at this stage is whether the professions' claim or quest for control of the workplace, even absent market control, does not involve an arrogation of power to themselves in a manner that detracts from the prerogative of government in a democratic society to order the organization of work for the general good; in essence, whether the control of the workplace by itself is not intrinsically delegitimizing. An immediate response would be that in the context of the MDP debate, the relevance of this issue is circumscribed, given that MDP essentially implicates the relationship of one profession to another and the terms of their interaction, rather than the relationship of the professions or one of them to the state. The whole question of MDP leaves largely untouched the perpetual tension between the state and the professions that have classically tried as a group to interpose themselves as modulators and arbitrageurs of power between the rulers and the people. This is not to say that the resolution of the MDP question may not hold implications for this tension, since it can among other possible effects exacerbate or ameliorate it by weakening or strengthening one profession vis-à-vis others, but rather that such effects are tangential to the long-standing and broad issue of government-professions relations. In another vein, it may be added that the MDP debate can be seen as just an aspect of the broader discussion of the relevant factors that should inform government in its regulation of the professions, one of which would be the social value and relevance of professional autonomy and workplace control.

Beyond this attempt to distinguish and separate the MDP question from the broader, pervasive problem of professions-state relations, it is necessary to show broadly the normative legitimacy of workplace control by lawyers. Unless such legitimacy can be shown, MDP as a phenomenon that undermines that workplace control would stand unimpeached and indeed reinforced. The legitimacy of lawyers' control of their workplace is best advanced by addressing directly the issue of lawyer independence, and attempting a more general justification of that independence, of which lawyer autonomy is but an aspect. Such justification would further reinforce the case for lawyer control of their work and the terms thereof, since genuine lawyer independence is impossible absent such control. This point is not only basic (indeed intuitive) but is also one that dovetails into the finest traditions of liberal thought. Along this line of thinking, the professions' attempt to control their work can properly be conceptualized as an effort at expanding the aggregate zone of private autonomy in society, by doing so for both the individual professional and the profession as a group. In exploring the normative dimension implicated in the issue of lawyers' independence and lawyers' control of their work as a key element of that independence, our primary question is essentially this: "Why is the independence of lawyers valuable or necessary, and by extension, why does it make sense to maintain

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136De Tocqueville captured this element for lawyers, especially American lawyers. See ALEXIS DE TOCQUEVILLE, I DEMOCRACY IN AMERICA 272-280 (Alfred A. Knopf Inc., 1994) (1835). For an exploration of the power of professions, especially the legal profession, as encapsulated in the notion that English professions (unlike continental European professions) are themselves lesser governments, see MACDONALD, supra note 68, at 72-74, 76-78, 97 (1995). Even continental European professions are not completely devoid of this dimension, however. See id. at 85-86.
the proscription of MDP in order to protect that independence from the threat posed by MDP and related arrangements?" The analysis below can be fully appreciated only when this cardinal question is constantly kept in view, since that analysis is essentially a response to this question.

Robert Gordon in an oft-cited article develops a typology of independence for lawyers. 137 Positing that lawyers may disagree on what independence means, he identifies three types of independence, which encapsulate lawyers’ contemplation of the subject historically:

1.) **Corporate self-regulation**, meaning lawyers’ freedom to regulate their own practices and be free from outside regulation;

2.) **Control over conditions of work**, meaning discretion and autonomy from outside direction in deciding the conditions of work, i.e. which clients and causes to represent, how much time to invest in a particular matter, what strategy or tactic to pursue, and so forth; and

3.) **Political independence**, meaning lawyers’ existence as:

   i) a separate estate or autonomous social force that is not subordinated to external authorities, particularly the state, in their assertion and pursuit of clients’ rights (the liberal advocacy ideal); and

   ii) as a public profession owing duties to the maintenance of the law and its infrastructure, which duties demand that the lawyer be free of all the particular factional interests of civil society including those of the clients (the ideal of law as a public profession). 138

Gordon’s article disavows interest in independence of the first and second type, focusing on the third type for which he provides a nuanced defense, his main thesis being “that the independence of lawyers has a social and political value going well beyond the value of effective client service.” 139 as implicated in the two prongs of political independence: the liberal advocacy ideal and the ideal of law as a public profession. Noting that the ideal of the law as a public profession is rooted in the now diminished but abiding republican tradition of civic virtue, Gordon shows the tension between that ideal and the liberal advocacy ideal. The former tends towards broad duties to the legal and political framework as a justification of lawyer independence, while the latter emphasizes the dedicated vindication of client rights—even if ostensibly inimical to the legal framework—as a justification of lawyer independence. 140 Focusing on the idea of purposive lawyering, which ameliorates the harshness of the most radical interpretations of the liberal advocacy ideal, and the tradition of civic virtue, Gordon justifies the political independence of lawyers on the basis of the political judgments inherent in their counseling functions which are

137 See Gordon, supra note 110, at 1. It may be noted that the forms of independence in Gordon’s typology falls within the quadrants AX and BX in Figure 1, supra text accompanying note 77. Since each form of independence mentioned by Gordon implicates individual as well as social questions, each one traverses AX as well as BX.

138 Gordon, supra note 110, at 6-13.

139 Id. at 10.

140 Id. at 14-21.
norm-shaping and behavior-influencing activities. For, "though the form and content of advice may vary, the choice of how to characterize the law to the client inevitably implicates political judgment." As important is his justification of independence in moral and aesthetic terms, emphasizing the lawyer's role in maintaining a legal framework that is fundamental to a socio-economic system that is just, at least in the aggregate. Overall, the justification for the lawyer's political independence is functional and aesthetic, focusing on his unique political role in non-adversarial contexts as well as his role in maintaining the legal framework and repairing the damages to that framework that necessarily result from excessive use of the liberal advocacy ideal. On this line of reasoning, lawyers are a separate estate by virtue of the role they play in society, which role demands such independence. "The very language and tone in which lawyers speak of the law to their clients is a local political action that subtly reinforces or subverts the legitimacy of the regulatory state." Gordon thus conceives of lawyering in deeply political terms.

As further evidence of the intrinsic political character of lawyering, one may point to the lawyer's gatekeeper functions. The lawyer often has to determine whether a potential client's cause is worthy and hence, whether it should be let into the stream of adjudication. This is not to say that lay persons may not enter the stream of adjudication without lawyer involvement, but rather that they enter on terms significantly less favorable than those whose access to the stream is facilitated by a lawyer. Lawyer involvement therefore performs a strong signaling function both to the opposing party and the public at large. To be represented by counsel is to signal that one is most serious about the issues in contention and that this seriousness is shared by a third party—counsel—who deems it worthy of his time and efforts. While this signaling is most potent in class action suits and other contingency fee cases where counsel invest their resources in pursuit of litigation for which there could potentially be no remuneration, it is also present in non-contingency fee cases. This because even when counsel's fees are assured rather than being contingent, counsel has nonetheless a residual reputational risk in taking on any client's matter. Since this reputational risk cannot be completely met by charging high fees, counsel needs to assess and carefully vet ab initio the merits of the cases he accepts. Because this rigorous intake process is assumed to have been followed by a lawyer for each case he accepts, a lawyer's acceptance of a client's brief thus legitimizes the client's cause. The process of determining which causes thus merit legitimation and

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141 Id. at 29-30.
142 For instance Gordon wrote that, [e]ven economists once given to seeing in business life nothing more than the clash of self-interest have again begun to recognize what their classical predecessors took for granted and the Japanese economic successes have dramatized. That is, markets cannot operate on purely self-seeking opportunism and strategic behavior; rather, they require an underlying substratum of moral conventions—norms of trust, loyalty, honesty, and reciprocity of dealing . . . . On this view, one purpose of legal advice is to remind clients who may be tempted to ignore the infrastructure for the sake of short-term profits of the usefulness of underlying business conventions . . . as well as of the explicit rules of the legal framework.

Id. at 18, 23-24.
143 Id. at 29.
admission into the stream of state-sponsored adjudication is itself no less an adjudicatory and hence political function. In this function the lawyer is aided by ethical rules such as the general doctrine against abuse of the judicial process, as reflected for instance in the injunction against filing frivolous legal claims.\textsuperscript{144}

It may be noted that the term "political independence" as used in Gordon's classification is not quite precise to the extent that it can sustain the impression that independence for political purposes is separable from corporate independence or control over conditions of work. It is difficult however to conceive of political independence without the other two. Gordon's typology can therefore be taken as a rough context-specific classification that enables Gordon to isolate and focus on his primary interest—the liberal advocacy and public profession ideals. While the focus of the discussion in this paper are the first and second types of independence, corporate self-regulation and control over conditions of work—the debate about MDP implicating less the perennial problem of state-profession relations than that of inter-professional relations, these forms of independence are inextricably linked to that of political independence because, political independence in its ramifications ultimately provide the raison d'etre for them. For, as David Wilkins has argued, albeit in the more discrete context of defining the optimal approaches to the enforcement of lawyers' compliance with professional norms,

\textsuperscript{145}\textsuperscript{[t]}he common assertion that independence is synonymous with self-regulation is, in this context, nothing more than a tautology. Without some justification for why society should value a profession that is self-regulating, the mere assertion that professions in general are thought to have this power is of little consequence. Similarly, without more, the fact that lawyers seek a certain level of control over the terms and conditions of their work is entitled to little weight. Like most other people, lawyers probably value the ability to decide how, when, and on what projects to devote their professional skills.\textsuperscript{145}

Along these lines, it is arguable that corporate self-regulation and control over conditions of work—at least as they relate to non-state parties—\textsuperscript{146}are justifiable as extensions or corollaries of political independence, since it is inconceivable—at least incongruous—that having claimed independence for the fundamental purpose of influencing or resisting the state, the profession would risk usurpation of that independence towards other ends by non-state actors who may assume corporate or workplace control.

David Wilkins, noting that participants in various regulatory debates often seek to link their arguments about professional independence to some more general conception of the public good, proceeds to isolate two categories of such arguments. The first is the position that an independent legal profession is necessary to maintain the separation of powers among the three branches of government—the separation of powers argument. The second is the position that an independent legal profession plays an essential role in preserving the rights of citizens in a democracy—the

\textsuperscript{144}\textit{See} \textsc{Model Rules of Prof' l Conduct} R. 3.1 (2004).

\textsuperscript{145}Wilkins, \textit{supra} note 110, at 854 (citations omitted).

\textsuperscript{146}To the extent that they relate to the state, they become largely coterminous with political independence, not corollaries of it.
democratic theory argument. Even though he adds that only arguments of the second kind constrain the enforcement choices that are at issue in his article, 147 this does not diminish the importance in the context of the present paper of the separation of powers argument, for it highlights another generic rationale for lawyer independence not captured in Robert Gordon's largely functional and aesthetic focus on lawyers' ideals. 148 The separation of powers argument thus merits a more detailed examination in the context of this paper.

Wilkins' argument is located within the context of his project, which concerns the means of achieving greater compliance with lawyers' professional norms. His suggested approach is to have different types of enforcement mechanisms going beyond traditional enforcement by bar or court disciplinary committees. Wilkins' approach presumably endorses lawyer rules and norms generally—or at least is neutral towards them—these being the very end for which enhanced compliance is sought. The problem he has to confront is that in seeking to strengthen professional norms in this way, one of these norms—professional independence—stands in the way, and his discourse is in part an argument for the relaxation or reinterpretation of this norm, to facilitate better enforcement of and compliance with other lawyer norms. In this regard, Wilkins specifically canvasses for the devolution of regulatory authority over the profession to several bodies, legislative and executive, notwithstanding the potential threat that such devolution poses to the lawyer's independence in terms of his role in maintaining individual liberty in a democracy. 149 For Wilkins, a proper understanding of independence is not incompatible with such devolution of regulatory authority over lawyers. His thesis is not an overarching conceptual attack on lawyer independence as apparent or implicit in some critiques such as those that conceive of the law as largely a monopoly that should be broken through accentuated state intervention or otherwise. 150 Indeed, Wilkins writes that, "[t]he value of a legal profession that is prepared to defy state authority in the name of individual rights, creatively advocate solutions to complex problems, and dissuade recalcitrant clients from undermining long-term legal values cannot seriously be disputed." 151

Because Wilkins does not accept the separation of powers rationale for lawyer independence, he sets out to deconstruct it and show its weakness. A very credible

147 Wilkins, supra note 110, at 855.

148 While Gordon's focus may be stretched to encompass a role for the lawyer in the separation of powers, as distinct from the role of the profession as an independent estate unto itself, that is clearly not Gordon's emphasis. This makes it unnecessary to dwell further on it in the context of this article. Even the more basic role of the lawyer in preserving individual rights and liberties in a democracy (the democratic theory argument) is not emphasized in Gordon's analysis. See Gordon, supra note 110, at 7-83. However, it is clearly implicit in his treatment of the liberal advocacy ideal—the second pillar of political independence. Id. at 9-30.

149 Wilkins specifically canvasses devolution of the powers to enforce disciplinary rules to agencies outside the bar and the judiciary, fashioned along the same lines as the Securities Exchange Commission or the Occupational Health and Safety Administration. See Wilkins, supra note 110, at 844-47.

150 See sources cited supra note 9.

151 Wilkins, supra note 110, at 860.
case can however be made—and this is the position canvassed below—that on the contrary, the relevance of the separation of powers argument is undiminished. The separation of powers argument remains abiding and resonant as a basis for lawyer independence, lawyers forming in this wise a key aspect of the judicial branch conceptually and practically.

Wilkins, adopting a typology of the separation of powers argument provided by Wolfram, distinguishes between two classes of arguments made in support of lawyer independence from external regulation as an incidence of separation of powers. First is the affirmative aspect of the inherent powers doctrine, which posits that courts have an inherent power to regulate lawyers as an essential part of judicial powers, even in the absence of specific statutes authorizing the court to do so. Second is the negative aspect of the inherent powers doctrine, which posits that courts have the power to regulate the legal profession to the exclusion of all other branches of government. This negative aspect is bifurcated into formalist and functionalist versions.

The formalist version of the negative inherent powers argument embodies the basic assertion that regulation of lawyers is part of the judicial function, which cannot be invaded by other branches of government. The functional version, on the other hand, asserts that the courts need to retain exclusive regulatory power over the legal profession because such exclusive power functions as a pragmatic buffer against the usurpation of judicial power by the other branches of government. Wilkins has no problem with the affirmative aspect of the inherent power doctrine, which he sees as justifiable. He sees the negative aspect however as problematic because it excludes the most effective enforcement systems, i.e. enforcement systems administered by other branches of government. Wilkins, therefore, proceeds to deconstruct and lay bare the negative aspect of the inherent power doctrine in order to arrive at a proper understanding of the separation of powers (and hence the independence of lawyers); an understanding that is compatible with the joint exercise of regulatory control over the legal profession by the judiciary and other branches of government.

1. Exclusive Judicial Control Under the Formalist Version of the Negative Inherent Powers Doctrine

Asserting that the claim of exclusive judicial authority over lawyers under the formalist version of the negative inherent powers doctrine proves too much Wilkins argues that

[a]lthough lawyers are essential to courts, they also play a crucial role in many executive and legislative affairs. With respect to these matters, the formal argument in favor of giving the legislature or an administrative agency regulatory jurisdiction are [sic] as compelling as the parallel claim asserted by courts in the litigation field.\textsuperscript{154}

\textsuperscript{152} Id. at 855 n.244 (citing Charles W. Wolfram, Lawyer Turf and Lawyer Regulation—The Role of the Inherent Powers Doctrine, 12 U. Ark. Little Rock L. Rev. 1, 4 (1989)).

\textsuperscript{153} Id. at 856.

\textsuperscript{154} Wilkins, supra note 110, at 856-57.
Wilkins' position here is however unsustainable. There is a crucial distinction between the role lawyers play within the judiciary and the role they play elsewhere, including the legislature and executive. The roles lawyers play in these other contexts derive from their primary role as actual or putative litigators. When lawyers play roles outside the litigation context, the value they bring to the table derives largely from their ability to anticipate what the courts would do and translate the insight so obtained into guidance for others. The capacity to take in a situation, process the key facts, isolate the key factors and authoritatively predict what the courts would do if presented with the same scenario is the core of the lawyer's expertise in the non-litigation context—his core competence so to say. Of course the guidance provided by the lawyer to the executive or legislature is not often expressed in terms of predictions of what the courts would do. However, at the back of every lawyer's mind, whether he is drafting a piece of legislation or writing a legal opinion on tax assessments, is a keen awareness of the centrality of the courts to his labors. In essence, in all situations where his talents qua lawyer are called into play outside the litigation context, the lawyer is trying to anticipate, prevent or prepare for litigation. Litigation before the courts may then be said to be the operating system on which lawyers run. It runs in the background, providing the platform for the lawyers' non-litigation activities.

Consider the lawyer's non-litigation activities in the corporate law context, the context in which the lawyer's connection with the judiciary is most easily challenged. Here the lawyer's work is principally outside the litigation context, being primarily transactional in character. Yet on closer examination, the nexus between transactional practice and litigation is anything but tenuous. Viewed critically, transactional practice or counseling constitutes a form of bargaining in the shadow of litigation. In the course of their work, transactional lawyers essentially try to anticipate what the courts would do were the transaction in question to come before a court in litigation. With this in mind, transactional work from the lawyer's perspective involves largely the amelioration of the litigation risks inherent in a transaction, such amelioration often involving bargaining on behalf of one's client in an effort to shift the most risk permissible to other parties to the transaction. Litigation and transactional work are thus very intertwined.

To the extent that Wilkins' challenge to exclusive judicial oversight over lawyers under the formalist version of the negative inherent powers argument is premised on an attenuated nexus between the judiciary and lawyers in the non-litigation context, the challenge fails in the light of the foregoing. The lawyer's relevance in the non-litigation context derives directly from his cultivated acquaintance with litigation and its paraphernalia (judicial precedents, the methods of statutory interpretation, judicial attitudes, etc.). The difference between the lawyer as litigator and the lawyer as a non-litigator is that the former deals with live litigation, while the latter deals with potential litigation. Cases past, present and prospective thus constitute the proper province of the lawyer in all instances in which his talents are called into play.

It is arguable that when the lawyer's talents are tapped outside the litigation context, it is not his substantive knowledge of litigation and its processes that is tapped, but rather a certain disposition of thought and temperament that is the result

155 Of course such risk shifting may sometimes have the negative result of shifting externalities to third parties who are unconnected with the transaction. That does not however detract from the essential character of the transactional lawyering process.
of constant engagement with the rebarbative issues of social life. This disposition, it can be argued, is a quality of mind more in the nature of intuition than knowledge and lawyers develop it because of the issues they deal with rather than the framework (litigation) with which they deal with those issues. Along this line of thinking, anyone who constantly grapples with difficult and practical issues of human life ought to develop the capacity for tact, circumspection and over-arching temperance that lawyers bring to the table. Lawyers’ possession of this capacity could therefore be said to be an accidental or contingent result of their work, rather than an imperative of their method—cases. A response to this argument would be to ask why lawyers, as a group, consistently remain the advisers of choice in the various non-litigation roles to which they are pressed; why no other single group of professionals has made the same impact on political life in American and lawyers given that other professionals also grapple with difficult issues of social life. A social worker, for instance, is no less confronted in his workday activities by the vicissitudes of social life than is a lawyer. The difference between a lawyer’s situation and the social worker’s, with the well-defined problems that he confronts on behalf of his clients as well as the expectations held of him and the methods by which he fulfills those expectations, would be apparent from the exploration below.

Anthony Kronman gives an articulation of the lawyer’s expertise and its essence that is apposite in the present context, as it explains why the lawyer’s disposition is a function of his substantive legal engagements and his training, rather than a contingency. He states that

[a] disproportionate number of America’s political leaders have always come from the legal profession. If lawyers are especially well-equipped to play a leading role in politics, however, it is not because of their technical legal expertise. It is because their training and experience promote the deliberative virtues of the lawyer-statesmen ideal.\footnote{KRONMAN, supra note 130, at 4 (emphasis added).}

But what is the lawyer-statesmen ideal and how do lawyers come to acquire it in large measure? Kronman describes this ideal as the “character-virtue of practical wisdom,” “a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess.”\footnote{Id. at 2, 109.} Lawyers come to acquire it by training and experience of a type that the ordinary circumstances of law practice promote in great measure. Implicit in the lawyer-statesman ideal is the notion that the experience of lawyers promotes the trait of prudence—or practical wisdom—and public-spiritedness and their professional duties require these traits in some regular and important way.\footnote{Id. at 109.} The training that lawyers receive, especially through the Socratic method of law teaching, is pivotal to the early cultivation of the necessary deliberative virtues along several lines. It exposes them to the unsettled regions of the law where there are no ready answers and certainty is an illusion, thus forcing them to cultivate a capacity for bifocality and circumspection. Beyond that, it forces them to attempt a reconciliation of the multiple dimensions of issues to which they are exposed by making them sometimes consider the case from the role

\footnote{KRONMAN, supra note 130, at 4 (emphasis added).}
of a judge rather than an advocate. In this role of judge, they must take a stand and decide between the competing perspectives of roughly equal weight presented in a case.\textsuperscript{159}

"The case method is largely an exercise in forced role-playing."\textsuperscript{160} In this exercise, students re-imagine and play the roles of both the parties and the judge. Its emphasis on the priority of the judge's point of view, however, habituates students to

the need for reasoned judgment under conditions of maximum moral ambiguity, and by giving them practice at rendering such judgments themselves. The result is a combination of attitudes in tension with one another: an expanded capacity for sympathetic understanding coupled with the ability to see every claim with the coldest and most distant, most judicial, eye; a broad familiarity with diverse and irreconcilable human goods coupled with an indefatigable willingness to enter the fray, hear the arguments, render judgment, and articulate the reasons that support it, even when all hope of moral certainty is gone.\textsuperscript{161}

Overall, lawyers are able, through exposure to the Socratic method, to entertain competing claims, not just in the sense of tolerating those who espouse such claims, but also in the sense of making an effort to see each claim and sympathize with its perspective "from the point of view of those who actually endorse it . . . "\textsuperscript{162}

Although few lawyers go on to become judges, this disposition inculcated through the case method system retains a centrality in the function of lawyers in all the settings in which their professional talent as lawyers are tapped.\textsuperscript{163} To show how this is so, Kronman examines the nature of the work that lawyers do in both their

\begin{itemize}
\item \textsuperscript{159} Id. at 110-15.
\item \textsuperscript{160} Id. at 117.
\item \textsuperscript{161} Id. at 117-18.
\item \textsuperscript{162} Id. at 114.
\item \textsuperscript{163} Id. at 121. Though Kronman hinges his argument in great part on the Socratic method, there is evidence that attorneys elsewhere develop this same capacity even when they were educated by means other than the case method which is a relatively recent pedagogical tool, just as eighteenth and nineteenth century U.S. attorneys were able to develop the same skills prior to the introduction of the Socratic system in the nineteenth century by Christopher Langdell. (Actually, Kronman does not account for the prudence of the earlier American lawyers who were not educated with the Socratic system. This potentially weakens his argument, but I aim to reinforce his argument by noting here the capacity of exposure to law practice to generate by itself, even absent Socratic education, the full complement of prudence required of the lawyer.) Regarding the prudence and deliberative qualities of the accomplished Victorian attorney (i.e. solicitor, as distinct from the then-more-accomplished barristers) see W.J. Reader, Professional Men, The Rise of the Professional Classes in Nineteenth-Century England 69 (1966). The case method's overarching importance would then seem to be that it nurtures prudence relatively early in law students, as distinct from other systems of lawyer education that entrusts the propagation of prudence exclusively to experience in law practice. The latter approach would however have been particularly appropriate in the context of earlier forms of lawyer education that relied heavily on extensive periods of apprenticeship to senior lawyers, during which the student lawyer was exposed to the prudence-cultivating engagements.
\end{itemize}
advocacy and counseling roles. He posits that the law is not applied as an abstract set of self-executing rules, but rather in social context, by human beings. From the client's perspective, therefore, the most important part of the lawyer's expertise is his knowledge of a certain sort of human behavior—the behavior of those who play a role in determining how the law shall be applied. These include judges, administrative agencies, and the client's competitors or adversaries. But of all these people in whose behavior lawyers have an interest, it is in judges that they have the most interest, since when any issue is pressed far enough, it must of necessity be referred to judges who, in Ronald Dworkin's famous words, are the princes of law's sprawling empire. It is thus by a lawyer's knowledge of judicial behavior to which his training in law school first exposed him, that his fitness for purpose is ultimately to be adjudged.

Kronman views the above presentation of the lawyer's expertise as the narrow view, in which the lawyer adopts the narrow purpose of merely implementing the client's untempered instructions, employing his expertise concerning judicial behavior. However, even this narrow view is noteworthy in its presentation of the strong nexus between the lawyer's work and the judicial department, a presentation that is by itself significant in terms of our critique of Wilkins' argument regarding the formalist version of the negative inherent powers doctrine, as well as our broader argument for exclusive judicial control of lawyers.

On Kronman's broader and proper view of the lawyer's expertise, in predicting and navigating the behavior of others who play a role in determining how law is applied, the lawyer does not act as a passive instrument in the hands of a client. He does not just take the client's interest as perfectly formed at the point the client issues his instructions. Rather the lawyer first helps to shape the client's wishes and objectives in order to determine the client's best interest, regarding which interest the lawyer and client further engage in a second level deliberation in order to facilitate a wise choice or decision by the client.

The lawyer's role in thus probing and examining the client's interests (and even motives) is an exercise in joint deliberation. In this exercise the lawyer tries to put himself in the client's position, but not as the client would. Rather he approaches the client's position with both sympathy and detachment, replicating the same calm and equanimity that a judge brings to bear on a matter, rather than the passion that usually extends to a client's definition of his own interest. On this account, the lawyer, even when he is out to simply discover under the narrow view, what judges and other arbiters of his client's interest would do, can only be effective if he properly deliberates with the client about the client's avowed interests, in order to

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164 Kronman, supra note 130, at 123-24.

165 Notice how Kronman's notion of the core expertise of a lawyer approximates Prahalad and Hamel's concept of the core competence of the corporation, Prahalad & Hamel, supra note 50, at 80-83, from which my notion of the core competence of lawyers, Wilkins, supra note 110, at 856-57, is derived.

166 Kronman, supra note 130, at 123-24.

167 Id. at 123.

168 Id. at 129-34.
first get the client to straighten out those interests and rid them of conflicting and harmful dimensions.

Beyond straightening the client's interests in this way, the lawyer goes on, as part of the second level deliberation, to assist the client in making a deliberately wise choice or decision concerning those very interests, broadly engaging in the same exercise of joint deliberation with the client. This exercise exposes to the client the conflicting dimensions of the available choices and the various dimensions implicated. The need for deliberative engagement with the client thus exists at all levels of the client-lawyer relationship. It is central to robust counseling. The lawyer, whether as counselor or advocate, cannot be a mere minister to the raw and untempered ambition of the client. He has to exercise deliberative judgment using the practical wisdom that is the forte of the lawyer-statesman. It is thus the lawyer's training and his constant involvement with engagements that peculiarly exercise his deliberative qualities that imbue him with the quality of prudence. His possession of that quality is far from being an accident or contingency.

Not being an accident, these qualities deriving as they do from his judicial training and the judicial requirements of his workaday life, link him inextricably to the judicial branch, which by virtue of such linkage has a supreme overriding interest in the regulation of lawyers as well as the infrastructure to make such regulation effective and efficient. This overriding interest in lawyer regulation, in the context of the lawyer's peculiar training and expertise, anchors the judiciary's claim to its exclusive regulation as an aspect of the separation of powers.

2. Exclusive Judicial Control Under the Functionalist Version of the Negative Inherent Powers Doctrine

Regarding the functionalist version of the negative inherent powers doctrine, Wilkins asserts that the case based thereon for exclusive judicial control of the legal profession is unpersuasive. This is particularly because its case for such control assumes that rule-making as well as enforcement authority will be transferred to the executive or the legislature—an assumption that Wilkins expressly removes from his framework by accepting that rule-making power would remain exclusively with the judiciary. Wilkins' argument thus assumes that "all enforcement officials are bound by the current rules of professional conduct." This omission makes unrealistic and unpersuasive his argument that all enforcement agencies would be assumed to have accepted the ethical rules of the bar as expressed in the Model Rules. The decision about who and what to prosecute or not

\[\text{\textsuperscript{69}}\] \textit{Id.} at 129.

\[\text{\textsuperscript{170}}\] A key aspect of this infrastructure is the unique culture of the judiciary itself—a broad culture of circumspection, neutrality, and decorum both in and out of court. This culture inspires the lawyer since it reflects and reinforces, in a manner that no other secular institution can, the qualities that the lawyer finds useful and essential in his own work.

\[\text{\textsuperscript{171}}\] Wilkins, \textit{supra} note 110, at 858.

\[\text{\textsuperscript{172}}\] It is practically unrealistic because once it is established that the legislature and the executive have legitimate bases for regulating lawyers, there is little justification for restricting such regulation to rule enforcement only.
prosecute, what sanctions to impose, when to prosecute, among others, all go to
determine the power of an ethical norm, strengthening it or diminishing it over time
almost as effectively as direct formal adjustment of the rules by the authorities vested
with express rule making power. Indeed the process of deciding whether a particular
lawyer behavior merits enforcement action involves an initial act of rule
interpretation and adjudication by the enforcement agency, leading to a decision—
the decision to enforce or not to enforce. This process of interpretation and
adjudication is no less norm-generating than the decisions of judges. Witness the
reach and influence of SEC no-action letters in the area of capital market regulation.
Enforcement gives meaning and content to a rule.

Wilkins seems to have vaguely recognized that enforcement powers have an
interpretive and rule-shaping dimension. He therefore attempts to provide for the
vagaries and permutations of interpretation and enforcement of the profession’s rules
by multiple enforcement agencies. This he does by allowing for the power of the
ABA to reign in aberrant results through express and exclusive powers of rule
amendments directed thereat.\textsuperscript{173} In this regard, it is noteworthy that to the extent that
such ultimate power over substantive rules and the impact of their enforcement rests
with the ABA, the legal profession’s independence remains intact, this being the key
factor for purposes of this Article. Wilkins does, however, recognize other
weaknesses in this approach. Using the Office of Thrift Services (OTS) as an
example, he acknowledges that an enforcement agency “might dispute the bar’s
power to overturn the agency’s interpretation.”\textsuperscript{174} This is a problem of no mean
dimension, for it underscores the futility of attempting a separation of rule
interpretation from rule enforcement in an administrative context in which:

1. the rule maker (ABA/the judiciary) has no control over the rule enforcer,
   and
2. the rule maker or its constituents (i.e. lawyers) are effectively subject to
   the jurisdiction of the rule enforcer whose key function is to ensure
   compliance by the rule maker or its constituents.

Indeed, quite apart from the agency with primary enforcement powers, other
agencies and interests might weigh in and contend against the bar’s rule-making
power in the circumstances. The most effective agencies, such as the SEC, are
supreme within their own spheres of authority in the sense that they typically work
with enabling powers provided by the legislature under special statutes, being
statutes that give them a core exclusive jurisdiction and subsidiary rule-making
powers. When this is not the case, as in where rule-making or rule-interpretation
powers are split, the result is a relatively-weak agency. With this in mind, the
chances are quite high that the ABA as the rule-making agency would be challenged
in the context of Wilkins’ framework. It is instructive that in relation to the Internal
Revenue Service (IRS), for instance, the Justice Department has argued that antitrust
considerations are implicated when the IRS defers to private agencies like the ABA
and the AICPA in rulemaking and decisions concerning tax practice before the
IRS.\textsuperscript{175} In a sense, the IRS can be said to possess a shared jurisdiction with the

\textsuperscript{173}Wilkins, \textit{supra} note 110, at 811 n.41.

\textsuperscript{174}Id. at 811 n.41.

\textsuperscript{175}See Justice Department Comments on Report of IRS Chief Counsel’s Advisory
Committee on Rules of Professional Conduct in Representation of Taxpayers Before IRS,
TOWARDS A REFORMED CONCEPTION

Justice Department regarding those who practice before the IRS. It is therefore not out of place that the Justice department insists on offering an interpretation of the IRS rules, which challenges the IRS position. Wilkins' ultimate decision to "bracket this potential jurisdictional dispute by assuming that all enforcement officials concede the ABA's power to render binding interpretations of ambiguous professional norms" is thus in order as a conceptual necessity, there being no solution ultimately to the problems attendant upon separating rule-making and rule-enforcement powers as he advocates. The legal profession's capacity to defy state authority when necessary and to be otherwise creative and active necessarily diminishes as compliance enforcement progressively devolves to far-flung administrative and legislative agencies and their mechanisms. Whenever compliance mechanisms involve non-lawyers, as would likely be the case if MDP were to become permitted, independence is jeopardized since enforcement action, even absent express rule making powers, nevertheless shapes the rules, and in shaping the rules interferes with judicial prerogative of control over the legal profession whose work is appurtenant to that of the judicial branch. Maintenance of the separation of powers between the judiciary and other branches of government therefore mandates and justifies the independence of the legal profession, generally. By compromising that independence, in terms of facilitating the control of lawyers and their work by other professions over whom the judiciary has no regulatory power, MDP undermines the separation of powers.

In the light of the foregoing, some skepticism is in order regarding the edifice that Wilkins constructs on the foundation of the assumption that rule making and rule-enforcement are separable such that the agency with enforcement powers need not have rule-making power; an edifice that provides him the basis for the conclusion that separation of powers as a justification for lawyer independence is not a sufficient reason for exclusive judicial exercise of regulatory power over the legal profession. In thus detracting from separation of powers, this argument detracts from the independence of lawyers. But as indicated above, its impact is weakened

(BNA) No. 241, at J-1, J-2 (Dec. 14, 1976). On two of the proposed rules, the Justice Department had this to say:

[T]he Committee briefly discussed the problem which arises when a licensed attorney, employed on a full-time basis by a firm of certified public accountants, seeks to represent the firm's clients in IRS proceedings. Although the Committee did not propose a regulation to deal with that situation, it did encourage two private associations to jointly develop dispositive rules . . . . The Department believes it unnecessary, and inappropriate as a matter of public policy, for the IRS in effect to delegate authority to private associations of competitors to determine conditions under which individuals may practice before the IRS.

Id.

176 It is noteworthy that the scenario here falls short of the extreme version of shared regulatory control advocated by Wilkins, in which special agencies would be established primarily for the purpose of monitoring lawyers to ensure compliance with the ethical rules. Wilkins, supra note 110, at 844-47.

177 Id. at 811 n.41.

178 Id. at 858.
by the underlying assumption. Thus weakened, it effectively leaves undiminished, the case for independence of lawyers. 179

Beyond the foregoing, there is a cultural dimension to the independence of the legal profession—a dimension which provides a distinct justification for that independence. The idea of cultural industries has become pervasive in trade and business regulatory circles. Underlying this idea is the notion that some industries embody more than the bare bones of productive activity, holding for the public something in the nature of a cultural ideal. The preservation of such industries becomes a national imperative, among other reasons, on account of their value as a bulwark against the blandness, homogeneity, commercialism and general anomic inherent in runaway economic liberalism. In various countries, such cultural industries have included farmstead agriculture, the cinematographic industry and the print media. Even if one were to admit that the legal profession is no more than a business as claimed in some quarters, there remains a case for its inclusion in this class of industries in the context of the American socio-political milieu. The independent legal practitioner, especially in his liberal advocacy mode, is an article of faith for Americans. In conducting their daily affairs such a practitioner, even if somewhat romanticized, is a constant element in their calculus. This flows from the pervasive role of the law and lawyers in the American society, a factor related to the distinctive nature and power (political and otherwise) of the American judiciary to which the profession is appurtenant. 180 An independent legal profession provides the context for the autonomy of the independent legal practitioner, whether in the counseling or litigation roles. It therefore merits preservation as a distinct, historical institution of social life, much like indigenous publications and film industries in some countries. The American lawyer and his special role constitute no less a distinctive aspect of American life than American democracy itself.

Writing in the context of international trade, Trebilcock and Howse state that, “concerns over the impact of trade and investment liberalization on a country’s cultural sectors (e.g. film, television, radio, newspapers, magazine and book

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179 It should be explained, that for the purposes of the present article, regulation of the legal profession by the judiciary is treated as coterminous with the profession’s regulation of itself. Given that judges may be viewed as ex-lawyers in the sense that they no longer offer legal service to clients, it may be argued that they are not members of the legal profession. This, however, would be a marginal argument, not just because judges in the United States are invariably lawyers, but also because lawyers as a group do not conceive of judges as belonging to a different profession as is the case in some other countries.

180 On the distinctive nature and power of the American judiciary, see Abram Chayes, How Does the Constitution Establish Justice?, 101 Harv. L. Rev. 1026, 1028 (1988). Chayes writes that,

The judicial department established by the framers was unique among nations in 1787 and, to a large extent, remains unique today. All modern societies have judges, and an independent judiciary is a hallmark of liberal democracy. In other countries, however, the judicial system is regarded primarily as a service provided by the government, much like education . . . with the workaday function of resolving the disputes that arise in the ordinary course of social and economic life. The courts in such societies are, of course, essential organs. Unlike the judicial branch brought to life by article III [of the Constitution], however, they are not thought to be, nor are they in fact, engaged in the political process.

Id.
publishing) continue to exert considerable influence in international economic relations as reflected in general or qualified exceptions (often contentious) for such sectors in domestic and international policy instruments. That such measures are "often contentious" underscores the opposition to them by third countries in the context of international trade rather than their non-acceptance within the country introducing them. These measures enjoy unsurpassed legitimacy in trade policy circles today, and their importance can only increase as the global civil society becomes stronger and more assertive in defense of non-economic values.

Overall, one feels drawn to Aleksandr I. Solzhenitsyn who said that he does feel that for humanity . . . moral authority is a necessity. The course of world history and world culture shows us that there are, and should be, moral authorities. They constitute a kind of spiritual hierarchy which is absolutely necessary for every individual. In the twentieth century, the universal tendency, not only in the West but everywhere, was to destroy any hierarchies so that everyone could act just as he or she wants without regarding any moral authority. This has already been reflected in, and has influenced, the whole of world culture, and the level of world culture has been lowered as a result.

In the aggregate, an independent legal profession, its flaws notwithstanding, is a moral authority as well as a legitimate aspect of American, if not world, culture, the demise of which would constitute a veritable recession towards moral and cultural impoverishment.

It is necessary in relation to the cultural value of an independent legal profession to address the oft-repeated view that many of the norms that undergird its independence are of pretended ancient vintage, having been only recently instituted in circumstances that evince an anti-competitive rationale. Arguments of this type frame the legal profession's core values or associated rules, including its norm of


182 Trebilcock and Howse describe them, for instance, as somewhat ominous and romanticized, noting that "[t]raditional closed societies may have preserved distinctive customs and beliefs against external influences, but only at the cost of racial, religious, and ideological intolerance, and of significant limits on individual self-development." Id. at 13. One can only point out that the examples here are rather extreme and predictably disposable, since there is universal belief today that racial, religious and ideological intolerance are unacceptable and as such, undermine any measure in which they are infused, including measures for the protection of industries. It is noteworthy that the authors, Canadians, are not quite critical of Canada's cultural exceptions under the North America Free Trade Agreement for certain cultural industries. Significantly, they recognize the inevitability of differences between nations on the balance between values of efficiency and competing considerations in sensitive areas like cultural industries, and accept that concerns about such industries are legitimate, even if capable of pursuit in other ways. Id. at 366.


184 See, e.g., Wolfram, supra note 5; Green, supra note 8, at 1115-18, 1144-45.
independence as reflected in the ABA Model Rule 5.4 prohibition against fee sharing, as artifices constructed with less than the public interest in mind.\textsuperscript{185}

This line of argument merits two responses. First is the fact that doctrinally, Model Rule 5.4 and associated rules are context-specific and carefully crafted derivatives of the age-long principle of common law and equity that obliges agents to maintain the highest levels of loyalty in executing their office. Beyond this, they also derive more directly from ancient statutes and the inherent powers of the courts as applied in English courts at least since the thirteenth century. Such statutes together with the inherent powers doctrine were the principal sources of disciplinary authority over medieval English lawyers.\textsuperscript{186} Though this regulatory arsenal seems narrower than what is available today, medieval judges were able to exercise disciplinary control over lawyers with regard to breaches of a broad range of values paralleling today's core values. Chief of these were breaches of the duty of loyalty as manifest in the duty to avoid conflict of interest (i.e. "ambidexterity" in vintage parlance). The breach of client's confidences, incompetent representation, negligence and abuse of the court's procedure or overreaching were all sanctionable by the court under inherent powers and statutory powers, as was the unauthorized practice of law.\textsuperscript{187} Most notable among the statutory powers was the power to jail a lawyer for a year and a day for ethical misbehavior,\textsuperscript{188} a power, which by criminalizing such conduct, indicated its accentuated perniciousness as a major annoyance to clients and the commonwealth in the context of those times. The protection of clients and the general public therefore lay at the root of these controls, notwithstanding that they could also be seen as constituting turf protection by medieval lawyers. Especially is this so with regard to the London Ordinance of 1280 which tried to create a professional monopoly of sorts by limiting to admitted lawyers the right to hold themselves out to clients as professional lawyers. This was done in the hope that incompetent representation and abuse of the judicial process

\textsuperscript{185} See Wolfram, \textit{supra} note 5, at 1628-31; Green, \textit{supra} note 8, at 1144-45.


\textsuperscript{187} \textit{Id.} at 61; \textit{See also} Paul Brand, \textit{The Origins of the English Legal Profession} 115-16 (1992).

\textsuperscript{188} Rose, \textit{supra} note 186, at 49-50. The earliest principal statutes were thirteenth century in origin: The Statute of Westminster I, Chapter 29 (1275), the London Ordinance of 1280 and the Ordinance of 1292. \textit{Id.} at 49. The Statute of Westminster I, Chapter 29, prohibited deceit or collusion against the court or any party by any serjeant (roughly equivalent to the modern English Barrister) or other person (an ambiguous term that was interpreted by the courts to encompass medieval attorneys—i.e. the lesser branch of the profession roughly equivalent to the modern English solicitor). This broad prohibition against deceit was expansively interpreted by the courts to reach many kinds of lawyer misbehavior, including breaches of the lawyer's duty of confidentiality and duty of loyalty, though it was not always clear whether the courts were acting under the inherent powers or under the statute. \textit{Id.} at 57-62. The latter encompassed the broad array of conflict situations reflected in modern conflict of interest regulation: simultaneous representation of current clients adverse in the same matter, representation adverse to former client, representation adverse to current client on unrelated matter, representation of potentially adverse multiple plaintiffs and defendants, conflict between client's interest and the lawyer's personal interest. \textit{See} Brand, \textit{supra} note 187, at 124-25, 127, 135.
would thereby be eliminated. The vices at which such control was aimed, whether lawyer misbehavior or unauthorized practice, were as much a scourge for the client as they were for the courts. The intent to secure the lawyer's independence in the context of the circumstances in which the medieval lawyer practiced and the temptations and vices to which he was most prone is clearly discernible.

These statutes and their judicial application were therefore measured responses to the vices and exigencies of medieval law practice, and were heavily animated by the need to secure a lawyer's independence from the interests (including the lawyer's personal interests) that competed with the lawyer's loyalty to his clients. The same concerns animate the modern prohibition against fee sharing and partnerships with non-lawyers—prohibitions undergirding the ban on MDP. These rules are no more than the same ancient principle of independence in the service of clients and the public made manifest in the context of modern law practice. The law is inherently dynamic and the law of lawyering cannot be an exception. The application of the ancient norm of fidelity to clients as underscored by the rules on loyalty, confidentiality and general independence must find current expression in ways that meet the exigencies of contemporary law practice, not the least of which exigency is the ever-threatening hegemony of high finance. Model Rule 5.4 as well as associated rules therefore shares the same pedigree as the ancient norms they embody and express.

The second response to the line of thinking in question is that even if one were to admit that the key components of the legal profession's norms are recent constructs, this point is largely irrelevant to the utility of such norms. Their utility cannot be assessed principally on the basis of their vintage, but rather by reference to the purposes they currently seek to attain and their fit for those purposes. Many of the most important institutions and legal principles in use today are serendipitous constructs; derivatives or distortions of earlier rules, as exemplified by Oliver Wendell Holmes' treatment of the long-abandoned law of deodands and its modern admiralty law manifestation in the form of actions in rem.

In sum, the case for the independence of lawyers remains strong, whether it is grounded on the liberal advocacy ideal, the ideal of law as a public profession, the separation of powers, cultural relevance or some permutation of these rationales. MDP as a threat to that independence cannot be meaningfully advanced while the case for independence remains so strong.

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189 Rose, supra note 186, at 63-65, 72. The London Ordinance of 1280 was tailored specifically for lawyer regulation in a manner that makes it worthy of description as the "earliest antecedent of modern professional regulation." Id. at 72.

190 See Brand, supra note 187, at 124-25, 127, 135.

191 See Rose, supra note 186, at 61, 65, 70 n.301, 74-76; Brand, supra note 187, at 121-23.

192 Simultaneous representation of current clients adverse in the same matter seemed for instance to have been a rampant form of ambidexterity, as were other forms of chicanery too blatant for today's average lawyer. Rose, supra note 186, at 70 n.301; Brand, supra note 187, at 121-23.

IV. CONCLUSION

Charles Wolfram, in the context of a predominantly favorable scholarly attitude towards MDP, observed that “[s]hockingly little has been written in opposition to MDP.” That a debate between academicians can be thus one-sided is a curious element of the discourse on MDP—an element that invites further inquiry into the factors that inform the research agenda of legal academics.

While such inquiry is beyond the compass of the present article, it bears mentioning that the effect of the lopsided character of the debates has been to engender a palpable feeling of despondency in the minds of many of those in the legal profession who are sensitive to the deleterious consequences of MDP. This was especially so before the Enron Corporation affair and the subsequent accounting scandals of 2002, which exposed the deeply corroded ethical infrastructure of the Big 5 firms in the United States and thus delegitimized their quest for MDP. This despondency should not come as a surprise, given that the academic branch of any discipline is supposed to be the repository of the best thinking in the field, so that the opinions of legal academicians, while largely academic, has a more-than-academic impact on the broader field. By critically analyzing the arguments deployed by proponents of MDP and making a case against it, this article effects a much-needed realignment and rebalancing of the MDP debate. This realignment is important because, notwithstanding the lull in the debate following the passage of the Sarbanes-Oxley Act in 2002, the issue is far from being settled, there being nothing in that Act that directly addresses the legal profession’s independence in the MDP context, the protections afforded the profession thereby being only contingent and incidental to the primary purpose of maintaining auditor independence.

194 Wolfram, supra note 5, at 1626 nn.3-4.