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Flight from the Center:  
Is It Just or Just About Money?

Burnele V. Powell†

The central concern of the American legal profession during the first decade of the twenty-first century will be the completion of its transition from a cartel based on the punishment, or threat of punishment, of transgressors into a profession guided by ideals that are embraced as defining characteristics. At its core, this evolution is about the nature of lawyer responsibility to clients and the courts. To identify this issue is also to acknowledge that the lawyer-client relationship has not always been pure in its motives or perfect in its execution. Too often, too little attention has been given to the lawyer's professional question—How can I do good?—and too much attention to the lawyer's business question—How can I do well?

Whether, and to what effect, the transition from trade association to professional association will be completed is not at all certain. During the final three decades of the twentieth century, the drive toward professionalism has certainly accelerated, bringing the American legal profession to a point even more accomplished than its fabled golden era. Still, because changes in the legal profession, including reforms of its substantive rules, its regulatory procedures, and its sanctioning...

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3. See Burnele V. Powell, Diagnosis and Prescription: Illusory Lawyer Disciplinary Reform and the Need for a Moratorium, 1 J. INST. FOR STUDY LEGAL ETHICS 263, 284 n.11 (1996); see also infra note 59.

4. See generally MODEL RULES OF PROFESSIONAL CONDUCT (1983). In 1997, the ABA initiated a new look at the substantive rules, naming the ABA Commission on the Evaluation of the Rules of Professional Conduct (Ethics...
standards, have coincided with the most dizzying and complex socio-economic and psychological changes in our nation’s history, our ability to appreciate the extent of the advance has been severely tested. Whatever may be the perception of those changes today, however, the lesson over time will be that we have vastly underestimated the depth and breadth of the change that has occurred in the legal profession.

Although replacement of the Model Code of Professional Responsibility by the Model Rules of Professional Conduct marks the beginning of the modern, reality-based view of the legal profession, the profession has since taken on a string of tough issues that bolster its claim to being the strongest, most substantively attentive, and most active professional regulatory regime in the nation. The American Bar Association’s (ABA) adoption of the McKay recommendations, which moved lawyer disciplinary systems conceptually from punishment-based, lawyer-discipline regimes to assistance-based, lawyer-regulatory systems, illustrates the quiet change. Thus, de-


5. In 1989, the ABA established the Commission on Evaluation of Disciplinary Enforcement (the McKay Commission). See Powell, supra note 1, at 709 n.2.


8. “Reality-based” views encompass such pragmatic decisions as the more lenient treatment of rules allowing fee splitting and the use of threats of litigation.

9. The McKay Report called for such needs as expanding regulation to protect the public and to assist lawyers, strengthening regulation of the profession by the judiciary, increasing public confidence in the disciplinary system, expediting the disciplinary process, and providing adequate resources to support the operation of disciplinary systems. See COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASSN, REPORT ix-xvii (1991) [hereinafter MCKAY REPORT].

10. In reference to the McKay recommendations, note that: Although never explicitly acknowledged, the McKay Report departed from the Clark Report in fundamentally different ways in regard to focus, philosophy, and programs. McKay’s recommendations reflected the need for the profession, as it were, to invite the public inside the lawyer disciplinary process, to embrace the legal profession’s critics so that they might feel vested in the lawyer regulatory system,
Despite the failure of many lawyers to notice the change, the regulatory model, with its emphasis on helping the public by helping errant lawyers, now sets the cadence for the profession.\textsuperscript{11} Despite the slow and, at times, arduous pace of change,\textsuperscript{12} however, at the close of the twentieth century there is little room for doubt that the legal profession has demonstrated that it can, indeed, do well while simultaneously acting in its highest tradition as servant of the courts and the public.\textsuperscript{13}

\begin{itemize}
  \item and to lower the barriers of professionalism that have historically left lawyers, vulnerable to charges that they care more about themselves than about their clients or the general society.
  \item Powell, supra note 1, at 723. See, e.g., \textit{MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT} Rule 11(G) (1996) (discussing the Alternatives to Discipline Program which can include “arbitration, mediation, law office management assistance, lawyer assistance programs, psychological counseling, continuing legal education programs, and ethics school”).
  \item 11. It should not be surprising that most lawyers pay little attention to the lawyer regulatory system. Since most are unlikely ever to have contact with it beyond registration and fee payments. It remains, like the brake pads on an automobile, something whose dependability is assumed unless there is screeching or an outright system failure.
  \item 12. For example, note the battle to open the records under the Oregon Rule. See Powell, supra note 1, at 717 (“McKay urged the profession to improve the credibility of the lawyer discipline process by opening complaint files and providing complainants with case-status reports covering the disciplinary process from complaint through disposition.”). Unfortunately, the Commission’s endorsement of this so-called Oregon Rule sought, imprudently in the eyes of many, “to link the open records recommendation with the recommendation elsewhere that complainants have absolute immunity from civil or criminal liability.” \textit{Id}. at 718. Furthermore, note the “landslide” victory for rewriting Model Rule 6.1, see \textit{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 6.1 (1993); the continuing fight over the “noisy withdrawal” and client fraud exception, see \textit{Center for Professional Responsibility: Model Rule 1.6—Reporter’s Explanation of Changes, Ethics 2000 Commission Draft for Public Comment, March 1999} (visited Mar. 28, 2000) \texttt{<http://www.abanet.org/cpr/e2ks/rule16memo.html>}; see also \textit{RESTATEMENT (THIRD) OF THE LAW: GOVERNING LAWYERS § 117B (Proposed Final Draft No. 2, Apr. 1998)}; and downright silly decisions such as \textit{Florida Bar v. Went For It, Inc.}, 515 U.S. 618, 635-45 (1995) (Kennedy, J., dissenting) (criticizing the Court’s reliance on a non-scientific, self-serving report generated by the Florida Bar as the basis for allowing Florida Bar rules banning truthful advertising). In \textit{Florida Bar v. Went For It, Inc.}, the Court accepted the report’s conclusion that Floridians considered targeted direct-mail solicitations of accident victims within 30 days of an accident to be an invasion of privacy and therefore detrimental to the public perception of attorneys. Thus, in holding the Florida Bar rule as constitutional, the Court accepted the view that an unsubstantiated expression of public perception about an influential interest group justified limiting commercial speech implicating an individual’s right to timely, truthful, understandable information likely to aid their decision-making and advance their economic interest. \textit{See id.}; see also Powell, supra note 3, at 263-65.
  \item 13. For example, Model Rule 6.1 encourages lawyers to provide fifty hours
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Notwithstanding what has been achieved, however, that which is, perhaps, the most daunting challenge still lies ahead. Having put in place changes that will inevitably transform the practice of law, the legal profession must now face squarely an issue that, up to this point, it has been able to deflect or artfully sidestep. With publication of the ABA Commission on Multi-disciplinary Practice's Report, the question uncomfortably raised is whether, having addressed its ethics and ethos, the profession is now prepared to address the public impact of its economic structure. It must decide whether rules that define how legal services are delivered are intended to serve the needs of pro bono service per year, see Model Rules of Professional Conduct Rule 6.1 (1993), while Rule 8.2 requires the attorney to communicate with candor to a tribunal or to the public when seeking public office, see id. Rule 8.2.


15. The legal profession's focus on "professionalism" during the last decade has been nothing, if not a testament, to hope and perseverance. We persist in attempts to make this ideal concrete, despite continuing strong evidence that confusion reigns, at least in part, because we lack an agreed definition of professionalism. We are unable to measure the significance of its presence or absence and even if we understood it, no common course of action exists about how we might address it. See, e.g., Burne V. Powell, Lawyer Professionalism as Ordinary Morality, 35 S. Tex. L. Rev. 275, 277 (1994) (observing that "the pursuit of lawyer professionalism has generated such passionate support... and such a variety of self-proclaimed innovative programs, codes and experiments, that one has to wonder how a concept that is so widely discussed could be so little-defined"); Timothy P. Terrell & James H. Wildman, Rethinking "Professionalism?", 41 Emory L.J. 403, 404 (noting that "the concept of professionalism has become confused and disjointed"); see also Deborah L. Rhode, Institutionalizing Ethics, 44 Case W. Res. L. Rev. 665, 668-69 (1994) (noting that the steps that might be appropriate to ensure that all interests are effectively represented, so as to mitigate the problem of unequal advocacy, have never been satisfactorily elaborated); Kara Anne Nagorney, Note, A Noble Profession? A Discussion of Civility Among Lawyers, 12 Geo. J. Legal Ethics 815, 815-16 (1999). Nagorney noted that:

As incivility has become recognized as a legitimate concern, we are now faced with the decision on how to address it. That is, to more precisely consider what it is, where it is manifest, what it has done to change the nature and perception of the profession, possibilities for improvement, and what benefits improvements will bring.

Id.

of the courts, clients and the public—which is to say, to promote the doing of good—or the economic interest of lawyers in exploiting a professional monopoly—which is to say, to ensure that lawyers do well.

At the outset, it must be conceded that the line distinguishing when the legal profession is seeking to do good for the public as opposed to simply doing well for itself is not easily drawn. In many, if not most, instances, the result consists of a combination of outcomes. Still, in the instant case, the acknowledgement that the fight over whether legal services should be permitted through structures other than the traditional law firm has been remarkable for its candor about the raw economic interests at stake. Opponents, proponents,

17. There is no suggestion here that lawyers have anything more than a figurative monopoly. As the McKay Report makes clear, it is the highest court in each jurisdiction that has the monopoly: lawyers are only privileged to serve the court under a licensing system that requires proof of minimum competency. See McKay Report, supra note 9, at iii-v, ix, 2-7.

18. Consider, for example, the rejection of the Model Code's DR 2-107(A), prohibiting fee splitting except when the client consents and each lawyer does equal work, in favor of Model Rule 1.5(e), allowing fee splitting with the client's consent and each lawyer assumes "joint responsibility." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1983). The change was said to do good for clients by encouraging lawyers to affiliate with lawyers who could bring a higher degree of expertise to a case. Of course, lawyers coincidentally were able to do well for themselves, since the change better facilitated "bundling" of cases. A profit, therefore, could be made on the attraction and referral of a case, even when no substantive legal value was added to a client's case.

19. The very first witness from whom the Commission heard at the 1999 ABA Annual Meeting, Pam H. Schneider, outgoing Chair of the ABA Section of Real Property, Probate and Trust Law—the largest of the ABA Sections—testified that in the areas of real property and trust law there have been significant inroads by nonlawyers in the practice of law. See Hearings Before the Commission on Multidisciplinary Practice (Aug. 8, 1999) (testimony of Pam H. Schneider, outgoing Chair of the ABA Section of Real Property, Probate and Trust Law), available at <http://www.abanet.org/cpr/schneider.html> [hereinafter Schneider Testimony]. Schneider went on to report that the Section Council supported the Commission's recommendations as an essential starting point for modifying the Model Rules to permit multidisciplinary practices. See id. It urged, however, that further consideration, consultation, and deliberation of the specific structure be undertaken prior to implementation to assure that the values of the legal profession—including the preservation of independent professional judgment, client loyalty, and confidentiality—not be compromised. See id.

20. The written testimony filed with the Commission for its August 8, 1999 hearing by Steven C. Krane framed the issue this way:

Why are we looking at this issue at all? Why has MDP suddenly been thrust upon the legal profession as an issue with which it must grap-
and observers alike have acknowledged the economic ramifications of the multidisciplinary practice (MDP) debate. Speaking unreservedly in the lead-off debate on the issue before the ABA House of Delegates, Mr. Lawrence Fox made the hall ring with an allusion to Senator Dale Bumpers' remarks before the Senate's recent Trial of Impeachment: "When you hear somebody say, 'This is not about money,' it's about money." If the economic implications of the carving up of the


21. See Schneider Testimony, supra note 19 (stressing that the Section Council believed that the marketplace required a comprehensive framework that would allow the legal profession to regulate the competition).

22. Delos Lutton, in written testimony for the Paris-headquartered Union Internationale des Avocats (UIA), which he described as "the world's oldest international association of bars, bar associations, and law societies," advised: We [the UIA] took no position on whether MDPs should be permitted, because, as an international association, we had to face the reality that MDPs are in fact permitted and exist in many countries. . . . [W]e only want to emphasize that our proposal does not encourage anyone to adopt MDPs. Instead, it recognizes that they exist and imposes standards to be met in order to preserve the crucial aspects of the attorney-client relationship which have been an integral part of the justice system in advanced societies for many hundreds of years: confidentiality, independence, loyalty, and avoidance of conflicts of interest.


nation’s legal business were not readily apparent, the Commission was reminded of what was at stake by a variety of witnesses: U.S. tax lawyers worrying about the increasing empowerment\textsuperscript{25} and professional competitiveness\textsuperscript{26} of domestic and foreign accounting firms;\textsuperscript{27} large law firms decrying and

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It was a breach of his family trust[,] It is a sex scandal. H.L. Mencken said one time, “When you hear somebody say, ‘This is not about money,’ it’s about money. . . . And when you hear somebody say, ‘This is not about sex,’ it’s about sex.”
\end{quote}

Id.

In his recounting of his nightmare in which all law firms had been taken over by large accounting firms, Fox’s reminder in essence was that, “They say that it ain’t about money, but of course, it’s about money.” Cf. Hearings Before the Commission on Multidisciplinary Practice (Feb. 4, 1999) (written remarks of Lawrence J. Fox, Drinker Biddle & Reath LLP), available at <http://www.abanet.org/cpr/fox1.html>; Hearings Before the Commission on Multidisciplinary Practice (Feb. 4, 1999) (oral testimony of Lawrence J. Fox, Drinker Biddle & Reath LLP), available at <http://www.abanet.org/cpr/fox3.html>.


26. The Commission was told about the rising numbers of tax lawyers in the ABA Section on Taxation now affiliated with accounting firms. Also noted were the increasingly high numbers of top law school graduates annually recruited by accounting firms.

27. Because the United States and Canada are the lucrative markets for lawyer services, the accounting profession is prepared to work for as long as may be necessary to gain entry into it. In written remarks, Melinda Merk and Patrick Schmidt, co-chair and vice chair of the Tax Law Committee of the Young Lawyers Division of the American Bar Association offered the following assessment in testimony before the Commission:

\begin{quote}
During the last few years, the legal profession has undergone significant changes, particularly in the tax law area. Today, young lawyers have more opportunities upon graduation from law school to apply their legal education in non-traditional practice settings such as consulting firms, banks, and trust companies, investment and financial planning services firms, corporate legal departments, and various governments agencies. The marketplace has changed in the last few years as well—young entrepreneurs of the “.com generation” are looking for efficient “one-stop shopping,” where all of their business, financial, legal, and investment needs can be taken care of by a team of advisors under one roof. Given the current state of affairs, one wonders who the existing Model Rules are really protecting?
\end{quote}

Hearings Before the Commission on Multidisciplinary Practice (Mar. 3, 2000) (written remarks of Melinda Merk and Patrick Schmidt, co-chair and vice chair of the Tax Law Committee of the Young Lawyers Division of the Ameri-
warning against the missteps of the ancillary business practices debate; lawyers in boutique law firms asking for recognition that the future of legal practice has already turned towards specialized forms of practice that are interdisciplinary and collaborative; and the urgings by general practitioners

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28. Alone among the jurisdictions, on March 1, 1990 (effective January 1, 1991), the District of Columbia Court of Appeals adopted a version of ABA Model Rule 5.4(b) permitting fee sharing between a lawyer and a nonlawyer. What at first appeared to be a major departure from the common view, however, has proven to be of less than apparent value. As adopted, the D.C. version of 5.4(b) restricted such partnerships solely to organizations providing legal services. This limitation proved to be the provision's undoing. It had the practical effect of allowing nonlawyers to join law firms, while preventing lawyers from becoming partners in the firms of other professionals. See generally Susan Gilbert & Larry Lempert, The Nonlawyer Partner: Moderate Proposals Deserve a Chance, 2 GEO. J. LEGAL ETHICS 383 (1988). See COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, REPORTER'S NOTES (1999), available at <http://www.abanet.org/cpr/mdpappendixc.html> [hereinafter REPORTER'S NOTES] (citing additional limitations imposed as a result of ABA Formal Opinion 91-360, holding it impermissible for law firms operating in more than one jurisdiction to have a nonlawyer partner in its D.C. office).

29. The effort to restrict multijurisdictional practice runs entirely counter to the entire edifice on which the late twentieth century American—and global—economic expansion has been built, namely free trade. See Anthony E. Davis, Collision Course with Disaster—Changes in “MDP,” “MJP,” and “UPL,” N.Y. L.J., Mar. 6, 1990, at 3.

The Statement on Multidisciplinary Practice in the ABA Section of Environment, Energy and Resources noted that:

1. The practice areas represented by the Section of Environment, Energy and Resources have very long experience with multidisciplinary practice. . . .

2. . . . However, long experience of Section members shows that for environmental, energy, and resource practitioners many of the feared problems of multidisciplinary practice are more theoretical than real. After extensive inquiries we have identified very few examples where malpractice, conflicts of interest, or unauthorized practice of law actually resulted from the participation of professionals from other disciplines in legal work in these practice fields, although there are a number of instances where clients were led astray by regulatory analysis conducted by non-lawyers.

3. The factors that have led to multidisciplinary practice in our fields are, if anything, accelerating: the complexity of regulatory programs; the interconnectedness of technological, economic, and legal issues; the globalization of both activities and impacts; the explosive growth of available data; and the interest of lawyers who have (voluntarily or by necessity) left law practice, but who wish to continue to use their special skills.

4. Any high walls that we try to create to insulate lawyers’ work from that of other professionals will likely be swamped by events, and will be disservice to our members and our clients.
that the rules must be adjusted to allow small and solo practitioners the options necessary to compete with business competitors who are increasingly engaged in the delivery of low-end legal services.  

Preliminarily, at least, it is the Commission itself that must wrestle with the issue of whether its Report found the appropriate balance in the debate over MDP.  

Although it made clear in its initial presentation to the ABA House of Delegates that the Commission’s intent was to address only the ethical and structural concerns inherent in allowing lawyers to join with other professionals to offer services through a single practice (which is to say, the requirements for doing good), the

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6. The Section, in particular, and the American Bar Association, in general, can play a constructive role by undertaking the following efforts:

(d.) Foster understanding among the professions by encouraging multidisciplinary conferences, training programs, and professional societies;
(e.) Help our members who are not employed in traditional lawyer settings to maintain their legal proficiency, share thoughts and experiences with other lawyers, and have access to legal research resources; and
(f.) Clarify and make more rational the restrictions on non-lawyers joining law firms and on lawyers joining non-law firms.


30. Noted, in particular, were real estate brokers, insurance sales personnel, financial planners, social workers, and even the publishing industry. In an earlier ABA Commission, the Commission on Nonlawyer Activity in Law Related Situations, one witness before that Commission reportedly estimated that in less than a decade, 50,000 independent legal technicians would be providing legal services in numerous instances: divorces, child support enforcement, low asset personal bankruptcy, estate probates, social security applications, name changes, visas, extensions of stay and other immigration matters, applications for credit and eviction complaints and defense. See COMMISSION ON NONLAWYER PRACTICE, AMERICAN BAR ASS’N, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS 10 (1995); see also REPORTER’S NOTES, supra note 28 (citing Elizabeth McDonald, Texas Probes Andersen, Deloitte On Charges of Practicing Law, WALL ST. J., May 28, 1998, at B15).


32. ABA Model Rule 5.4 provides, in pertinent part, that:
(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
1. an agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable
resolution to table the Report adopted by the House of Delegates was pointedly aimed at sending a message that some sizeable number of delegates were primarily concerned about what such a change would mean for their economic well-being, notwithstanding the needs of the courts or the public. In view of the tabling, therefore, the obligation is now clearly on the Commission to decide whether it matters, and if so how much, that the good it has sought to accomplish may have the consequence of leaving some lawyers less well-off financially or socially.

period of time after the lawyer's death; . . .
(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer; . . . and
(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan . . .
(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
(1) a nonlawyer owns any interest; . . .
(2) a nonlawyer is a corporate director or officer thereof; or
(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.


33. It is, of course, impossible to say what percentage of the proponents for Report No. 109 were focused solely on economic concerns, some combination of economic and ethical concerns, or entirely on ethical concerns. See generally AMERICAN BAR ASS'N, REPORT ON THE ANNUAL MEETING (1999), available at <http://abanet.org/scripts/leadership/select.html>; Robert R. Keating, ABA Delegates Report: Report of the Actions at the 1999 Annual Meeting, COLO. LAW., Oct. 1999, available at <http://cobar.org/tcl/1999/october/ABAdelegate.htm>. That is the nature of legislative logrolling. Still, the heavy emphasis laid on the economic implications of allowing multidisciplinary practice makes it clear that the majority was not indifferent to the consideration.

34. The concern here is not simply that lawyers might be less well off in terms of the financial bottom line, although that is surely the largest concern. Important, too, are the concerns of self-image and professional standing engendered by the Commission Report. The lawyer who foresees himself in "competition" with a nonlawyer for the right to represent a client can understandably view the eventuality as evidence of lost social standing. It is clearer still that social standing has been lost when a lawyer looks into the future and foresees that she is working under the supervision of someone who lacks formal legal training.
Accordingly, in the succeeding sections, this Article addresses three questions that are preliminary to resolving the ultimate issue raised here: Should the Commission abandon the center position represented by the Report because of the financial and social concerns that it has raised? To this end, Part I briefly summarizes what the Commission Report concluded. Part II states and responds to the key critiques of the Commission Report. Finally, Part III addresses directly the question of the proper role of economic and social considerations in the exercise of the lawyer regulatory process. I conclude that when protecting clients and judicial processes, the rational approach to lawyer regulation must seek to balance the judicial need for rules that are clear and easily applied, while giving consideration to the procedures, practices and traditions of the legal profession. Such an analysis, also, must not give determinative weight to the financial and social concerns of lawyers at the expense of clients and the profession.

I. WHAT DID THE COMMISSION REPORT CONCLUDE?

"[T]here is an interest, by clients," the Commission concluded, "in the option to select and use lawyers who deliver legal services as part of a multidisciplinary practice." Many would agree that those words have forever changed the American legal profession. No matter the ultimate disposition of the Commission's recommendations, that declaration—unanimously adopted by the Commission of twelve expert commiss-
sioners and two liaisons from the ABA Board of Governors—publicly acknowledged three truths that for long had only been whispered about within the legal community.

First, the declaration acknowledged that the Commission's decision turned mostly on a determination of "an interest by clients," rather than on the interests of practicing lawyers. Although discussions within the Commission recognized the important interests represented by others (e.g., judges and lawyers), it was equally clear, as was finally recommended, that the Commission viewed its responsibilities as, first and foremost, owed to the public.

Second, the Commission spoke about "interest by clients in the option [of MDP]." Thus, the Commission readily acknowledged the limits of its ability to prognosticate. What was important was that clients have an alternative to the existing course of securing lawyer services only through the traditional law firm or in-house counsel arrangement. There was, however, no claim that clients were clamoring to jettison their current modes of securing legal services. The Commission merely determined that in this context the fiduciary obligation of the legal profession requires recognition that concerns about how services are rendered are most appropriately within the client's province.

Finally, the Commission was clear in noting its determination that those who deliver legal services as part of a multidisciplinary practice would be expected to do so consistent with the general standards governing lawyers in the traditional settings. In other words, the recommendation that a multidisciplinary practice be recognized did not entail the creation of a different standard of practice, but rather a different corporate structure for the delivery of quite familiar services. As was the case when the legal profession's structure evolved from the solo

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37. Joanne M. Garvey, Heller, Ehrman, White & McAuliffe, San Francisco, California and Seth Rosner, of counsel Jacobs Persinger & Parker, New York, New York, served as Board of Governors Liaisons. See REPORT, supra note 31. As such, they exercised all of the privileges of Commission members, but they were not technically members. Each, however, played a prominent role in the Commission's determination.

38. Id. (emphasis added).

39. The Commission did not urge that in-house counsel be allowed to render legal services to the public. Instead, it focused on elevating the expertise available to the corporate client. See id. Silence on the matter did not rule out, however, that what was previously an in-house counsel operation might not transform itself into a multidisciplinary practice.
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practitioner to the small firm, and then again to embrace the large law firm, the government law office, in-house counsel, and most recently the ancillary business law firm, the Commission saw structural change not only as beneficial, but as inevitable because it was beneficial. Mindful, too, of the ways in which the corporate structure of the law firm has been influenced, if not driven, by the economic imperatives of the practice, the Commission took note of the changes that have already occurred in response to lawyers' needs for multidisciplinary support, including law firms using affiliations, contractual arrangements, relocations to sites within their clients' facilities, networks, and the sharing of trademarks. This Commission also recognized the transition of many law firms from partnerships to limited liability corporations and public corporations.

While noting past changes in the legal profession, the Commission's view of the legal profession of the future is in significant ways radical, precisely because it is so very conservative. Although it breaks important ground by proposing that the prohibition on lawyers sharing equity with a nonlawyer be abandoned, the change is not to be achieved by articulating even a single new substantive ethical principle for the profession. Rather, the proposed change is to be achieved through evolution of the corporate and financial structures through which legal services are delivered. The multidisciplinary practice would emerge alongside the law firm, the in-house counsel, and the government office.

Thus, a multidisciplinary practice would be a structure through which lawyers—still subject to all, save one, of the


41. In New South Wales (NSW), legislation has been introduced that would allow law firms to incorporate, raise capital through passive investment by listing shares on the Australian Stock Exchange and share profits with other professionals. Proposed by NSW Attorney General Jeff Shaw and approved by the NSW Cabinet, the legislation might lead to conflict between the State Government and the Australian Securities and Investments Commission (ASIC) over a possible provision to ensure that legal professional privilege overrides the ASIC's powers to obtain access to company files. See Shaw Should Watch the Society He Keeps, AUSTL. FIN. REV., Sept. 3, 1999, at 27, available at 1999 WL 26582433.

42. The rule prohibiting lawyers from sharing fees with anyone other than
rules of the jurisdiction presently governing lawyer conduct—would be permitted to have nonlawyer professionals as partners. It might exist in either a regular or a nonregular form—which is to say, supervised by a lawyer or by a nonlawyer, respectively—but its primary characteristic would be easily identified. For the first time in the modern history of the legal profession, the MDP would allow clients to use lawyers who deliver legal services as part of a fully integrated professional practice. In its regular form, the MDP's penultimate decision-maker would have to be a lawyer licensed to practice within the jurisdiction; in its nonregular form, the decision-maker could be a professional who is not a lawyer.

While supporting this significant change in the legal profession, the Commission also recommended significant constraints on establishing MDPs. First, as a philosophical matter, it made clear that the costs of figuratively gaining possession to the keys of an MDP office would be high. In order to be certified as an MDP or to continue that certification, someone who is answerable to the legal profession through, for example, the jurisdiction's Bar disciplinary process would have to establish a demonstrated commitment to the lawyer standards of professional conduct.

For regular MDPs, demonstration of that commitment would include the years of law school education, bar admissions testing (including, in most jurisdictions, passage of the Multistate Professional Responsibility Exam), and the oath-taking that are requisite to every attorney's admission to the practice of law. In other words, the Commission was willing to accept that lawyer-led regular MDPs were already practiced in exercising precisely the standards that were most critical to the safeguarding of the rights of clients and the profession in mul-


See Bruce A. Green, The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate, 84 MINN. L. REV. 1115, 1137 (2000) (noting that the formal prohibition forbidding lawyers from sharing fees with nonlawyers was not focused on preventing lawyers from bringing peers into their firms, but aimed, instead, to prevent corporations from practicing law).

The terms "regular" and "nonregular" are my own, as is the use of the phrase "penultimate decision-maker." The latter definition concedes that the referenced decision-maker might cede or delegate to a lawyer without reservation the power to make all law-related decisions for the MDP. Under such circumstances, what began as a nonregular MDP should be regulated as a regular MDP.
tidisciplinary contexts. Lawyer duties arising from the fiducial nature of the lawyer-client relationship already require that lawyers protect client confidences and secrets, avoid conflicts of interest, and assist in extending representation to those who need it.

For nonregular MDPs, though, the requisite demonstrated commitment to the lawyer standards of professional conduct would be established in a different way. With respect to them, the Commission followed President Ronald Reagan's memorable admonition regarding the signing of the Intermediate Range Nuclear Forces Treaty (IMF): "Trust but verify." MDPs headed by nonlawyers would be allowed, but only subject to verification of their lawyers' demonstrated commitment to the standards of the profession. The verification would consist, at minimum, of two parts: a self-study report certifying to the highest court with the authority to regulate the legal profession answers to questions covering any essential aspect of the MDP structure and operation deemed relevant; and an audit sufficient for the regulatory body to assure itself of the MDP's operation in accordance with applicable standards, safeguards, and policies. Moreover, the costs of the certification and audit would be entirely borne by the MDP.

45. See Model Rules of Professional Conduct Rule 1.6 (1983) (providing that a lawyer shall not reveal information relating to client representation unless exceptions apply); see also Model Code of Professional Responsibility DR 4-101 (1980) (providing that a lawyer shall not knowingly reveal a confidence or secret of his client unless exceptions apply).

46. See William Safire, Nyet Problemy on Snow Jobs, N.Y. TIMES, Jan. 3, 1988, § 6, at 6 (recording Reagan as having said to President Mikhail Gorbachev: "Though my pronunciation may give you difficulty, the maxim is doveryai no proveryai. 'Trust but verify.'").

47. Note that although the Commission contemplates the regulation of lawyers in the first instance, it does not rule out extending the verification process as widely as necessary. Thus, the certifying lawyer (or lawyers) in the MDP would be in a parallel role to that of lawyers who work with nonlawyers in traditional practice structures.

48. "The Commission decided that these core values were best protected by recommending a special set of regulatory undertakings to govern the MDP and the conduct of lawyers in MDPs." Reporter's Notes, supra note 28.

49. The Commission noted:

The Recommendation calls for an annual review of the undertakings and related procedures and to amend the procedures as needed. It requires the MDP to provide a copy of its certificate of compliance to the lawyers in the MDP and to the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in the delivery of legal services. The certification requirement thus provides a timely reminder to lawyers of their own ethical obliga-
The essentially conservative outline of what might at first appear a radical proposal thus becomes apparent. For every check there is a balance; for every right there is a responsibility; for every new expense there is a new payer. By establishing an MDP, lawyers may join in equity relationships with other professionals, but the duty to ensure that professional standards of ethics are adhered to remains. The basic scheme is straightforward: Lawyer-run MDPs must adhere to the core values of the legal profession because lawyers are legally bound to do so; nonlawyer-run MDPs must adhere to the core values of the legal profession because, as a condition of their authorization, they are contractually bound to do so.

Despite its straightforward scheme for regulation of MDPs as a whole, the Commission's recommendation is needlessly ambiguous about its regulation of nonregular MDPs. It does not rule out the possibility of requiring direct certification of lawyers practicing within MDPs or MDP-like environments, but neither does it affirmatively call for such certification. The stronger course would seem to be to require certifications broadly. Every lawyer within a nonregular MDP and every lawyer who is a subordinate of the person who controls that

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50. See id.
51. The Commission stated:
To emphasize the importance of the certification being submitted to the courts, the Commission proposes that it be signed by the chief executive officer (or similar official) and by the board of directors (or similar body). Furthermore, it has specifically recommended that an MDP that fails to comply with its written undertaking be subject to withdrawal of the court's permission to deliver legal services or to other appropriate remedial measures.

Id. (citations omitted). But see id. at n.67 ("In all likelihood, the lawyers in the MDP would be subject to discipline as well. Depending upon the circumstances of the noncompliance, a client might be able to bring an action for malpractice or breach of fiduciary duty based on the underlying facts.").

52. Certifications are specifically called for from the chief executive officers, board of directors, or similar officials. See COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, RECOMMENDATION Recommendation 14 (1999), available at <http://www.abanet.org/cpr/mdprecommendation.html> [hereinafter RECOMMENDATION].

53. A regulating court is not limited to requiring certifications by lawyers actually practicing in MDPs. As the regulatory authority, for example, it may require certifications about working conditions and client safeguards from any attorney who answers to a nonlawyer superior.
MDP should be required to sign off on the self-study and certification. Such a rule would make clear that although lawyers may join in equity relationships with other professionals through MDPs, the duty to assure that professional standards of ethics are adhered to remains that of lawyers. Clients may have the advantage of the synergies and efficiencies produced from associating multiple professional services, but if law is one of those services, then the duty to assure applicable standards of legal ethics should remain the lawyers' responsibility.

In sum, although the emergence of MDPs should be an essentially seamless evolution for lawyer-led (regular) MDPs, nonregular MDPs should, by definition, expect more transparency in their operations, more intrusion into their workspace, and equal accountability for their conduct.

II. ARE THE KEY CRITIQUES OF THE COMMISSION REPORT PERSUASIVE?

Notwithstanding the balanced solution proposed by the Commission, opposition to MDPs has been immediate, prolonged, and in many instances extreme. Essentially, though, the critiques have raised three concerns—about protecting the majesty of the profession, about the malevolence of the marketplace, and about the likely faint-heartedness of judicial oversight. Accordingly, I will critique each of them.

A. THE MYTHIC PROFESSION

Concern about the supposed need to protect the majesty of the legal profession characterized much of the first wave of reactions to the Report. Because these criticisms were largely reflexive, having more to do with how critics viewed the legal profession than the merits of the Report, it is not surprising that few have been willing to make the argument their primary basis for opposition. For those who have remained committed to the argument, however, the highpoint came with Mr. Fox's speech on the motion to table the Report at the 1999 ABA Annual Meeting.

Rising to the occasion, Mr. Fox recounted in almost mystical terms how he had recently dreamed about a world that was

54. See generally Commission on Multidisciplinary Practice (visited Apr. 26, 2000) <http://www.abanet.org/cpr/multicom.html> (listing various links to comments, testimony, and reports on MDPs).

55. See supra text accompanying notes 23-24.
so horrifying in its portent that he had been left shaken and afraid for the future of the legal profession. Jeremiah-like, he had seen a future wrought with such danger for the legal profession that the only salvation lay in utter rejection of even the willingness to consider the subject of a multidisciplinary practice.56

What was the great evil that portended a plague on the profession? It was the very idea that the practice of law might be thought of as a “professional service” that could be rendered through an ownership structure involving principals who were not lawyers. As his dream dissolved into nightmare, Mr. Fox reported that he was horrified to discover that by the year 2050, or so, law firms no longer existed. In their place, there had arisen—Scary! Scary!—MDPs, where law was practiced under such names as PricewaterhouseCoopers, KPMG, and Ernst & Young. It was a world in which those who were once known as lawyers now kowtowed to accountants in the servile role as clerks. The accountant principals, moreover, were without principles. In effect, went the nightmare, the now dominant accountants treated clients like commodities, traded client secrets like Pokémon trading cards, and embraced the ideal of legal services for the public good with a variation: What’s good for Ernest & Young, is good for the public.57

Of course, the argument that the majesty of the legal profession is put at risk by the idea of a multidisciplinary legal practice depends primarily on acceptance of the premise that the practice of law is a mythically pure experience.58 Thus, as a

56. You could almost hear the Prophet, himself: “For my people have committed two evils; they have forsaken me the fountain of living waters, and hewed them out cisterns, broken cisterns, that can hold no water.” Jeremiah 2:13 (King James).

57. President Eisenhower’s Secretary of Defense, Charles Wilson, offered the reductionist business philosophy now regularly invoked to besmirch all business with his proclamation that: “What’s good for General Motors is good for America.” The quote is actually a misquote. Testifying at his confirmation hearing before the Senate Armed Services Committee in 1953, Wilson actually rejected a question about a potential conflict of interest between his then-company and the U.S. by noting: “I cannot conceive of one because for years I thought that what was good for the country was good for General Motors, and vice versa.” A. Samuel Oddi, An Uneasier Case for Copyright Than for Patent Protection of Computer Programs, 72 NEB. L. REV. 351, 439 n.357 (1993); see also Robert F. Housman, Democratizing International Trade Decision-Making, 27 CORNELL INT’L L.J. 699, 707-08 (1994); Martin H. Redish & Howard M. Wasserman, What’s Good for General Motors: Corporate Speech and the Theory of Free Expression, 66 GEO. WASH. L. REV. 235, 235 (1998).

58. Note the summary of remarks by Patricia J. Kerrigan, an attorney in
historical matter, the notion of a golden era when all was idyllic with the legal profession must conveniently ignore key facts like the following: that what we today view as the modern practice of law did not begin to emerge until the 1950s; that since its earliest days, lawyers have regularly practiced across disciplines; that the prohibition against lawyers sharing fees

private practice in Houston, Texas, who testified on behalf of the Texas Association of Defense Counsel (TADC). See Hearings Before the Commission on Multidisciplinary Practice (Aug. 8, 1999) (testimony of Patricia J. Kerrigan, President of TADC), available at <http://www.abanet.org/cpr/kerrigan.html> [hereinafter Kerrigan Testimony]. "The TADC is a professional organization comprised of about 2,300 civil trial lawyers whose practice is primarily in areas other than the representation of plaintiffs and personal injury lawsuits. Their lawyers engage in the civil practice areas of intellectual property, employment, insurance, and general civil and tort litigation." Id. In general, the TADC opposes the recommendations pertaining to MDPs and amending the ethics rules on several grounds:

First, the proposal is not supported by sufficient study. Second, the recommendations are fundamentally inconsistent with the preservation of the core professional and ethical values that are so important to the legal profession. Third, the proposal raises important questions on how an MDP may create situations that encourage the unauthorized practice of law.

Id.

59. Precise dates—or even a precise nomenclature for the Golden Age, Golden Era, or Gilded Age, as the preference may be—is difficult to designate. Michael Ariens has stated that:

A number of biographies exist of elite lawyers whose practices encompassed much of the Gilded Age. These works, written between 1917 and 1940 and almost exclusively concerned with the practice of law in New York City, unanimously agreed that the "great" lawyers before the turn of the century were advocates, or in today's parlance, trial lawyers.

Michael Ariens, Know the Law: A History of Legal Specialization, 45 S.C. L. REV. 1003, 1014 (1994). Others add that the "golden age"—that era when lawyers "aspired to be governed by a consensus among partners engaged in law practice, rather than by professional managers who devoted themselves solely to administrative matters"—lasted approximately through the late 1950s and early 1960s, when law firm partnerships where last exclusive. Milton C. Regan, Jr., Law Firms, Competition Penalties, and the Values of Professionalism, 13 GEO. J. LEGAL ETHICS 1, 29 (1999); see also Marc Galanter, Lawyers in the Mist: The Golden Age of Legal Nostalgia, 100 DICK. L. REV. 549, 558 (1996) ("Whether lawyers' conduct has worsened remains unknown, but what surely has declined is the opportunity for lawyers to hide beneath the wraps of confidentiality, free of any external scrutiny.").

60. James W. Jones, Vice Chairman and General Counsel of APCO Associates Inc., a global public affairs and strategic communications firm headquartered in Washington, D.C., contrasted the ancillary business discussion of the 1990s with what he characterized as "the flip side" of the debate presented by the MDP discussion. While the earlier debate had focused on the extent to which lawyers should be permitted to control entities engaged in multidisciplinary practices, the new debate simply acknowledged that "affiliations be-
with nonlawyers was not formally adopted as part of the profession’s ethic until the 1930s; that with respect to both the in-house counsel situation and the government law office, the legal profession has long recognized that the risk to lawyer independence does not arise from the structure of the practice, but from situations where “[a] non-lawyer has the right to direct or control the professional judgment of a lawyer.”

To reject change, therefore on the basis of the “golden age” myth requires ignoring that for more than thirty years, law firms operating pursuant to business principles have managed to maintain the highest degree of ethical and professional commitment.

Looking beyond the historical inaccuracies of the myth, however, the picture it supposes for the legal profession fails on another, more important, account. It requires a calculatingly chauvinistic view of other professions aided by a conveniently impotent judicial branch that is either unable or unwilling to police lawyer conduct. Proponents of the myth suggest that today’s legal profession is so professionally unique that it, and it alone, is governed by enforceable ethical standards or notions of professionalism. Thus, we can assume that regardless of ap-
Applicable standards, nonlawyers working in consort with lawyers will ignore conflict-of-interest concerns, violate confidences, and reject the notion of public service. As appealing as such an argument might sound, there is simply no evidence that the precisely opposite result will not obtain. It seems in fact more likely that because of the participation of lawyers, who are usually conceded to be ethically upright, the overall ethics of firms will be raised.

B. THE MALEVOLENT MARKETPLACE

It is possible, though, to reject the mythic view of the legal profession and still conclude that MDPs must fail. Rather than

...
a critique based on a longing for a non-existent bygone era, disdain for the business elements of the profession and a dismissive attitude towards other professionals, a new, more modern, concern is raised about the marketplace. It is not that the legal profession is unsullied and disdainful of those in the pits, but rather that, as recent entrants to the fray, lawyers are too genteel to survive in the modern marketplace.\textsuperscript{67}

In this view, the legal profession is too weak and unsophisticated to operate in a rough and tumble marketplace where the sharp-elbowed interest of international capitalists—meaning here, the Big Five accounting firms—now compete. Rather than idealism, then, it is the \textit{art of the deal} that engenders fear and fuels lawyers’ opposition to MDPs. In this new era of globalization, we are told, standards, guarantees, safeguards, monitoring and sanctions can never be enough. Nor is confidence to be placed in personal attitudes, notions of professionalism, codes of professional ethics, or even the historical record. In the new era only power in the marketplace counts. And the new golden rule counts the most: “He who has the gold, makes the rules.”

In the end, though, the strength of the marketplace critique is that it is irrefutable, precisely because, like the related mythic profession argument, it focuses on the wrong issue. Like Mr. Fox’s nightmare, it suggests that our course ought to reflect our answer to the question: Are you so confident that the doomsday scenario I imagine is not real, that you are willing to risk what you have?

When Mr. Fox is candid enough to admit, therefore, that it is “about money,” he is telling us something of significance. He is telling us that, at minimum, opposition to the Report is based on a sideways glance at how well financially he sees traditional lawyers fairing in a new environment. The real issue, though, is not whether lawyers might be skeptical—even fearful—of change and the unknown risks it brings, but rather, why we should doubt lawyers’ abilities to survive and prosper in any situation, including a judicially regulated MDP environment.

\textsuperscript{67} See Krane Testimony, \textit{supra} note 20 (“We can seriously question whether the nonlawyer members of an MDP will stand idly by while the lawyers in the organization attempt to fulfill their traditional functions of standing up to the excesses of government, representing unpopular causes, and providing free legal services to the poor.”).
The bases for such doubts are, of course, as varied as the number of lawyers, but there are two concerns that are raised so frequently that they deserve singling out. First, it is argued that since many professions, such as accounting, prohibit (or at least limit) the interest that lawyers (or other professionals) can have in their organizations, as a matter of fairness, such professions should not be allowed to have ownership in our firms. If the only way to prevent such unilateral disarmament is to bar equity interest by all professions, then the price is worth paying.

As if to make the point that opposition to the Report is not entirely self-motivated, however, opponents argue as a second matter that law firms are simply financially unable to compete with competitors such as the accounting firms, because law firms lack the capital structure that would be necessary to such an undertaking. The reason MDPs should not be allowed, therefore, is not because lawyers oppose them as a matter of economic interest, but because allowing a nonlawyer professional to own the controlling interest in an equity relationship that includes lawyers would lead inevitably—no matter what other limitations or safeguards might exist—to the subordination of a lawyer's professional obligations to the needs of the principal owner.

Thus, we are to believe that lawyers are both unwilling and unable to play in the global marketplace. The concern for proponents of this view is market niche; the clients' needs be damned. If the Federal Trade Commission will acquiesce in the barriers to entry created to keep lawyers from, say, heading an accounting firm, then the appropriate response ought to be tit-for-tat. More diplomatically stated, since no other profession can reasonably claim that they maintain either standards or enforcement practices superior to those of the legal profession, any barriers that exist to lawyer control of another profession must be economically self-serving. But if that is the case, what is good for one ought to be good for all.

In the alternative, we are told that even if lawyers are willing to accept a service-oriented marketplace, where only the interests of clients—not the economic needs of lawyers—is the standard, it would be impossible to achieve such a regime. The economic realities of the marketplace, we are told, preclude it,

(a single international corporation, like Arthur Andersen, dwarfs the value of the top five law firms combined).\textsuperscript{69} It seems more likely, however, that nonlawyer-controlled MDPs would flourish because they would have the advantages of ready capital without the disadvantages of a principal who is directly subject to the lawyers' standards of professional conduct.

C. FAINT-HEARTED MANAGEMENT

Common to the concerns about protecting the majesty of the profession and marketplace mistrust, however, is a third, overarching, concern—concern about the willingness or capacity of the lawyer regulatory systems of the several jurisdictions to regulate lawyers. This concern is expressed, first, as a conclusion that lawyer regulatory authorities across the country do not adequately regulate the practice of law. Indeed, the claim is more strongly put as a charge that, but for the failure of lawyer regulatory bodies to protect practitioners from individuals engaged in the unauthorized practice of law, there would have been no need for a commission to study multijurisdictional practice.\textsuperscript{70} In this view, the heart of the problem is that state regulatory authorities have failed to prevent accounting firms, in particular, from engaging in the unauthorized practice of law. By allowing accounting firms, for example, to hire law-


\textsuperscript{70} This concern was most recently given expression in the ABA House of Delegates' adoption of the Ohio resolution calling upon jurisdictions to enforce unauthorized practice of law provisions. The implicit assumption that such laws are capable of enforcement to a degree that would reverse changes that have occurred in the global marketplace went unexplored. The \textit{Daily Journal ABA House of Delegates Report of Action Taken at the ABA Midyear Meeting Dallas, Texas February 14, 2000}, summarized action taken on an Ohio State Bar Association resolution that was cosponsored by the Tennessee Bar, North Carolina Bar Association, the Indiana State Bar Association, the Cuyahoga County Bar Association, the Maricopa County Bar Association, the Broward County Bar Association, the State Bar of Michigan, the Wisconsin Bar, and the Arkansas Bar. Report No. 8B, urged each jurisdiction to establish and implement effective procedures for the discovery and investigation of violations of its laws prohibiting the unauthorized practice of law and to pursue active enforcement of such laws.
yers\textsuperscript{71} to engage in the giving of so-called "tax and business advice," the argument is that enfeebled lawyer regulatory bodies have all but invited accounting firms to engage in the unauthorized practice of law.

Despite the insistence by accounting firms that they avoid the practice of law by limiting their involvement with clients to such activities as discussions with in-house counsel, advising clients about non-substantive matters of policy, and directing clients to secure legal representation, many lawyers remain unconvinced. For opponents of the Report, even with substantial costs and the risk of loss of face,\textsuperscript{72} nothing short of the most zealous prosecution of the unauthorized practice of law would be sufficient.

Lack of confidence in the ability of the courts to regulate nonregular MDPs,\textsuperscript{73} however, has a second dimension. Even assuming that the courts desire to pursue aggressively unauthorized-practice-of-law cases,\textsuperscript{74} MDP opponents doubt that courts would have the capacity to do so. They suggest that it would take a huge bureaucracy to review the self-audit and certifications.\textsuperscript{75} In addition, undertaking the audits themselves would be too costly.\textsuperscript{76}

\textsuperscript{71.} The hiring of "lawyers" as used in this instance also includes individuals who are educated in the law, but who are unlicensed in the jurisdiction.

\textsuperscript{72.} See generally In re Nolo Press/Folk Law, Inc., 991 S.W.2d 768 (Tex. 1999).

\textsuperscript{73.} Note that judicial regulation of regular MDPs is not in dispute, because under the terms of the Commission proposal, regular MDPs—unlike nonregular MDPs—would be regulated only in the manner provided for traditional law firms:

As a condition of permitting a lawyer to engage in the practice of law in an MDP not controlled by lawyers, the MDP should be required to give to the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in the delivery of legal services (the "court"), a written undertaking, signed by the chief executive officer (or similar official) and the board of directors (or similar body).

See RECOMMENDATION, supra note 52, Recommendation 14 (concerning independent professional judgment; the proper maintenance of client funds; adherence to the lawyer rules of professional conduct; the promotion of lawyers' pro bono publico obligation; and compliance with and payment for an annual administrative audit).

\textsuperscript{74.} Unauthorized practice of law cases are commonly referred to as "UPL" cases.

\textsuperscript{75.} See supra note 49 and accompanying text.

\textsuperscript{76.} See supra note 50 and accompanying text.
Given the breadth of the objections raised to the Report, it is not surprising that upon reconvening following its submission to the ABA House of Delegates, Commissioners expressed strong reservations about their willingness to continue to support what are here described as the Commission's moderate recommendations. Nor is it surprising that not a single member of the Commission showed the slightest willingness to undermine the core values of the legal profession. To the contrary, the Commission expressed the view that absent a solution that protected the core values, no further recommendations were likely to be issued. Whatever the extent to which Commissioners were willing to acknowledge the legitimacy of codes of ethics and standards of professionalism with respect to other professionals, the need to affirm the core values of the legal profession remained. Similarly, concerns about the impact of the marketplace on the viability of MDPs remained a consideration, although not a determinant.

Thus, the Commission appears at this stage—three months before the ABA Annual Meeting—to be fully cognizant of the need to avoid a bureaucratic response. The objective remains that of using MDP participants in cooperation with the existing judicial regulatory scheme to assure that proposed changes are practical. It is unclear, however, how the Commission will propose that objective be met.

III. WHAT IS THE PROPER ROLE OF ECONOMIC AND SOCIAL CONSIDERATIONS?

Presently, it is too early to determine what the Commission will do in response to the wave of criticism following the release of the Report. It is clear, however, what it ought do as a professional and ethical matter. In a sentence: It should continue to hold the center. It should not be deterred by those who claim that the Commission has opened the doors of the profession too wide by allowing nonlawyers to enter into peer-professional relationships with lawyers. Nor should it heed


79. It is an issue of peer relationships that is in dispute; not an issue, as
the cries of those who complain that the Commission has made the price for entering into lawyer-peer relationships—self-study, certification, and audit—too high.

If its work is to have credibility outside the legal profession, what the Commission must affirm is that even while it speaks to the legal profession, it speaks for the public interest. It cannot afford to be seen as engaged in turf-protection or as acting to safeguard lawyers' economic interest at the expense of the public interest. Instead, the Commission must be seen as having been willing to put to itself the same hard questions that lawyers regularly put to defendants when matters of myth and lax regulatory oversight threaten to distort the marketplace. Thus, the queries ultimately come down to two: Do the present rules barring lawyers from entering into equity relationships with other professionals—i.e., fee sharing—prevent lawyers from providing clients the very highest quality service? If the answer is yes, then a second question arises: Do there exist reasonable alternatives to the present rule that would allow lawyers both to practice as competent lawyers and to provide the very highest quality legal services to clients?

In light of the Commission's Report, we now know that the answer to both questions is affirmative. But for the prohibition on the sharing of fees with nonlawyers, the marketplace would deliver legal services through partnerships providing the highest degree of expertise known to exist. Conversely, we know that because of the prohibition on fee sharing, law firms are able to hire (and, thus, make available to clients) only a limited strata of experts from other professional fields. Nonlawyer professionals who have the highest level of expertise have not and will not make themselves continuously available to serve lawyers (for example, as analysts in law firms), because to do so would relegate such professionals to a second-tier status within law firms. Thus, elite-level nonlawyer professionals (as measured by education, experience, income, and status) are effectively precluded from partnering with lawyers seeking to assist clients in need of legal services. The barrier to fee sharing as-

the most partisan would have believed, of the subordination of lawyers to nonlawyers. The Commission does not recommend a situation where lawyers would be freed from their current obligation under the ABA Model Rules (and similar standards) to exercise independent judgment. The impossibility argument provides that lawyers are personally too weak and the regulatory mechanisms too feeble to reasonably expect lawyers to adhere to principles. See supra Part II.B. (discussing the malevolent marketplace).
asures that nonlawyer expertise can never be equally valued with the expertise of lawyers within a law firm. Lacking such economic equality, moreover, nonlawyers are also deprived of its corollary equal status.80

Worse yet is the second market distortion that results from prohibiting lawyers from entering into equity relationships with nonlawyers. Because clients are willing to pay to secure the highest level of expertise the marketplace can produce, providers of legal services are motivated to operate "under the table."81 The phenomenon is well-known of the lawyer who works in an accounting firm (or some other professional service entity), but who denies that his advising, interpreting, organizing and strategizing constitutes the practice of law. In order to get the multidisciplinary assistance they desire, clients must turn

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80. Steven C. Krane argues, in effect, that nonlawyer professionals are adequately compensated under presently permitted trickle-down procedures:

The rules of professional ethics in effect in most jurisdictions in the United States today permit nonlawyer employees to be compensated through profit-sharing plans. The services of nonlawyer professionals can thus be integrated with those of lawyers in a law firm and the nonlawyers compensated based on the success of the overall venture.

Krane Testimony, supra note 20.

The position begs the question: If this is the way to assure market competitiveness, why are lawyers generally not compensated under such schemes?

81. See Hearings Before the Commission on Multidisciplinary Practice (Aug. 8, 1999) (testimony of Leo Jordon, Past Chair of the Tort and Insurance Practice Section and a Member of the House of Delegates), available at <http://www.abanet.org/cpr/jordon.html>. At the Hearings, Leo Jordon related the following episode:

He was in a conference room with about 10-15 lawyers and hadn't realized that the other law firm had a small public affairs subsidiary, some members of which were also in the room. As the discussion went on it became clear that there were nonlawyers in the room and it had a major negative impact on the discussion. The discussion was not in any sense complete because the question arose immediately as to how confidential the discussion was. The concept of what is confidential communication is of extreme importance to the profession. There are other questions. Would a personal injury law firm be permitted to establish a truly full-service MDP? What, in fact, would be a full-service personal injury law firm? Would a law firm specializing in financial planning be permitted to associate with a life insurance agent to facilitate one stop shopping? Would the profits of the MDP encompass the commission of the insurance agency and would that put undue influence on the client? TIPS honestly does not know the answer to these questions and needs time to reflect on the effect and long term implications of an MDP. With these thoughts in mind TIPS will support deferral within the House and hopes additional time will give them an opportunity to come back and have a more enlightened response to some very important developments.

Id.
to lawyers who are willing to practice beyond the regulatory reach of the profession. Instead of recognizing the need and issuing a response, until now the legal profession has found it more salubrious either to ignore the problem of the underground practice of law or to engage in threats and bluster on the assumption that the providers or users of elite multidisciplinary legal services will be cowed or fail to understand that what they are doing is of obvious and reciprocal benefit. In its simplest terms, however, the underground delivery of multidisciplinary practice is a case of the marketplace responding to a consumer need created by an overbroad limitation on services.

Ultimately the Commission, like the legal profession as a whole, must decide whether the needs of clients or the needs of individual economic players will determine the thrust of its regulation. If it is to be the needs of the latter, the reasonable response is to continue the prohibition on nonlawyers entering into equity relationships with lawyers. The rule succeeds, however, in lowering the quality of expertise generally available to clients. It increases profits for lawyers and motivates lawyers and clients to collude in the delivery of underground legal services. Furthermore, the status quo reinforces suspicions that lawyers are, more often than not, interested in advancing their own welfare at the expense of their clients' needs.

Conversely, if the needs of clients are to guide the scope of judicial regulation of the legal profession, the reasonable response is to end the prohibition on nonlawyers entering into equity relationships with lawyers by embracing MDPs and the self-study, certification, and audit requirements that support it. We must see the prohibition on lawyers sharing fees with nonlawyers for what it is—a virtual guarantee that the quality of expertise generally available to clients will be lower than optimum. Only experts who are prepared to allow the legal profession to be comprised of lawyer-subordinates will countenance it.

By depressing the quality of available experts, the prohibition exposes both the public and the legal profession to exploitation. In the underground world outside the realm of judicial regulation, lawyers who promote themselves as providing business advice, financial-planning, and the like have little incentive to respect the core values and concerns of the legal profes-

82. Furthermore, by delivering lower quality expertise to the public, lawyers are able to pocket the difference represented by income that would otherwise have had to be applied to overhead or shared between the lawyer and a nonlawyer peer.
sion. When the cost of maintaining the status quo is to open the legal profession to the charge that for the sake of money it is refusing to heed the public's call for the cautious, step-by-step, cost-free alternative represented by the MDP proposal, it is clear that a change is overdue.